2019 YEAR IN REVIEW – THE FALSE CLAIMS ACT

March 2020

haynesboone CELEBRATING 50 YEARS

Clients and Friends,

The False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (“FCA”), continued to be a significant focus of government and whistleblower activity in 2019. This Year in Review highlights several key developments, including:

- The recovery by the government of more than $3 billion in settlements and judgments in FCA cases in 2019.
- Courts’ continued efforts to interpret “materiality” under the FCA after the Supreme Court’s landmark decision in *Escobar*.
- Significant judicial decisions regarding the statute of limitations, the public disclosure bar, and pleading requirements for FCA cases, among other issues.

In 2019, Haynes and 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. We also advised a number of contractors and healthcare providers regarding FCA compliance and other related issues.

If you have any questions about the issues covered in this year’s Review, please let us know. We look forward to working with our clients and friends in 2020.

Stacy Brainin, Bill Morrison, and Chris Rogers

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MEET THE AUTHORS

STACY BRAININ

Stacy Brainin has extensive experience in white collar criminal defense and government investigations, including representation of companies and individuals in both criminal and civil False Claims Act 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, compliance programs and legal audits.

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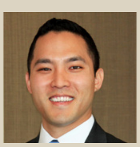

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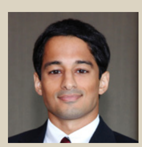
Phil Kim is a partner in the firm's Healthcare and Life Sciences Practice Group, and he focuses his practice on transactional and regulatory healthcare matters. Phil represents various types of providers, ranging from healthcare systems, hospitals, ASCs, physician groups (including NPHOs), home health providers, and other healthcare companies involved with mergers and acquisitions, joint ventures, and operational matters. He also handles regulatory, licensure, contractual, and administrative issues for public medical device, biotechnology, and pharmaceutical companies. Phil also regularly advises clients on compliance issues involving liability exposure, the Stark law, anti- kickback statutes, and HIPAA/HITECH issues.



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Special thanks to the following attorneys for their contributions and assistance: Kayla Johnson, Wes Dutton, Daley Epstein, and Adrienne Dellinger.

A. 2019: A LOOK BACK AT THE NUMBERS

On January 9, 2020, the Department of Justice ("DOJ") reported that the United States recovered more than $3 billion in settlements and judgments from FCA cases during fiscal year 2019.[1] This represents the tenth time since 2006 that the DOJ's annual recovery exceeded $3 billion. Total recoveries since 1986, the year Congress significantly strengthened the FCA, now exceed $62 billion.

DOJ further reported:

- Of the $3 billion recovered, $2.6 billion came from the healthcare industry.
- Whistleblowers filed 636 new *qui tam* action in 2019.
- Of the $3 billion recovered, $2.2 billion related to cases filed by private whistleblowers, with whistleblowers receiving over $270 million for their share of the reward.

Among the cases resolved in 2019, there were several notable settlements and recoveries. The three largest settlements involved the pharmaceutical industry:

- A $700 million settlement with Reckitt Benckiser Group PLC ("RBG") to resolve allegations that it caused false claims to be submitted from 2010 through 2014 related to its marketing of Suboxone, an opioid addiction treatment drug.
- The settlement resolved six *qui tam* lawsuits pending in the Western District of Virginia and the District of New Jersey, which alleged that RBG: (a) promoted the sale and use of Suboxone for unsafe, ineffective, and medically unnecessary uses; (b) promoted the sale or use of Suboxone to physicians and state Medicaid agencies using false and misleading claims that it was less susceptible to diversion and abuse than other products; and (c) took steps to delay the entry of generic competition for Suboxone to improperly control its pricing.
- A $209.2 million settlement with national pharmacy chain Walgreens to resolve allegations that it improperly billed Medicare, Medicaid, and other healthcare programs for unnecessary amounts of insulin pens by: (a) submitting false data to evade federal limits on the total days of supply that could be dispensed and reimbursed; and (b) configuring its electronic pharmacy management system to prevent its pharmacists from dispensing less than a full box of five insulin pens, even when patients did not need that much insulin.
- A $195 million settlement with Insys Therapeutics to resolve allegations that it paid kickbacks to induce physicians and nurse practitioners to prescribe Subsys, a powerful but addictive opioid painkiller manufactured by Insys. The alleged kickbacks included payments for sham speaker programs, lavish meals and entertainment, and jobs for providers' relatives and friends.

Notable settlements beyond the pharmaceutical industry included:

- A $112.5 million settlement with Duke University to resolve allegations that it submitted applications and progress reports containing falsified research data related to 30 federal grants to the National Institutes of Health and the Environmental Protection Agency.
- A $57.3 million settlement with Greenway Health LLC to resolve allegations that it submitted false claims to the government by misrepresenting the capabilities of its electronic health records software "Prime Suite" and providing unlawful remuneration to users to induce them to recommend Prime Suite.

[1] *Release available* ***here***.

- A $34.6 million settlement with Hydro Extrusion Portland, Inc. f/k/a Sapa Profiles, Inc. to resolve allegations that it falsified thousands of certifications for aluminum extrusions over a 19-year period, resulting in government contractors purchasing aluminum that did not meet contract specifications.

- A $22.1 million settlement with American Airlines, Inc. to resolve allegations that it falsely reported its delivery times of U.S. mail transported internationally to avoid penalties under contracts with the U.S. Postal Service for mail that was delivered late or to the wrong location.

There were also several notable settlements involving the alleged submission of false claims by Texas-based health care providers:

- A $6.25 million settlement with Highlands Rehabilitation Hospital, an acute care hospital in El Paso, owned by Vibra Healthcare, to resolve allegations that it submitted false claims to Medicare for services that did not meet the requirements for payment, including the requirement that patients be examined by a qualified physician at least three times per week throughout their inpatient stay.

- A $2.93 million settlement with Accutrack Medical Claims Service, LLC, El Paso Integrated Physicians Group, P.A., and three associated providers to resolve allegations that they double-billed and over-billed government payors for Remicade (Infiximab), an infusion drug sold in single-use vials.

- A $2.13 million settlement with Dr. Augusto Castrillon, a family physician in Mission, Texas, to resolve allegations that he fraudulently submitted claims to Medicare for medically unnecessary diagnostic tests, including complex tests typically ordered by neurologists or cardiologists.

B. UPDATE ON ENFORCEMENT POLICIES

1. Granston Memorandum and Motions to Dismiss

When a relator brings a *qui tam* action under the FCA, the action is brought on behalf of the government. The government can elect to intervene in the action or decline to intervene. 31 U.S.C. § 3730(b)(2). If the government declines to intervene, the relator can prosecute the case on its own. *Id.* § 3730(b)(4)(B), (c)(3).

Even if the government declines intervention, it remains an ultimate beneficiary and retains its rights throughout the litigation. This includes the right to dismiss the action over the objections of the relator so long as the relator "has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." *Id.* § 3730(c)(2)(A). The government has used this dismissal power sparingly in the past.

On January 10, 2018, Michael Granston, Director of DOJ's Civil Fraud Division, issued a memorandum advising U.S. Attorneys to consider dismissing meritless FCA suits pursuant to 31 U.S.C. § 3730(c)(2) instead of simply declining intervention (the "Granston Memorandum").[2] The Granston Memorandum encouraged the government to more readily exercise its "unfettered" discretion to dismiss certain FCA suits—a tool that it had previously seemed reluctant to use—when dismissal would advance the government's interests, preserve limited resources, and avoid adverse precedent. Towards this end, the Memorandum outlined seven non-exhaustive goals for the government to consider in making the dismissal decision:

1) Curbing meritless *qui tam* actions;
2) Preventing parasitic or opportunistic *qui tam* actions;
3) Preventing interference with agency policies and programs;
4) Controlling litigation brought on behalf of the United States;
5) Safeguarding classified information and national security interests;
6) Preserving government resources; and
7) Addressing egregious procedural errors.

Deputy Associate Attorney General Stephen Cox reaffirmed the importance of moving to dismiss frivolous or non-meritorious *qui tam* actions in remarks made to the Cleveland, Tennessee Rotary Club on March 12, 2019. Cox explained that the DOJ's dismissal authority is "an important tool to protect the integrity of the False Claims Act, the interests of the United States, and the interests of the defendants, judiciary, and public at large."

Since the issuance of the Granston Memorandum, the DOJ has moved to dismiss 45 *qui tam* FCA cases it deemed meritless or unsustainably burdensome. Courts have decided 26 of these motions, dismissing all but one. *See United States ex rel. CIMZNHCA, LLC v. UCB, INC.*, No. 3:17-cv-00765, 2019 WL 1598109, at *4 (S.D. Ill. Apr. 15, 2019), *appeal filed*, No. 19-2273 (7th Cir. July 5, 2019).[3] But courts evaluating these "Granston" motions to dismiss have disagreed on the correct standard of review because § 3730(c)(2) does not provide statutory grounds for granting or denying dismissal.

On one hand, the Ninth and Tenth Circuits have endorsed a two-step "rational relation" test, under which the government must identify a "valid government purpose" to be served by the dismissal and a "rational relation between dismissal and accomplishment of the purpose." *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*,

[2] *Memorandum available* ***here***.

[3] A district court also denied a § 3730(c)(2)(A) motion to dismiss in *United States v. Academy Mortgage Corp.*, No. 3:16-cv-02120, 2018 WL 3208157, at *3 (N.D. Cal. June 29, 2018). But that motion was filed before the Granston Memorandum was issued. An appeal of the denial is pending. *See United States v. United States ex rel. Thrower*, No. 18-16408 (9th Cir. July 27, 2018).

151 F.3d 1139, 1145 (9th Cir. 1998); *Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005) (quoting *Sequioa*, 151 F.3d at 1145). If the government satisfies the two-step test, the burden switches to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequioa*, 151 F.3d at 1145.

Under this test, the "rational relation" need not be a "tight fitting relationship." *Ridenour*, 397 F.3d at 936–37. It is enough if there are "plausible, or arguable, reasons supporting the agency decision." *Id.* at 937. A plausible reason for dismissal can include a determination that the costs and resources required for a declined *qui tam* case—such as making employees available for depositions, burdening government attorneys to defend depositions, and expending resources monitoring relators' claims—outweigh the likelihood of recovery. *See United States ex rel. SMSPF, LLC v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 490–91 (E.D. Pa. 2019) (granting the government's motion to dismiss and explaining that the government is "entitled to do a cost/benefit analysis to decide whether to pursue a case, even a meritorious one" because "[p]reserving litigation costs is a valid interest even where the claims may have merit"); *United States ex rel. Health Choice All. LLC v. Eli Lilly & Co., Inc.*, No. 5:17-cv-00123, 2019 WL 4727422, at *6 (E.D. Tex. Sept. 27, 2019) (granting the government's motion to dismiss and explaining that "[t]he Government has a legitimate interest in preserving its resources," which aligns with Fifth Circuit precedent that "controlling costs is a compelling governmental interest").

Generally speaking, federal district courts in the Third, Seventh, Ninth, and Tenth Circuits have followed this "rational relation" standard. *See, e.g.*, *United States v. Gilead Scis., Inc.*, No. 3:11-cv-00941, 2019 WL 5722618 (N.D. Cal. Nov. 5, 2019); *CIMZNHCA, LLC*, 2019 WL 1598109, at *3. Indeed, one district court explained that the rational relation test "accords with statutory interpretation," "fosters transparency," and "is consistent with the constitutional scheme of checks and balances." *SMSPF, LLC*, 370 F. Supp. 3d at 488.

On the other hand, the D.C. Circuit has rejected the "rational relation" test and held that § 3730(c)(2) gives the government an "unfettered right to dismiss" an FCA action. *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). Federal district courts in the Fifth, Eighth, and D.C. Circuits have followed this more deferential standard, explaining that "[g]iving the government the unilateral power to dismiss *qui tam* actions is consistent with the notions of prosecutorial and executive discretion" provided by the FCA. *United States ex rel. Sibley v. Delta Reg'l Med. Ctr.*, No. 4:17-cv-00053, 2019 WL 1305069, at *4 (N.D. Miss. Mar. 21, 2019); *see also United States ex rel. Davis v. Hennepin Cty.*, No. 0:18-cv-01551, 2019 WL 608848, at *6 (D. Minn. Feb. 13, 2019), *appeal dismissed*, No. 19-1530, 2019 WL 4296887 (8th Cir. May 14, 2019); *United States ex rel. Kammarayil v. Sterling Operations, Inc.*, No. 1:15-cv-01699, 2019 WL 464820, at *1 (D.D.C. Feb. 6, 2019).

Ultimately, the Granston Memorandum clarified the government's position that it is looking to avoid the time and expense of monitoring declined *qui tam* cases that lack substantial merit, waste government resources, or adversely affect its ability to enforce the FCA. As such, *qui tam* litigants should evaluate any weaknesses in a relator's case based on the Granston factors while the case is under seal and being investigated.

2. Cooperation Credit in FCA Investigations

On May 7, 2019, the DOJ issued formal guidelines for the manner in which it would award credit to defendants who cooperate during an FCA investigation.[4] Under the guidelines, a non-exhaustive list of cooperation activities that can earn credit include:

- Voluntary self-disclosure of misconduct that could serve as the basis for FCA liability;
- Identifying individuals substantially involved in or responsible for the alleged misconduct;

[4] *Guidelines available* ***here****.*

- Disclosing relevant facts and identifying opportunities for the government to obtain evidence relevant to the government's investigation that is not in the possession of the entity or individual or not otherwise known to the government;
- Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements;
- Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures;
- Making an entity's officers and employees who possess relevant information available for meetings, interviews, examinations, or depositions;
- Disclosing nonprivileged facts relevant to the government's investigation gathered during the entity's independent investigation, including attribution of facts to specific sources rather than a general narrative of facts and providing timely updates on the organization's internal investigation into the government's concerns, including rolling disclosures of relevant information;
- Providing facts relevant to potential misconduct by third-party entities and individuals;
- Providing information in native format and facilitating review and evaluation of that information if it requires special or proprietary technologies so that the information can be evaluated;
- Admitting liability or accepting responsibility for the wrongdoing or relevant conduct;
- Assisting in the determination or recovery of the losses caused by the organization's misconduct; and
- Taking remedial measures in response to an FCA violation.

3. Inter-Agency Memorandum Easing FCA Enforcement in FHA Mortgage Lending

On October 28, 2019, the DOJ and the U.S. Department of Housing and Urban Development ("HUD") signed a Memorandum of Understanding ("MOU") that provides guidance on how the agencies will coordinate to use the FCA for violations by lenders approved by the Federal Housing Administration ("FHA").[5] The MOU clarifies that HUD will handle enforcement of violations of FHA program requirements "primarily through HUD's administrative proceedings," including through the agency's mortgagee review board, not through FCA litigation. This is meant to allay mortgage lenders' concerns that "unintentional mistakes and honest errors" would result in uncertain and unanticipated FCA liability.

The MOU explains that HUD intends to refer FCA litigation to the DOJ "only where such action is the most appropriate method to protect the interests of FHA's mortgage insurance programs, would deter fraud against the United States, and would generally serve the best interests of the United States." This standard will be met only where: (1) certain serious regulatory violations affect at least 15 loans or loans with unpaid principal balances or claims of at leas $2 million; and (2) there are aggravating factors that warrant FCA litigation, such as evidence that the violations are systemic or widespread.

In addition, the MOU instructs that the DOJ will confer with HUD when a FCA action is initiated by a party besides HUD—such as a *qui tam* relator, HUD's Office of the Inspector General, or the DOJ itself. In such situations, the MOU expressly counsels collaboration between the DOJ and HUD, including, for example, soliciting HUD's views on the merits of the FCA litigation and consulting with HUD regarding dismissal under 31 U.S.C. § 3730(c)(2).

[5] *Release available **here**.*

4. The Supreme Court's Decision in *Allina* and Implications for Government Enforcement Actions

In June, the Supreme Court held in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019), that the U.S. Department of Health and Human Services ("HHS") must go through formal notice-and-comment rulemaking for any rule, requirement, or policy statement that establishes or changes a "substantive legal standard" affecting Medicare benefits. The Court thus affirmed a D.C. Circuit decision that vacated a new government policy that reduced payments to hospitals serving low-income patients because the policy did not go through the notice-and-comment process. *See Allina Health Servs. v. Price*, 863 F.3d 937, 945 (D.C. Cir. 2017).

Allina may have significant implications for FCA cases. For example, one court recently relied on *Allina* to conclude that FCA claims premised on a CMS rule articulated in payment manuals must fail because the rule constituted a "substantive legal standard" that did not go through notice-and-comment rulemaking. *See Polansky v. Executive Health Resources, Inc.*, No. 2:12-cv-04239, 2019 WL 5790061 (E.D. Pa. Nov. 5, 2019).

HHS issued an internal memorandum on October 31, 2019 clarifying that *Allina* now prevents HHS and CMS from taking enforcement actions based on sub-regulatory standards or manuals unless such guidance is "closely tied to statutory or regulatory requirements."[6] Guidance is "closely tied to statutory or regulatory requirements" if it does not establish or change a substantive legal standard, but rather is "aiding in demonstrating that the standards in the relevant statutory and regulatory requirement have been or have not been satisfied." If the guidance is tied to the statutory or regulatory requirements in that way, the memorandum states that enforcement actions based on that guidance would be invalid under *Allina*. The memorandum also clarifies that enforcement actions based solely on local coverage determinations are now generally unsupportable. Finally, the memorandum explains that guidance documents that comply with the requirements of *Allina* may be relevant to the determination of materiality, as outlined in the Supreme Court's decision in *Escobar* (discussed below).

Both the Supreme Court's holding in *Allina* and the subsequent HHS memorandum underscore the importance of verifying the basis and standards upon which a government enforcement action is based.

[6] *Memorandum available* ***here***.

C. SIGNIFICANT JUDICIAL DECISIONS

1. Statute of Limitations: Supreme Court Resolves Circuit Split

An FCA action must be brought within the later of: (1) six years of the alleged violation, or (2) three years after the government has knowledge of "facts material to the right of action," but no later than ten years after the alleged violation was committed. 31 U.S.C. § 3731(b). The question of when a claim should receive the benefit of the latter extended limitations period previously created a circuit split. In 2019, the Supreme Court resolved this split in the case of *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

Before *Cochise*, circuit courts of appeal were split over whether the government's "knowledge" of the disputed violation triggered the three-year extension to the limitations period in cases where the government had declined to intervene. The Fourt and Tenth Circuits previously held that the extended limitations period did not apply in such cases. *See United States ex rel. Sanders v. N. Am. Bus Indus. Inc.*, 546 F.3d 288, 294 (4th Cir. 2008) (holding any other interpretation would create "the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action"); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 724–25 (10th Cir. 2006) ("Surely, Congress could not have intended to base a statute of limitations on the knowledge of a non-party.").

The Eleventh Circuit rejected this reasoning in *Cochise* and applied the extended limitations period despite the government's non-intervention. 887 F.3d 1081, 1092 (11th Cir. 2018). The Eleventh Circuit held that the Fourth and Tenth Circuits "failed to consider the unique role that the United States plays even in a non-intervened *qui tam* case," evidenced by the facts that the government receives most of the recovery regardless of whether it intervenes and retains the power to stay discovery, veto a relator's voluntary dismissal of the action, seek to intervene at any time upon a showing of good cause, and request pleadings and deposition transcripts. *Id.* at 1091–92.

The Supreme Court ultimately resolved the circuit split in favor of the Eleventh Circuit's reasoning, holding that the three-year statute of limitations in § 3731(b)(2) applies to a relator's *qui tam* action *even if* the government declines to intervene. Relators can now bring suit after the expiration of the FCA's normal six-year statute of limitations where the government "official . . . charged with responsibility to act" does not know, and should not reasonably have known, of the alleged fraud during that period. *Cochise*, 139 S. Ct. at 1513.

The Supreme Court did not comment on the Eleventh Circuit's reasoning regarding the government's unique role in a declined *qui tam* case. *See Cochise*, 887 F.3d at 1091–92. Rather, the Supreme Court based its holding on fundamental rules of statutory interpretation. *Cochise*, 139 S. Ct. at 1512. Reasoning that courts must avoid interpretations "that would attribute different meanings to the same phrase," the Supreme Court held that the plain text of the statute makes the two limitations periods applicable in both government-initiated *and* relator-initiated suits. *Id.* at 1511–12 (quotations omitted). Finally, with this decision, the Supreme Court abrogated *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), which previously held that the *relator*'s knowledge—not the government's knowledge—triggered the statute of limitations. *See id.* at 1513–14.

2. Rule 9(b): Pleading with Particularity

One of the first hurdles for plaintiffs in an FCA suit is the heightened pleading standard associated with allegations of fraud. *See* Fed. R. Civ. P. 9(b). Under this standard, a complaint must "state with particularity the circumstances constituting fraud" to provide sufficient notice of the claims and to protect the defendant against baseless allegations.

As we have discussed in previous Reviews, circuit courts of appeal continue to be split on how exactly the Rule 9(b) standard applies and, in particular, whether the plaintiff must provide specific examples of actual false claims presented to the government and whether that standard changes if the relevant information is peculiarly within the defendant's knowledge.

Generally speaking, the Fourth, Sixth, and Eleventh Circuits impose a "rigid" view of Rule 9(b), which requires alleging with particularity specific false claims that were actually presented to the government for payment, or, at the very least, alleging a pattern of conduct that would *necessarily* have led to the submission of false claims. *See United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 198 (4th Cir. 2018).

The other circuit courts have been more flexible, allowing complaints that do not allege the details of an actually submitted false claim to nonetheless pass Rule 9(b) muster by "alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *E.g., United States ex rel. Strubbe v. Crawford County Mem'l Hosp.,* 915 F.3d 1158, 1164 (8th Cir. 2019), *cert. denied*, No. 19-225, 2019 WL 6257418 (U.S. Nov. 25, 2019). Even under this flexible standard, however, the mere possibility—rather than a strong inference—that false claims were actually submitted is not enough. *Id*. at 1165.

a. Plaintiffs must show connection between defendants and alleged violations or false claims.

With the Supreme Court yet to resolve the circuit split, courts continued to provide varying guidance in 2019 on what is required under Rule 9(b)—even in the same court.

For example, several recent opinions from the District of Massachusetts provided examples of what is and is not sufficient to meet the flexible standard employed by the First Circuit, under which "[t]here is no 'checklist of mandatory requirements' that each allegation in a complaint must meet to satisfy Rule 9(b)." *United States ex rel. Allen v. Alere Home Monitoring, Inc.*, 355 F. Supp. 3d 18, 27 (D. Mass. 2019) (quoting *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 233 (1st Cir. 2004)).

In one case from that court alleging violations of Medicare and Medicaid rules covering billing and record-keeping for surgeries, the court determined that the relator satisfied the Rule 9(b) standard by "provid[ing] specific dates, identification numbers, amounts billed, services, individuals involved, and amounts paid for several claims that relate to improperly conducted overlapping and concurrent surgeries." *United States ex rel. Wollman v. Gen. Hosp. Corp.*, 394 F. Supp. 3d 174, 188 (D. Mass. 2019). These details tied the defendants to the alleged violations of the billing rules. *See id*. at 189. In another case, the same court dismissed claims that did not show a "connection" between the defendant and an alleged off-label marketing scheme because the relator failed to allege the defendant "directed, implemented, participated or conspired in the alleged marketing scheme." *United States ex rel. Clarke v. Aegerion Pharm., Inc.*, No. 1:13-cv-11785, 2019 WL 1437914, at *10 (D. Mass. Mar. 31, 2019).

In addition, the Northern District of Texas held that a relator's complaint did not have sufficient "details or reliable indicia to lead to a strong inference that defendant actually submitted false claims for payment" where the complaint "blur[red] the distinction as to which [entity] is allegedly committing the fraudulent action," "lack[ed] details about 'the particular workings of a scheme,'" pleaded a weak temporal connection between defendants' meeting and the alleged submission of false claims, and "provide[d] few details about the allegedly false submissions." *United States ex rel. Jamison v. Career Opportunities, Inc.*, No. 3:16-cv-03248, 2019 WL 460229, at *4–5 (N.D. Tex. Feb. 6, 2019).

b. Direct observations and personal knowledge are not required to adequately allege false claims.

In *United States ex rel. Godecke v. Kinetic Concepts, Inc.*, a fired employee alleged that the defendant fraudulently billed Medicare for its wound therapy devices by delivering such devices to Medicare patients without first obtaining required written orders from a physician and then failing to include the proper billing code modifier to indicate that not all requirements for reimbursement had been met. 937 F.3d 1201, 1206–07 (9th Cir. 2019). The relator's allegations of falsity were based on observations made during her employment as the defendant's Director of Medicare Cash and Collections. *Id*. at 1209. The defendant argued that the relator's case fell short on falsity grounds because the relator did not cite specific bills, was not personally directed to exclude the proper billing modifier, and did not personally observe employees omitting the codes.

The Ninth Circuit reversed the district court's dismissal, finding that relator's allegations included evidence of the defendant's immediate termination of the relator after she expressed concerns about the allegedly fraudulent practices, as well as witness recollections, which, collectively, provided the "details of a scheme to submit claims that were fraudulent" that "lead to a strong inference that [the defendant] actually submitted false claims to Medicare." *Id*. at 1210–11.

The Western District of Texas also addressed a similar issue in a case in which the relator alleged that the defendant engaged in a scheme to manipulate Medicare reimbursement by pressuring employees to provide reimbursable rehabilitation services, regardless of patient need, training therapists to fraudulently bill for services not provided to meet the prerequisites for reimbursable services, and enforcing a policy to maximize patient stay when not clinically warranted. *See United States ex rel. Integra Med Analytics, LLC v. Creative Sols. in Healthcare, Inc.*, No. 5:17-cv-01249, 2019 WL 5970283 (W.D. Tex. Nov. 13, 2019).

To support its allegations, the relator relied on statistical analyses to identify overutilization of the reimbursable services at-issue and used specific examples of patients whose claims showed that defendant billed for unreasonable and unnecessary treatment. *Id*. at *2. The court held that the relator properly alleged specific details through the statistical analyses and witness interviews to lead to a "strong inference" that false claims were submitted. *Id*. at *4. While statistical studies alone are not enough to implicate defendant, when coupled with supporting witness interviews, the statistical information was sufficient to establish that false claims were submitted by the defendant. *Id*. at *5.

c. Second Circuit relaxes pleading standard where false claims information is uniquely within defendant's knowledge.

Courts also continue to disagree about what a relator must plead in cases where the information about the alleged false claims is uniquely within the defendant's knowledge. For example, the Ninth Circuit affirmed dismissal of a relator's claims that several construction contractors knowingly billed for work and materials that did not meet state quality assurance standards because the relator's complaint did not allege with particularity the "who, what, when, where and how" of a consistent course of fraudulent conduct. *United States ex rel. Perry v. Hooker Creek Asphalt & Paving, LLC*, 765 F. App'x 318, 319 (9th Cir. 2019), *cert. denied*, 2019 WL 6257420 (U.S. Nov. 25, 2019) (unpublished). The relator had argued that the contracts and bills underlying his allegations were "in the exclusive possession of the government and/or defendants," but the Ninth Circuit agreed with the trial court's reasoning that FCA *qui tam* actions are only properly brought by "insiders" with "at least some knowledge of the actual claims presented for payment." No. 6:08-cv-06307, 2017 WL 2311666, at *2 (D. Or. May 26, 2017).

Conversely, the Second Circuit has carved out an exception in such circumstances, allowing a relator to plead that false claims were actually submitted on information and belief alone so long as the plaintiff (1) "make[s] plausible allegations that the bills or invoices actually submitted to the government were uniquely within [the defendant's] knowledge and control," and (2) "adduce[s] specific facts supporting a strong inference of fraud." *United States ex rel. Gelbman v. City of New York*, No. 18-3162, 2019 WL 5242326, at *3 (2d Cir. Oct. 17, 2019) (unpublished).

3. Falsity

As the name implies, the FCA only imposes liability for "false claims"—that is, for presenting a false or fraudulent claim or making a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(A)-(B). Although the terms "false" and "fraudulent" are not defined in the statute, courts provided helpful guidance in 2019.

a. Fraud cannot be proven if applicable contracts or regulations do not impose limitations or requirements related to the claim.

In *United States ex rel. DeFatta v. United Parcel Serv., Inc.*, the Ninth Circuit affirmed dismissal of a *qui tam* case in which the relator, a UPS employee, alleged that UPS had (1) fraudulently induced shipping contracts with the government by making false statements in its response to the government's request for proposal ("RFP") for expedited shipping services, and (2) submitted facially false invoices overcharging the government for such services. 771 F. App'x 735, 737 (9th Cir. 2019) (unpublished). Both of relator's factual theories alleged that UPS failed to comply with requirements in the RFP and its governing contracts—but the Court held that neither stated a claim for fraud. *Id*. at 737–38.

The first claim was based on UPS's nondisclosure of "UPS Ground" service among the shipping options listed in its response to the government's RFP. The court explained that the RFP sought expedited shipping services with guaranteed delivery within one-to-three days and that, while UPS Ground shipments within certain distances will be delivered within one-to-three days, UPS Ground does not *guarantee* delivery within those timeframes. Thus, UPS's decision not to offer UPS Ground service in response to the RFP was neither fraudulent nor misleading because such service did not meet the RFP's express requirements. *Id*. at 737.

The second claim was based on invoices through which UPS charged the government for "Next Day Air" or "Second Day Air" services when the shipments at-issue were actually made via ground transportation. The court found that this claim was also properly dismissed because, under the governing contracts, UPS retained discretion to choose the appropriate method of transport in each case, regardless of the service selected in advance, and that the amount charged was to be based on the service *selected*, not the actual method of transport. *Id*. at 738. Therefore, defendant's use of ground transportation for shipments for which one of the "Air" services was selected was not misleading and the invoices were not false. *Id*.; *see also United States ex rel. Perry v. Pac. Mar. Indus. Corp.*, 751 F. App'x 1021 (9th Cir. 2019) (unpublished) (dismissing relator's claim against the maker of certain metal doors based on the doors' alleged noncompliance with a weight limit where it was undisputed that the applicable specifications imposed no weight limit).

b. Reasonable disagreement between medical experts is not sufficient, on its own, to support a falsity determination.

In a closely-watched case in the Eleventh Circuit, the court considered whether Medicare claims can be deemed false for purposes of the FCA when there is a disagreement between medical experts as to the accuracy of the information contained in the claim. *See United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019). The relator contended that AseraCare had a practice of knowingly submitting unsubstantiated Medicare claims—that is, claims without the necessary clinical information to support a physician's certification of terminal illness, as required to demonstrate the patient's hospice eligibility. *Id*. at 1282. To establish falsity, the relator claimed that its expert testimony demonstrated that the patients were not terminally ill at the time AseraCare collected reimbursement for their hospice care and, therefore, that the physician certifications were unsupported. *Id*. at 1285-1288. In response, AseraCare offered expert testimony that directly contradicted the relator's expert, using a different approach to assess terminal illness. *Id*. at 1288.

After a series of lower court trials, the Eleventh Circuit affirmed summary judgment in favor of AseraCare, agreeing that: "(1) the FCA's falsity element requires proof of an objective falsehood; and (2) that a mere difference of opinion between physicians, *without more*, is not enough to show falsity." *Id*. at 1290–91; *see also id.* at 1295–97 ("[T]he law is designed to give physicians meaningful latitude to make informed judgments without fear that those judgments will be second-guessed after the fact by laymen in a liability proceeding.").

4. Reverse False Claims

A defendant may also be liable under the FCA for a "reverse false claim" if it makes or uses a false record or statement for the purpose of avoiding or decreasing an "obligation" owed to the United States. *See* 31 U.S.C. §3729(a)(1)(G).

In 2019, the D.C. Circuit addressed what constitutes such an "obligation" with respect to federal disclosure requirements. In *United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.,* the court held that the defendants were not liable under the FCA for avoiding civil penalties by failing to disclose certain information to the Environmental Protection Agency ("EPA") related to the health risks of certain chemicals—a reporting requirement under the Toxic Substances Control Act ("TSCA"). 929 F.3d 721, 724 (D.C. Cir. 2019). The court determined that the TSCA penalties were discretionary and the EPA did not impose the penalties on the defendants. *Id*. at 725. Based on those findings, the court held that the unassessed penalties did not constitute an obligation giving rise to a reverse false claim. *Id*. at 726.

As a secondary matter, the court also addressed whether defendants' failure to adhere to the TSCA reporting requirements was a breach of an obligation to transmit property to the United States. The court determined that the EPA's right to be informed of health risk information does not constitute a property right. *Id*. at 727. It further held that defendant's requirement to inform the EPA of health risks does not qualify as an FCA obligation to "transmit property." *Id*.

5. Scienter

The FCA's scienter requirement forces the plaintiff to show that the defendant "knowingly" submitted a false or fraudulent claim. 31 U.S.C. § 3729(a)(1). To act "knowingly," a defendant must have acted with "actual knowledge of the information" or in "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information." 31 U.S.C. § 3729(b)(1). While the FCA does not require plaintiffs to show a specific intent to defraud, it does require more than a showing of negligence. *See United States v. Wagoner*, No. 2:17-cv-00478, 2018 WL 4539819, at *6 (N.D. Ind. Sept. 20, 2018) ("Innocent mistakes or negligence are not actionable.") (citation omitted).

a. Actual knowledge may be shown by concealment.

What constitutes "actual knowledge" has long been a subject of discussion in FCA jurisprudence. In 2019, two courts held that the suppression of information can constitute actual knowledge to satisfy the FCA's scienter requirement. In *United States ex rel. Wollman v. Gen. Hosp. Corp.*, the plaintiff alleged violations of Medicare and Medicaid reimbursement rules with respect to billing and record-keeping for overlapping and concurrent surgeries, billing for the administration of anesthesia, and a requirement to obtain the patient's informed consent. 394 F. Supp. 3d 174, 179 (D. Mass. 2019). The plaintiff contended that the defendant violated these billing standards by submitting reimbursement requests containing false information even after an internal investigation revealed noncompliance. The court held that the scienter requirement was met by evidence of "active concealment of concurrent surgeries from patients and intentionally restricted record-keeping practices designed to avoid government detection." *Id*. at 190.

The Fifth Circuit reached a similar result in a case involving false claims made to the Department of Housing and Urban Development ("HUD"). *See United States v. Hodge*, 933 F.3d 468, 472 (5th Cir. 2019). The court held that evidence that the defendant hid the involvement of unregistered bank branches from HUD and lied about them when the violations were discovered in a state audit was sufficient to show the defendant's actual knowledge for FCA liability purposes. *Id*. at 473.

b. Having a motivation for submitting claims is not evidence of knowledge.

The Fourth Circuit confirmed that mere motivation to submit a false claim is not evidence of knowledge. In *United States ex rel. Oberg v. Penn. Higher Educ. Assistance Agency*, the court affirmed a decision to exclude evidence of an audit report that criticized the defendant's culture of favoring excessive compensation and extravagant employee benefits in determining FCA liability. 912 F.3d 731, 735 (4th Cir. 2019). The plaintiff claimed that the defendant submitted false claims for subsidies by transferring student loans to tax-exempt bonds with higher returns that resulted in additional revenue for the defendant. *Id*. The plaintiff argued that an audit report established scienter by showing that personal gain motivated the defendant's officers to submit false claims to maximize allowable subsidies under a Department of Education ("DOE") program.

The court held, however, that the scienter determination could not be based on the employees' intent or desire to make additional compensation, but on whether defendant had knowledge that its submission of subsidy claims to the DOE was illegal. *Id.* (citing *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 921 (4th Cir. 2003)) ("In establishing liability under the FCA, a plaintiff need not prove the defendant had a financial motive to make a false statement relating to a claim seeking government funds.").

c. The FCA's scienter requirement is meant to capture "ostrich-like" situations such that defendants cannot bury their heads in the sand.

The Ninth and Tenth Circuits addressed the application of the FCA's scienter requirements in "ostrich-like situations"—that is, "where an individual has buried his head in the sand and failed to make simple inquiries which would alert him that false claims are being submitted." The Tenth Circuit considered whether a defendant's organizational structure had prevented it from learning the relevant facts, thereby causing it to act in deliberate ignorance or reckless disregard of the falsity of the invoices submitted to the federal agencies. *See United States ex rel. Coffman v. City of Leavenworth, Kan.*, 770 F. App'x 417, 420 (10th Cir. 2019) (unpublished). While the plaintiff alleged that the defendant had a compartmentalized structure that allowed it to evade any knowledge of potential liability, the court held that a division of responsibility for submitting invoices and lack of inquiry did not demonstrate that an organizational structure prevented defendants from learning relevant facts regarding the falsity of its claims for payment. *Id.* at 421.

In contrast, the Ninth Circuit held that deliberate ignorance could be found where a company's system of management, tracking, and termination worked together to keep corporate officers in the dark about the company's fraudulent claims. *See United States ex rel. Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1207 (9th Cir. 2019). A fired employee brought an action alleging that the defendant filed false reimbursement claims with Medicare for medical equipment without first obtaining required written orders from a physician prior to delivery of the equipment and without using the proper billing codes to alert Medicare of the situation. *Id*. at 1206–07.

The court held that defendant made itself deliberately ignorant of the false claims by (1) its use of exceptions in its tracking system for physician orders (to avoid knowledge regarding when orders were received), (2) instructing employees not to appeal Medicare denials for fear that the lack of a prior written order was missing, and (3) the aggressive termination of the plaintiff shortly after she raised concerns about the submission of false claims. *Id*. at 1212; *see also United States v. Sci. Appls. Int'l Corp.*, 626 F.3d 1257, 1275–76 (D.C. Cir. 2010) (stating that Congress adopted the definition of "knowingly" in the FCA to include deliberate ignorance or reckless disregard "to capture the ostrich-like conduct which can occur in large corporations where corporate officers insulate themselves from knowledge of false claims submitted by lower-level subordinates").

6. Post-*Escobar* Materiality

The Supreme Court's 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* has continued to receive significant attention from the lower courts. 136 S. Ct. 1989, __U.S.__ (2016).

By way of background, *Escobar* issued two key holdings. First, the Court resolved a circuit split by confirming the validity of the "implied false certification theory of liability," under which a defendant's failure to disclose noncompliance with a statute, regulation, or contract requirement can render a claim "false or fraudulent"—even if the claim does not expressly certify such compliance. *See id.* at 1995–96. The Court clarified that "not every undisclosed violation of an express condition of payment automatically triggers liability." *Id.* Instead, the misrepresentation about compliance "must be material to the government's payment decision." *Id.* at 2002 (emphasis added).

Second, the Court held that determining materiality is a "rigorous" and "demanding" fact-based inquiry of whether a noncompliance has a natural tendency to influence, or be capable of influencing, the government's payment decision. *See id.*; *see also United States ex rel. Gelman v. Donovan*, No. 1:12-cv-05142, 2017 WL 4280543, at *5 (E.D.N.Y. Sept. 25, 2017) ("[After *Escobar*,] materiality is essentially a matter of common sense rather than technical exegesis of statutes and regulations."). This inquiry may be influenced by non-exclusive factors such as whether the alleged noncompliance goes to the "essence of the bargain," whether the noncompliance is significant (as opposed to "minor or insubstantial"), and whether the government has taken action in response to similar, known violations. *Escobar*, 136 S. Ct. at 2003–04.

Since the Supreme Court issued its opinion in *Escobar*, numerous district and appellate courts have attempted to interpret what is and is not "material." Questions remain without unanimous answers, including:

- Does the government's continued payment despite knowledge of *alleged* noncompliance defeat materiality? Or must the government have knowledge of *actual* noncompliance?
- To what extent should courts consider whether the government may have had reasons to continue payment unrelated to the alleged fraud?
- At what point in time does a court assess government knowledge? When claims are submitted? Does knowledge acquired in subsequent investigations matter?

The following is a summary of some key decisions issued in 2019.

a. Regulations indicating that government would not pay are probative evidence that noncompliance is material.

The Third Circuit held that the materiality element was satisfied in a case where the relator alleged that the defendant falsely represented to Medicare that neurological testing was being supervised by a licensed neurologist. *United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 318 (3d Cir. 2019). Specifically, the government had provided evidence that the relevant Medicare regulations precluded payment of diagnostic neurological testing claims without certification of a supervising neurologist, and the defendant could not provide any controverting evidence that Medicare generally paid such claims despite knowing that the regulations were violated.

The Ninth Circuit similarly held that a relator sufficiently alleged materiality in a case alleging that a provider of medical equipment delivered durable medical equipment to Medicare patients before obtaining a detailed written order from a physician—which is a requirement for Medicare reimbursement—and then failed to use proper billing code modifiers to alert Medicare of the situation. *United States ex rel. Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019). Notably, a local coverage determination ("LCDs") by the applicable Medicare contractor explicitly provided that payment would not be made by Medicare if a device was delivered before the written order was received. *Id.* As in *Doe*, the defendant could not provide controverting evidence that the government had reimbursed any claims despite knowing that the LCD requirements were not met, suggesting noncompliance with the requirements was material.

b. Prior enforcement actions are relevant to materiality.

The Fifth Circuit also addressed materiality in a case where a hospice care provider allegedly failed to comply with various Medicare billing requirements for hospice services, including failing to complete certifications of terminal illness or the supporting documents for hospice patients. *United States ex rel.*

Lemon v. Nurses To Go, Inc., 924 F.3d 155, 157 (5th Cir. 2019). The district court characterized the relators' allegations of incomplete certifications as "laziness, bungled paperwork, and mistakes that were corrected," not as inadequate care, and thus deemed them not material to Medicare reimbursement. No. 4:16-cv-01775, 2018 WL 1898559, at *2 (S.D. Tex. Apr. 20, 2018).

The Fifth Circuit reversed, finding the alleged fraudulent certifications of compliance to be material as they violated conditions of payment. 924 F.3d at 161. The court also found the allegations material because there was evidence that the "U.S. Department of Health and Human Service's Office of Inspector General ha[d] taken criminal and civil enforcement actions against other hospice providers that submitted bills for ineligible services or patients, including situations where the provider failed to conduct appropriate certifications." *Id*. at 162. Thus, the relators had "raised a reasonable inference that the Government would deny payment if it knew about Defendants' alleged violations." *Id*.

c. The Government's intervention decision is a factor considered in assessing materiality.

In *Cimino v. Int'l Bus. Machines Corp.*, the district court dismissed a relator's claim that IBM misled the IRS into signing a software licensing deal for lack of materiality. No. 1:13-cv-00907, 2019 WL 4750259, at *1 (D.D.C. Sept. 30, 2019). The court found that the IRS's decision to continue making payments on that deal, despite learning about the whistleblower suit shortly after the agreement began, was "strong evidence" the IRS did not view those allegations as material. *Id*. at *7. The court also held that the government's decision not to intervene in the case after an extensive multiyear investigation was "entitled to some respect," although it was not dispositive of materiality. *Id*.

Other courts have also discussed the government's intervention decision as being a non-dispositive factor to consider in assessing materiality. *See, e.g.*, *United States ex rel. Longo v. Wheeling Hosp., Inc.*, No. 5:19-cv-00192, 2019 WL 4478843, at *10 (N.D.W.Va. Sept. 18, 2019) ("A final factor, absent in *Escobar*, is that in this case the Government has intervened seeking reimbursement. This final factor strongly militates in favor of materiality.") (citing *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 177 (4th Cir. 2017)); *United States ex rel. MacDowell v. Synnex Corp.*, No. 3:19-cv-00173, 2019 WL 4345951, at *4 (N.D. Cal. Sept. 12, 2019) ("Although the fact that the government has declined to intervene in the seven years since relator instituted this action weighs toward finding a lack of materiality, it is not dispositive as there are other reasons why the government may decline to intervene.").

d. Noncompliance with cybersecurity requirements can be material.

In a defense contracting case, a California district court held that the contractor's noncompliance with government cybersecurity requirements could be material. Aerojet Rocketdyne develops and manufactures products for the aerospace and defense industries. Their former senior director of Cyber Security, Compliance, and Controls brought a *qui tam* suit after being terminated, alleging that the company falsely certified to the government that it was in compliance with the Department of Defense's cybersecurity rules, which impose requirements on defense contractors to safeguard unclassified controlled technical information from cybersecurity threats. *United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, 381 F. Supp. 3d 1240, 1243–44 (E.D. Cal. 2019).

The district court deemed the alleged noncompliance with cybersecurity requirements possibly material as it "could have affected [Aerojet's] ability to handle technical information pertaining to missile defense and rocket engine technology[,]" which, in turn, could have affected Aerojet's ability to perform under its various Department of Defense and NASA contracts—and thus influence the government's decision to enter into and pay on the contracts. *Id*. at 1248.
While government agencies continued contracting with Aerojet after the government's investigation into the relator's allegations, the court held that this was not dispositive for a motion to dismiss. *Id*. Instead, "the appropriate inquiry is whether [the] alleged misrepresentations were material *at the time the government entered into or made payments* on the relevant contracts." *Id*.

7. Public Disclosure Bar and Original Source Exception

The FCA's public disclosure bar prohibits *qui tam* suits based on publicly disclosed allegations of fraud, unless the relator has sufficient knowledge of the fraud to qualify as an "original source." 31 U.S.C. § 3730(e)(4). This defense is continually a source of litigation, as courts attempt to strike the congressionally intended balance between discouraging parasitic lawsuits and properly incentivizing true whistleblowers.

The public disclosure bar was amended in 2010 by the Affordable Care Act ("ACA"). The pre-ACA public disclosure bar required that an original source have "direct and independent knowledge" of the information forming the basis of the allegations. The post-ACA public disclosure bar lowers the bar and qualifies a relator as an "original source" if she "has knowledge that is independent of and *materially adds* to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B) (emphasis added).

Due to the lengthy nature of most FCA suits, many courts are still grappling with cases implicating the pre-ACA version of the public disclosure bar. Thus, analysis of the "materially adds" provision in the post-ACA public disclosure bar is relatively sparse to date. However, in 2019, the Tenth Circuit addressed the meaning of this provision. Relying in large part on the First Circuit's rationale in *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016), the Tenth Circuit explained that a relator satisfies the "materially adds" requirement when she "discloses new information that is sufficiently significant or important that it would be capable of 'influenc[ing] the behavior of the recipient.'" *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 757 (10th Cir. 2019) (quoting *Winkelman*, 827 F.3d at 211). Merely adding background information or additional details about a known fraudulent scheme is not enough. *Id.*

In *Reed*, the Tenth Circuit held that the relator "materially added" to the information available in public disclosures because: (1) she made specific allegations of investigator and management-level fraud in the context of her company's program; and (2) her allegations concerning her company's responses to her reports of possible fraud provided direct evidence of her company's scienter. *Id.* at 759. Because the district court had not reached the second part of the original source standard, the Tenth Circuit remanded on the question of whether the relator's allegations were "independent" of the public disclosures. *Id.*

8. First-to-File Rule

The FCA's first-to-file rule 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). Generally speaking, the rule prohibits an individual from bringing a *qui tam* action if there is already another pending action based on the same essential facts. "The first-to-file bar thus functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim." *In re Nat. Gas Royalties Qui Tam Litigation (CO2 Appeals)*, 566 F.3d 956, 961 (10th Cir. 2009).

In 2019, the First Circuit held for the first time that the first-to-file rule is not jurisdictional—that is, it simply affects whether a later-filed suit states a claim for relief and does not limit the subject-matter jurisdiction of the court. *See United States ex rel. McGuire v. Millennium Labs., Inc.*, 923 F.3d 240 (1st Cir. 2019). In doing so, the First Circuit joined the Second and D.C. Circuits in a circuit split on the issue. The court awarded a whistleblower named Mark McGuire a $34 million share of the settlement recovery and ruled that it was McGuire's suit—rather than a first-filed suit by another whistleblower, Robert Cunningham—that identified the "essential facts" underlying the settlement.

McGuire's complaint, which was filed after Cunningham's, primarily alleged that the defendant engaged in a scheme that resulted in unnecessary confirmatory testing. *Id.* at 246. Cunningham's complaint had focused on point-of-care testing. *Id.* The government intervened in McGuire's action and eventually settled the case (focused on confirmatory testing) for $227 million. *Id.* at 247. The settlement set aside 15% for a relator's share, but did not resolve which relator was entitled to it. *Id.* McGuire filed a crosscl aim for declaratory relief, arguing he was entitled to the relator's share because he was first to file a complaint that alleged the "essential facts" underlying the settlement agreement. *Id.* at 248. Cunningham moved to dismiss McGuire's crossclaim, arguing instead that he was first to file. *Id.* The district court dismissed McGuire's crossclaim for lack of subject-matter jurisdiction, holding that Cunningham was first to file, that the first-to-file rule was jurisdictional, and thus it did not have jurisdiction over McGuire's crossclaim. *Id.*

The First Circuit reversed, holding that the court had jurisdiction over McGuire's claim. *Id.* The court explained that it had three main reasons for its conclusions. First, the Supreme Court in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015) addressed the operation of the first-to-file rule on "decidedly nonjurisdictional terms," implying that the Court did not consider it to be jurisdictional. *Id.* at 249. Second, the First Circuit's prior cases holding the first-to-file rule was jurisdictional all pre-dated *Carter* and did not contain substantive analysis on this issue. Third, the court applied the "bright line" rule articulated in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) and found that rule could only lead to the conclusion that the first-to-file rule is not jurisdictional. *Id.*

The First Circuit next addressed which relator was entitled to the relator's share, examining whether Cunningham's complaint contained the "essential facts" of the fraud McGuire alleged. *Id.* at 252. The court did a claim-by-claim analysis and concluded that Cunningham's allegations did not cover the essential elements of the fraud McGuire alleged, which the government pursued. *Id.* at 254. Therefore, the court held that it was McGuire and not Cunningham who was the first-to-file relator and was therefore entitled to the $34 million relator's share. *Id.*

9. Retaliation Against Whistleblowers

To protect whistleblowers, the FCA has an anti-retaliation provision that imposes liability on an employer if an employee is "discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter." 31 U.S.C. § 3730(h)(1).

Circuits courts of appeal have generally held that when there is no direct evidence of retaliation, a successful FCA retaliation action involves three steps:

- *First*, an employee must prove that:
  (a) she engaged in a protected activity;
  (b) her employer knew about these acts; and
  (c) she suffered adverse action because of these acts.
- *Second*, if the employee proves these three elements, the burden of proof shifts to the employer to provide a legitimate, non-retaliatory explanation for its allegedly-retaliatory action.
- *Third*, the burden then shifts back to the employee to demonstrate that the employer's explanation is pretextual and the employer's action was therefore retaliatory.

See, e.g., *Garcia v. Prof'l Contract Services, Inc.*, 938 F.3d 236, 241 (5th Cir. 2019) (adopting the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973)); *Miller v. Inst. for Def. Analyses*, No. 19-1110, 2019 WL 6997900, at *4 (10th Cir. Dec. 20, 2019) (same). Several cases in 2019 addressed the requirements imposed at each step of that analysis.

At the first step, the employee must show only that there is a "causal connection" between the protected activity and the adverse action, including, for example, proximity in time between the two. *See id*. at 241, 243 (noting that a proximity of four months from protected activity to adverse action can create an inference of causation).

Under the plain language of the statute, "protected activity" means either an employee's lawful acts that are "in furtherance of" an FCA action or efforts to stop violations of the broader subchapter governing claims against the United States government. 31 U.S.C. § 3730(h)(1). Circuit courts generally agree that the first category of protected activity (lawful acts "in furtherance of" an FCA action) encompasses actions that, if investigated, "reasonably could lead to," or have a "distinct possibility" of leading to, a "viable False Claims Act case." *Singletary v. Howard Univ.*, 939 F.3d 287, 295 (D.C. Cir. 2019) (quoting *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 66, 68–69 (D.C. Cir. 2008)); *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 200 (4th Cir. 2018); *see also Guilfoile v. Shields*, 913 F.3d 178, 189 (1st Cir. 2019) (contrasting heightened pleading standards for FCA claims of fraud with the general standards for a retaliation claim; "[p]ut colloquially, rather than plausibly pleading the existence of a fire—the actual submission of a false claim—a plaintiff alleging FCA retaliation need only plausibly plead a reasonable amount of smoke—conduct that could reasonably lead to an FCA action based on the submission of a false claim").

Circuit courts also agree that the second category of protected activity ("other efforts to stop one or more violations") is intended to encompass a broader category of actions, including employees' efforts to stop an employer's general "fraud in connection with the submission of a claim for federal government funds." *Singletary*, 939 F.3d at 296; *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 201 (4th Cir. 2018).

For example, the D.C. Circuit held that a relator's internal complaints about her university-employer's noncompliance with NIH animal welfare standards constituted protected activity because she "had an objectively reasonable belief that the university was or would soon be submitting false certifications of its compliance with animal welfare requirements in connection with funding claims." *Singletary*, 939 F.3d at 298. Similarly, the Fourth Circuit held that a relator's complaints about his employer's "pencil whipping and failure to use proper tools" constituted protected activity where the complaints "alleged specific illegal, fraudulent conduct against the government." *Grant*, 912 F.3d at 202.

At the second step of the retaliation claim framework, the employer must "set forth, through admissible evidence, reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful [retaliation] was not the cause of the employment action." *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 561 (5th Cir. 2019) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993)). In *Musser*, the employer carried its burden by articulating two legitimate, non-retaliatory reasons for firing the plaintiff-employee: that the relator's position was eliminated due to (1) poor job performance and (2) a broader reorganization of the employer's business. *Id.*

At the third step, circuit courts continue to disagree on whether an employee must show that the protected conduct was a "but for" cause of the employer's actions or only that it was a "motivating factor." *Compare Singletary*, 939 F.3d at 293 ("To satisfy the second element, a plaintiff must further allege . . . that the retaliation was motivated "at least in part" by her protected activity) *with Nesbitt v. Candler Cty.*, No. 18-14484, 2020 WL 38525, at *4 (11th Cir. Jan. 3, 2020) (concluding that the text of the FCA supports a "but-for" causation standard, under which a plaintiff must show that the retaliatory harm would not have occurred but for the protected conduct).

Under the stricter "but for" standard, an employee cannot rely on mere proximity in time alone. The evidence must instead be of "such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions" when comparing it with the employer's proffered evidence. *Musser*, 944 F.3d. at 561–62 (citing *Hernandez v. Yellow Transp.*, Inc., 670 F.3d 644, 658 (5th Cir. 2012)).

For example, in *Garcia*, the relator produced evidence showing that: (1) he and his employer disputed facts leading up to his termination; (2) a similarly situated employee was not terminated; (3) he was harassed by his supervisor after reporting the fraudulent billing; (4) the employer's stated reason for firing him—poor performance—had been known to the employer for years before it took action; and (5) "that the company stood to lose millions of dollars if its conduct was discovered." 938 F.3d at 244. Viewing the evidence in its totality and in the light most favorable to the relator, the Fifth Circuit held that a reasonable jury could conclude that the relator's reports of false billing were indeed a but-for cause of his termination. *Id.* at 246.

10. Anti-Kickback Statute and Stark Law

Violations of the Anti-Kickback Statute ("AKS") often serve as the basis for liability under the FCA. The AKS prohibits knowingly and willfully offering, paying, soliciting, or receiving any remuneration (including any kickback, bribe, or rebate) to induce or reward referrals for items or services reimbursable under a federal healthcare program. 42 U.S.C. § 1320a-7b(b).

The Stark Law may also serve as a basis for liability under the FCA. The Stark Law prohibits doctors from referring Medicare patients to a hospital if those doctors have certain types of "financial relationships" with that hospital. It also prohibits the hospital from presenting claims for payment to Medicare for any medical services it rendered to such referred patients. 42 U.S.C. §1395nn(a).

a. Fair market value correlation between favorable terms and referrals plays a central role in assessing FCA claims premised on AKS or Stark violations.

In 2019, the Eleventh Circuit affirmed the dismissal of a suit in which the relator alleged that a national hospital management company violated the AKS and Stark Law by providing "sweetheart" deals to certain physicians who leased space in medical office buildings developed by the company in exchange for patient referrals from those physicians. Specifically, the relator alleged that the company paid improper subsidies to a medical office building developer and that the developer passed the value of these subsidies on to physician tenants who signed 10-year leases through low initial lease rates, restricted use waivers, operating cash-flow shares, and free office improvements. The relator also alleged the company provided direct remuneration to physician tenants, including free parking, subsidized common area maintenance, free use permissions, and below-market rent, in exchange for referral of patients to the company's hospitals.

In addressing the AKS allegations, the Eleventh Circuit determined that to prove a kickback violation, the relator needed to show that the doctors received rents that strayed from fair market value. But the relator conceded that the proposed rents fell within a range of "market rates" for new constructions according to an appraisal study. The relator also failed to tie the alleged benefits to specific physician tenants who were or could be referral sources and failed to present evidence that the use waivers were anything other than a standard exercise of discretion under the relevant leases or that the company was required to ask for something in exchange for the use waivers. The Eleventh Circuit further determined that the relator's Stark Law claim failed because the company showed that there was no correlation between the physicians' lease amounts and the volume or value of patient referrals they made to its hospitals.

Another important decision addressing the Stark Law came from the Third Circuit, which vacated its own earlier opinion to remove a controversial theory from its holding. The court's original opinion determined that a relator could sufficiently allege a Stark Law and FCA violation by claiming that an employed physician's compensation for personally-performed services "correlated" with the volume or value of his referrals to the hospital for corresponding hospital services. *United States ex rel. Bookwalter v. UPMC*, 938 F.3d 397 (3d Cir. 2019).

However, on rehearing, the Third Circuit removed the correlation theory from its opinion, declining to address the meaning of whether compensation impermissibly "varies with" the "volume or value" of referrals if there is merely a correlation between the compensation and the referrals, as opposed to a causal relationship. *United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 171 (3d Cir. 2019). Instead, the court focused on whether the compensation arrangement "takes into account" referrals, finding that the "surgeons' suspiciously high compensation suggests causation." *Id*. at 171–73. The revised opinion assuages fears that a hospital may violate of the Stark Law and FCA merely because a physician employment agreement contains a productivity bonus for personally-performed services. But the Third Circuit still found that relators had sufficiently alleged an FCA claim to defeat a motion to dismiss, making it important for hospitals to ensure compensation agreements with physicians are commercially reasonable and for fair market value.

b. Rescission under the Texas Securities Act does not lead to FCA liability.

The Fifth Circuit explored whether a buy-out of interests in a physician-owned hospital violated the AKS and Stark Law. *See United States ex rel. Patel v. Catholic Health Initiatives*, No. 18-20395, 2019 WL 6208665 (5th Cir. Nov. 20, 2019) (per curiam) (unpublished). In *Patel*, following the passage of the ACA, St. Luke's Health System ventured to change one of its hospital's ownership structures through a buy-out of physicians' partnership interests pursuant to the Texas Securities Act ("TSA"). *Id.* at *1. Three physician-owners resisted the attempt to rescind their ownership interests and sued St. Luke's and other defendants in connection with the buy-out. These relators alleged that the process by which the other physician-owners were bought out under the TSA resulted in payments substantially above the market value of their stakes in the hospital. The relators also alleged that the defendants intended for these high prices to help maintain referral relationships with the physicians, in violation of the AKS and Stark Law. *Id.* But the Fifth Circuit rejected the relators' AKS and Stark Law claims, finding the defendants "had a reasonable basis to utilize the TSA approach" to try to comply with the ACA, "and nothing tie[d] the allegedly high payment for physician shares to any inducement or referrals." *Id.* at *2.

11. Relators' Rights

a. The FCA does not allow relators to appear *pro se*.

As noted throughout this Review, the FCA allows private parties to bring civil *qui tam* actions on behalf of themselves and the United States to encourage insiders to come forward with information about fraud against the federal government. 31 U.S.C. § 3730(b)(1).

But several courts recently reaffirmed the fact that individuals cannot appear *pro se* when representing the United States in FCA actions. *See Wojcicki v. SCANA/SCE&G*, No. 17-2045, 2020 WL 202298, at *4–5 (4th Cir. Jan. 14, 2020); *Shu v. Hutt*, No. 2:18-cv-00517, 2019 WL 293375, at *1 (D. Nev. Jan. 22, 2019) (citing *United States ex rel. Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116, 1126–27 (9th Cir. 2007)). This is because the United States remains a party in interest (even if it declines intervention), and the relator's interest is not a personal one. *See Wojcicki*, 2020 WL 202298, at *4; *Chailla v. Navient Dep't of Educ.*, No. 17-3812, 2019 WL 5690463, at *1 (2d Cir. Nov. 4, 2019) (unpublished). One court even affirmed dismissal with prejudice of a *pro se* plaintiff's suit while expressly rejecting the plaintiff's argument that he should be given the opportunity to hire an attorney. *See Sheikh v. Wheeler*, No. 19-1851, 2019 WL 5296368, at *2 (7th Cir. Oct. 18, 2019) (unpublished).

b. Relators' right to share in recovery has limitations.

When a relator initiates a *qui tam* action, the United States has to review the claim and determine whether it wishes to intervene and proceed with the action. *United States v. L-3 Commc'ns EOTech, Inc.*, 921 F.3d 11, 13 (2d Cir. 2019) (citing 31 U.S.C. §§ 3730(b)(2), (b)(4)). If the United States does intervene, the relator has the right to remain a party in the action, although the United States assumes primary responsibility for prosecuting the action. *Id.* (citing 31 U.S.C. § 3730(c)(3)). If the action is ultimately successful, the relator is generally entitled to receive a portion of the recovery—"typically 15-30% of the proceeds, depending in part on whether the government has intervened and taken over prosecution of the action, or instead has declined to intervene and left prosecution to the relator[.]" *Id.* (citing 31 U.S.C. §§ 3730(d)(1)-(2)).

In *L-3 Communications*, the United States brought an FCA action against the manufacturer of defective holographic firearm sights, and the parties entered a settlement agreement. Following the settlement, a relator who had voluntarily dismissed an earlier FCA claim against L-3 Communications (DaSilva) sought to claim a share of the recovery, but the district court denied his claim. On appeal, DaSilva contended that: (1) the district court misinterpreted the FCA as requiring a relator to have a *qui tam* action pending when the government commenced its suit to be entitled to share in any recovery; and (2) his voluntary dismissal of his lawsuit was actually coerced by the government. *Id.* at *17.

The Second Circuit rejected both arguments and affirmed the district court's denial of DaSilva's motion to share in the recovery, concluding that the unambiguous provisions of § 3730(c)(5) and other sections of the FCA precluded DaSilva from sharing in the recovery. *Id.* at *30. The Second Circuit noted that DaSilva's voluntary dismissal of his original *qui tam* action did not preserve his right to participate in the government's later-filed FCA action; and while DaSilva was free to file a later suit, it would not have been pending at the time the government's suit commenced 14 months later. *Id.* at *21. Because DaSilva's *qui tam* action was not pending at the time the government's FCA action was filed, there was no statutory basis for DaSilva to move for a share of the government's recovery.

Conversely, the Third Circuit confronted the issue of whether a relator with a pending *qui tam* action could claim a share of $1.5 million in restitution that the defendant agreed to pay after a *criminal* action was brought by the United States. *United States v. Wegeler*, 941 F.3d 665, 668–69 (3d Cir. 2019). The United States had previously declined to join the relator's *qui tam* civil action, but used the information provided by the relator to investigate possible crimes, ultimately prosecuting the defendant and resolving the prosecution in a plea agreement for $1.5 million in restitution. *Id.* at 668. The relator learned of the restitution and sought to participate in the recovery.

The Third Circuit ultimately held—in a case of first impression—that the alternate-remedy provision of the FCA did not extend to criminal proceedings. *Id.* at 669. The Third Circuit relied on a "'long line of precedent holding that a [private individual] lacks a judicially cognizable interest in [another]'s prosecution' and likewise, 'in [another's] sentence.'" *Id.* (quoting *United States v. Stoerr*, 695 F.3d 271, 277–78 (3d Cir. 2012)). While a relator has every right to continue pursuing a *qui tam* action after the government elects not to intervene, the relator has no standing to prosecute a criminal action alongside the government. *Id.* Thus, the Third Circuit affirmed the district court's denial of relator's motion to intervene.

c. Circuits are split as to whether a relator has the right to an in-person hearing before dismissal.

If the United States elects not to intervene in a *qui tam* action under the FCA, the relator may still conduct the action under 31 U.S.C. § 3730(c)(3). *Chang v. Children's Advocacy Ctr. of Delaware Weih Steve Chang*, 938 F.3d 384, 386 (3d Cir. 2019). But, as discussed above in Section B.1, the government may nevertheless "dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." *Id.* (quoting 31 U.S.C. § 3730(c)(2)(A)).

In a recent Third Circuit appeal, the relator (Chang) filed a *qui tam* action alleging that Children's Advocacy Center of Delaware had applied for and received funding from the state and federal governments by misrepresenting material information. *Id.* Both the United States and State of Delaware declined to intervene, and Chang proceeded with his state and federal FCA claims unilaterally. *Id.* Three years after Chang filed his complaint, the United States and State of Delaware each moved to dismiss the case, asserting that—following their investigation—Chang's allegations were factually incorrect. The district court granted the governments' motions without issuing an opinion or holding a hearing on Chang's consolidated opposition to the motion.

Chang appealed, arguing that the district court erred in granting the governments' motions to dismiss without first conducting an in-person hearing. *Id.* at 387. The Third Circuit noted (again as discussed above in Section B.1) a circuit split over the federal courts' authority to approve or deny the government's decision to dismiss a *qui tam* suit, with the Ninth and Tenth Circuits agreeing that the courts have that authority and the D.C. Circuit holding that the United States has "an unfettered right" to dismiss a *qui tam* suit. *Id.* (citing *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003) and *Hoyte v. Am. Nat'l Red

Cross, 518 F.3d 61, 65 (D.C. Cir. 2008)). The Third Circuit ultimately declined to adopt either position, concluding that Chang failed to carry his burden of proof even under the Ninth and Tenth Circuits' standards. *Id.* Not only did Chang fail to actually request a hearing, but his opposition to the governments' motions to dismiss failed to demonstrate that the governments' motions were arbitrary or capricious. *Id.* at 388. Therefore, the district court did not err in granting the governments' motions to dismiss without first holding an in-person hearing to evaluate Chang's arguments.

12. Estoppel of FCA Cases

In certain circumstances, a party's claims or defenses under the FCA may be barred by estoppel. This year, several appellate courts weighed in on the application of estoppel principles under the doctrines of res judicata, collateral estoppel, and judicial estoppel.

a. Res Judicata

Res judicata, also known as claim preclusion, bars relitigation of any issues that were or could have been raised in an earlier action between the same parties. Claim preclusion typically applies when four elements are met: "(1) the parties in both the prior suit and current suit must be identical; (2) a court of competent jurisdiction must have rendered the prior judgment; (3) the prior judgment must have been final and on the merits; and (4) the plaintiff must raise the same cause of action in both suits." *Davis v. Dallas Area Rapid Trans.*, 383 F.3d 309, 313 (5th Cir. 2004).

As to the fourth element, the Fifth Circuit recently confirmed that the proper test to determine whether two FCA cases involved "the same cause of action" is the "transactional" test, under which a court asks whether the claims arose out of the "same nucleus of operative facts" as the other claim or action. *Javery v. Lockheed Martin Corp.*, 765 F. App'x 98, 99 (5th Cir. 2019) (unpublished). The appellants in *Javery* had argued that the court must analyze the narrower question of whether the "primary right and duty or wrong are the same in each action." *Id.* But the court rejected this assertion, explained its support for the transactional test, and affirmed the district court's grant of summary judgment on res judicata grounds.

b. Collateral Estoppel

Collateral estoppel, also known as issue preclusion, bars a party from relitigating an adverse finding on an individual issue in an earlier proceeding. Issue preclusion applies when three elements are met: "(1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a part of the judgment in that earlier action." *United States ex rel. Gage v. Rolls-Royce N. Am., Inc.*, 760 F. App'x 314, 317 (5th Cir. 2019) (citation omitted). The Fifth Circuit recently affirmed dismissal of *qui tam* complaint under the collateral estoppel doctrine where a relator had brought a nearly identical complaint in a prior case against a different defendant, as "filing the same suit against different defendants in a piecemeal fashion is inefficient" and not permitted. *Id.* at 318.

The Third, Fourth, and Eight Circuits also considered the collateral estoppel doctrine and its effect on FCA claims in 2019. In accordance with 31 U.S.C. § 3731(e), both the Third and Eighth Circuits agreed that a defendant's criminal conviction for the same underlying transaction collaterally estops the defendant from denying the falsity and knowledge elements in a subsequent civil FCA claim. *United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 317 (3d Cir. 2019); *United States v. Thompson*, 770 F. App'x 315, 315 (8th Cir. 2019) *(*per curiam*)* (unpublished).

The Fourth Circuit, on the other hand, interpreted the doctrine of collateral estoppel regarding criminal prosecutions in a new light. In *United States v. Whyte*, the court held that the government was not estopped from criminally prosecuting a defendant even when it declined to intervene in a previous FCA action based on the same fraudulent conduct in which the defendant prevailed. 918 F.3d 339, 346–47 (4th Cir. 2019). In *Whyte*, the defendant argued that the government remains a party to every FCA suit even if it declines to intervene and thus should be estopped from bringing a criminal prosecution after an unsuccessful FCA suit. *Id.* But the court disagreed, finding that the government is not a party to an FCA action in which it has declined to intervene. *Id.* at 347. In coming to this decision, the court explained that the key question to resolve the collateral estoppel issue was whether the government had a full and fair opportunity to litigate the issue in the prior civil FCA proceeding. *Id.* at 346–47. Ultimately, the court decided that a non-intervening party does not. *Id.*

c. Judicial Estoppel

Generally speaking, judicial estoppel is estoppel that precludes a party from taking a position in a case that is contrary to a position it has taken in earlier legal proceedings. The Fifth Circuit used the judicial estoppel doctrine to prohibit a relator from bringing an FCA retaliation claim where the relator failed to disclose the claim in his earlier-filed Chapter 13 bankruptcy case. *United States ex rel. Bias v. Tangipahoa Parish School Board*, 766 F. App'x 38, 41 (5th Cir.) (per curiam) (unpublished), *cert. denied*, 140 S. Ct. 75 (2019). In making this decision, the Fifth Circuit affirmed that Chapter 13 debtors have a continuing affirmative duty to disclose post-petition causes of action. *Id.* at 41.

13. Other Notable Decisions

a. Federal reserve banks are agents of the United States for FCA purposes.

The False Claims Act imposes liability for fraudulent claims "for money or property" presented to "an officer, employee, or agent *of the United States*." 31 U.S.C. § 3729(b)(2)(A)(i) (emphasis added).

Under this provision, the Second Circuit ruled that the FCA can apply to those who defraud the lending programs of the Federal Reserve Bank. *United States ex rel. Kraus v. Wells Fargo & Co.*, 943 F.3d 588, 601 (2d Cir. 2019). In *Kraus*, relators alleged that defendants misrepresented their assets as financially sound and sufficiently capitalized to become eligible to receive loans from federal reserve banks ("FRBs"). *Id.* at 591. The district court granted defendants' motion to dismiss, finding that FRBs do not act as the U.S. government or its agents for FCA purposes. But the Second Circuit reversed. While the Second Circuit agreed that FRB personnel are not "officer[s]" or "employee[s] of the United States" within the meaning of § 3729(b)(2)(A)(i), it concluded that loan requests presented to the FRBs were nonetheless "claims" under the FCA because the FRBs are "agents of the United States" within the meaning of § 3729(b)(2)(A)(i), and also because the "money requested" by such borrowers is "provided" by the United States to advance a Government program or interest within the meaning of § 3729(b)(2)(A)(ii). *Id* at 596, 602–06.

The court's ruling was notably narrow, however. It only found that FRBs are "agents" of the United States within the meaning of the FCA when extending emergency loan credits, because the Government exercises "substantial control" over FRB emergency lending activities. *Id.* at 604. Whether FRBs are agents of the United States in other contexts remains to be determined.

b. The Court of Federal Claims does not have jurisdiction over FCA actions.

In 2019, the Federal Circuit held that the Court of Federal Claims did not err in determining that it lacked subject-matter jurisdiction over a purported FCA *qui tam* claim. *Brashear v. United States*, 776 F. App'x 679 (Fed. Cir. 2019). Observing that the *qui tam* claims were made for the first time on appeal, the Court reaffirmed that "*qui tam* actions are properly raised in federal district court and not before the Court of Federal Claims." *Id.* at 683.

c. Dismissal may be used as a sanction.

In 2019, the Fourth Circuit upheld a district court's dismissal of an FCA suit as a sanction. *Rangarajan v. Johns Hopkins Univ.*, 917 F.3d 218 (4th Cir.), *cert. denied*, 139 S. Ct. 2762 (2019). The district court, in reaching its decision, employed a six-factor test. *Id.* at 226 (*citing United States v. Shaffer Equip. Co.,* 11 F.3d 450, 462 (4th Cir. 1993)). The factors considered were: (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest. *Id.*

The Fourth Circuit agreed with the district court's finding that all six of the factors worked against the plaintiff. *Id*. at 227. The court described the plaintiff's actions at the trial level as "totally dysfunctional," including commencing four actions "when only one was proper and would have sufficed," repleading claims in later actions when the district court had already denied those same claims, and "flagrantly" failing to produce thousands of documents, several of which were core documents relating to her claims," among other offenses. "In short, she rendered virtually useless the entire discovery process, in which the parties had invested substantial time and money." *Id*. at 227-228.

The court, noting the "strong policy favoring the disposition of cases on the merits and disfavoring dismissals," nevertheless found that when a party "'abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process'—as we conclude [the plaintiff] did here—she forfeits her right to use the process." *Id*. at 228 (citing *Shaffer,* 11 F.3d at 462).

d. Courts may award prevailing defendants attorneys' fees where relators bring claims for improper purposes.

A prevailing defendant can recover attorneys' fees under the FCA if the relator asserted a claim that was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4). For example, in 2019, the Tenth Circuit awarded defendants $92,592.75 in attorneys' fees—the full amount requested by defendants—where the relator failed to provide evidence of false billing claims, failed to satisfy the FCA's scienter requirement by not deposing the defendant and others, had no documentary evidence and instead relied on hearsay and speculation, and proposed a settlement offer that "tended to show he brought the action for an improper purpose." *See Pack v. Hickey*, 776 F. App'x 549, 559 (10th Cir. 2019).

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