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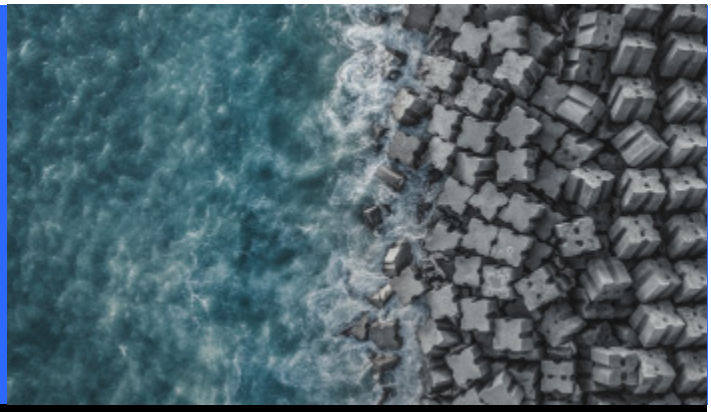

False Claims Act / Qui Tam Defense Update July 14, 2025

False Claims Act 2025 Mid-Year Update

This update analyzes recent enforcement activity, notable policy and legislative developments, and significant court decisions from the first half of the year.

While the first half of the year saw the second Trump Administration make immediate changes to corporate enforcement, the emphasis on False Claims Act (FCA) enforcement has been as strong as ever. Indeed, the new Administration has emphasized its intent to utilize the FCA as a tool for enforcing policy interests, starting with the Executive Branch-wide focus on combatting fraud, waste, and abuse, but also expanding into other areas such as tariffs and anti-discrimination laws. Unusually high tariff levels promise a major expansion in *qui tam* and U.S. Department of Justice (DOJ)-led FCA cases alleging customs fraud. Historic moves against the diversity, equity, and inclusion (DEI) policies of government funding recipients portend an increase in FCA actions premised on allegedly false certifications of compliance with federal anti-discrimination laws. Amid these developments, DOJ has re-emphasized its support for the constitutionality of the FCA's *qui tam* provisions, both in briefing an appeal of a district court decision that ruled them unconstitutional, and via multiple policy pronouncements urging whistleblowers to continue bringing cases to DOJ.

If all of that were not enough, the first half of 2025 also has witnessed blockbuster monetary recoveries across industries—nearly $3.8 billion in judgments and settlements in a mere six months; a steady flow of notable decisions in the lower courts, including a key opinion on causation in FCA cases alleging improper health care remunerations; and other significant federal- and state-level policy developments. And this all comes alongside significant changes in the organization of DOJ itself, including the upcoming reorganization of the Commercial Litigation

Branch, which is home to the Civil Frauds Section, the office within Main Justice that enforces the FCA.

Below, we summarize recent enforcement activity, then provide an overview of notable legislative and policy developments at the federal and state levels, and finally analyze significant court decisions from the first half of the year. Gibson Dunn's recent publications regarding the FCA may be found on our website, including in-depth discussions of the FCA's framework and operation, industry-specific presentations, and practical guidance to help companies navigate the FCA. And, of course, we would be happy to discuss these developments—and their implications for your business—with you.

I. NOTEWORTHY FCA RECOVERIES DURING THE FIRST HALF OF 2025[1]

2025 has been a significant year thus far in terms of FCA recoveries, both in court and through negotiated settlements. By our count, in the first six months of the year, DOJ recovered approximately $2.7 billion in verdicts and judgments (and affirmances thereof) and approximately $1.06 billion in settlements, for a combined total of nearly $3.8 billion in recoveries. The amounts of some of the jury verdicts could change as post-trial briefing continues and if appeals challenge the damages and/or penalties imposed on the defendants. But regardless of how those amounts shift, the number of trials that went to a significant verdict is especially notable given how few FCA cases go to trial each year.

A. Trial Verdicts and Judgments

1. Notable Jury Verdicts, Court Judgments, and Affirmances in DOJ's Favor

Given the frequently astronomical financial consequences that can accompany an adverse verdict, trials in FCA cases remain rare. In the first half of 2025, however, we have seen a higher-than-usual number of trial verdicts and other judgments in FCA cases—five in total, each amounting to eight figures or more and together totaling nearly $3 billion. The following section summarizes these developments.

- On February 26, a judge in the Northern District of Texas entered final judgment in the amount of approximately $16.5 million against a health care provider in a declined FCA case alleging Medicare overbilling. This marked a significant reduction from the jury's original verdict, which found the defendant liable for 21,844 false claims and approximately $2.8 million in single damages—on the basis of which the relator then sought a judgment of nearly $450 million in per-claim civil penalties. The court's order found that the contemplated penalties-to-damages ratio would have violated the Eighth Amendment's prohibition on excessive fines; the court adjusted the penalties amount below the statutory range to avoid that constitutional problem.[2]
- On March 28, the judge overseeing a declined District of New Jersey case ruled, after a June 2024 jury verdict, that the defendant pharmaceutical company must pay $1.64 billion, of which $360 million is treble damages and $1.28 billion is penalties. The relators in the case alleged that the company violated the FCA by improperly marketing certain of its drugs for off-label uses. The relators also alleged FCA violations premised on an Anti-Kickback Statute ("AKS") theory, claiming that the company provided speaker fees to

physicians that amounted to illegal kickbacks—but the jury found in favor of the company on those allegations.[3]

- On April 29, a jury in an intervened FCA case in the Southern District of New York found a pharmacy company's subsidiary liable for $135.6 million in improper billings to Medicare, Medicaid, and TRICARE. The jury also found the subsidiary caused the submission of more than 3 million false claims. In a June 5 order, the court extended a portion of the jury's damages award to the pharmacy company, holding that the parent company had "knowingly ratified" its subsidiary's submission of false claims by not forcing the subsidiary to stop the conduct. On July 7, the judge in the case issued an order trebling the damages award and imposing $542 million in penalties (limiting penalties, at the government's request, to a 4:1 ratio, instead of awarding full penalties which would have totaled more than $26 billion), for a total judgment of $949 million collectively against the company and its subsidiary. In a dynamic that has played out in prior cases, DOJ made the request to limit the penalties-to-damages ratio in an "exercis[e] [of] its prosecutorial discretion," and in recognition of the risk that a higher ratio would create for the government under the Excessive Fines clause of the Eighth Amendment.[4]
- On June 23, the Ninth Circuit affirmed a $26 million verdict against an importer in a case alleging customs fraud under the FCA. The original verdict consisted of approximately $24.2 million in treble damages and $1.8 million in civil penalties. The court's opinion dealt with important issues of federal court jurisdiction over customs-related FCA cases, which we address in detail in Section II below.[5]
- On June 25, after a bench trial, the court in a declined FCA case in the Eastern District of Pennsylvania against a pharmacy company's pharmacy benefits manager (PBM) found the PBM liable for $95 million in overbillings for Medicare Part D drugs under the FCA. Briefing on trebling and per-claim penalties is not yet complete.[6]

2. Inconclusive Verdict in Trial on Remand from Supreme Court Case

After fourteen years of litigation—including a U.S. Supreme Court decision in 2023—a jury in March found that SuperValu, a grocery chain with in-store pharmacies, knowingly submitted false claims to the government. The jury, however, awarded no damages. The case centered on allegations that SuperValu misrepresented its "usual and customary" drug prices when seeking reimbursement from federal health care programs.[7]

In *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023), the Supreme Court had clarified that liability under the FCA turns on a defendant's subjective belief at the time of the claim, not on any objectively reasonable interpretation developed later.[8] Applying that standard, the jury concluded that SuperValu acted knowingly but found that the relators had not proven the government suffered damages.[9]

After the verdict, the relators filed a motion to amend the judgment and request a new trial on damages.[10] They argue that the FCA mandates civil penalties for each false claim, regardless of whether the government incurred actual damages.[11] The relators contend that the verdict form improperly required the jury to find both falsity and damages before counting the number of false claims, and that this effectively precludes any penalty assessment despite a finding of liability.[12] The motion remains pending as of the date of this publication.

B. Settlements

1. Health Care and Life Science Industries

In keeping with the overall trend in recent years, a significant share of FCA settlements in the first half of this year involved health care providers and life science companies.

- On January 3, a drug testing laboratory and two individuals agreed to pay more than $4.4 million to resolve FCA claims that the company caused physicians to submit Medicare claims for unnecessary urine drug testing and hormone testing. DOJ alleged that the laboratory encouraged physicians to blanket order presumptive and definitive urine drug tests without making an individual determination of medical necessity. DOJ also alleged that the laboratory billed Medicare for urine tests for hormone levels that had already been ordered. The laboratory and the two individuals also entered into integrity agreements with the Department of Health and Human Services, Office of Inspector General (HHS-OIG).[13]

- On January 13, a health care system agreed to pay $29 million to resolve allegations that it knowingly retained inflated payments received from the Department of Defense (DOD). According to DOJ, the system participated in the Uniformed Services Family Health Plan program. Under that program, the Defense Health Agency paid the system a fixed rate to provide health care services to military personnel, retirees, and their families. DOJ alleged the company learned that the fixed rate was miscalculated, and then improperly retained and concealed the resulting overpayments.[14]

- On January 16, a pharmaceutical company agreed to pay $59.7 million to settle allegations that one of its subsidiaries, prior to acquisition by the company, violated the FCA and the AKS by providing improper remuneration—in the form of speaker honoraria and meals—to health care providers to induce the providers to prescribe the subsidiary's migraine medication.[15]

- On January 23, a medical technology company and two of its affiliates agreed to pay $17 million to resolve allegations that they gave urology practice groups discounts and free samples as illegal inducements to use the company's prescription form in prescribing catheters to their patients. DOJ alleged that the prescription form listed the company's catheters and that the company paid the alleged kickbacks in an effort to make its prescription form the standard form that urology practices used.[16]

- On January 31, a Florida health care company agreed to pay up to $4.9 million to resolve allegations that it paid a marketing service for referrals of Medicare beneficiaries in violation of the FCA and the AKS.[17]

- On February 14, a health care provider agreed to pay $3 million to resolve allegations that it claimed Medicare hospice benefits for services provided to patients who were not terminally ill. DOJ alleged that the provider knew the patients were ineligible for hospice benefits but submitted the claims anyway.[18]

- On February 27, a counseling service provider and the estate of its deceased owner agreed to pay $4.6 million to resolve FCA allegations that the provider and its owner submitted claims for Medicaid for services that were not rendered. DOJ alleged that the provider offered Medicare recipients financial incentives in exchange for their patient information. Then, the provider allegedly used the patient information to bill Medicaid for crisis intervention services that were not provided. A federal grand jury indicted the

owner on multiple criminal charges in 2022, but the owner passed away before a verdict was reached.[19]

- On February 28, a skilled nursing facility and an acute care hospital agreed to pay $6.5 million to resolve allegations that they violated the FCA and the Texas Health Care Program Fraud Prevention Act. DOJ alleged that the skilled nursing facility submitted medically unnecessary Ultra-High Resource Utilization Group therapy claims. It further alleged that the hospital submitted claims for individual therapy services that were actually group therapy, and submitted claims for therapy services provided without a physician-signed plan of care. The facility and hospital received an unspecified amount of cooperation credit in the settlement, attributable to their disclosure of the results of an internal investigation that resulted in an overpayment refund to Medicare, their voluntary disclosure to HHS-OIG of overpayments for outpatient therapy, and their identification of corrective actions.[20]

- On March 14, a health care provider agreed to pay $58.74 million to resolve allegations that it fraudulently increased its Medicare Advantage reimbursements by submitting false billing codes for two spinal conditions. As part of the settlement, the provider's owner agreed to pay $1.76 million and a radiology group that worked with the provider agreed to pay $2.35 million. DOJ alleged that the provider submitted claims related to diagnosing two spinal conditions, spinal enthesopathy and sacroiliitis, for patients without those conditions. The radiology group allegedly created radiology reports that appeared to support the spinal enthesopathy diagnosis.[21]

- On March 19, a medical device company agreed to pay up to $14.25 million to resolve FCA and state law allegations related to its vision test device. DOJ alleged that the company caused health care providers to submit claims for use of the device to provide electroretinography vision testing, when the U.S. Food and Drug Administration (FDA) had only cleared the device to provide visual evoked potential testing. Additionally, DOJ alleged that the company made substantial changes to the device without seeking approval from the FDA. The settlement amount is based on the company's ability to pay with a combination of upfront payments and payments based on a percentage of the company's annual gross revenue.[22]

- On March 26, a not-for-profit that operates a network of residential and non-residential facilities and programs for adults with developmental or intellectual disabilities agreed to pay over $5 million to settle an FCA lawsuit. DOJ will receive $2,148,540 and New York will receive $2,868,085. According to DOJ, the provider allegedly submitted claims to the New York Medicaid Program for services that did not meet program documentation and training requirements and failed to report and return Medicaid overpayments. The non-profit also entered into a Corporate Integrity Agreement with HHS-OIG.[23]

- On April 18, a pharmacy company agreed to pay $300 million, plus possible future payments contingent on revenue, to resolve allegations that it violated the FCA and the Controlled Substances Act when filling opioid prescriptions. The company entered into a parallel Memorandum of Agreement with the Drug Enforcement Administration and a five-year Corporate Integrity Agreement with HHS-OIG. The DOJ settlement agreement acknowledges that the company cooperated with the investigation in several ways, including by preserving and disclosing relevant data and assisting in the determination of the financial impact of the alleged conduct.[24]

- On April 23, a Delaware company agreed to pay $6 million to resolve claims that it violated the FCA by participating in schemes meant to fraudulently cause Medicare to pay claims for genetic testing that were medically unnecessary and tainted by kickbacks.[25]

- On April 23, two affiliated health care providers agreed to pay $8 million to resolve allegations that they violated the FCA by knowingly submitting or causing the submission of false claims to the COVID-19 Claims Reimbursement to Health Care Providers and Facilities for Testing, Treatment, and Vaccine Administration for the Uninsured Program, which was administered by the Health Resources & Services Administration of HHS. DOJ alleged that the companies were aware of data integrity issues with patient information collected at the point of service but failed to substantively address those issues, and did not ensure the collection of complete patient information, including demographic and accurate insurance information, before submitting claims.[26]

- On April 29, a pharmaceutical manufacturer agreed to pay $202 million to resolve FCA allegations that it paid improper remuneration during 2011 to 2017, in the form of speaker program compensation and meals, to health care practitioners to induce them to prescribe the company's HIV drugs.[27]

- On April 30, an addiction rehabilitation facility agreed to pay $19.75 million to resolve FCA allegations that it submitted claims to the Veterans Health Administration and New Jersey's Medicaid program for short-term residential treatment and partial hospitalization care for which the facility was not properly licensed or contracted, and that the facility misled state inspectors.[28]

- On May 5, an individual practitioner agreed to entry of a consent judgment in the amount of $4.7 million. The settlement resolves allegations that the practitioner submitted or caused to be submitted claims to North Carolina Medicaid for in-home physician visits that never occurred.[29]

- On May 7, a California health system and its affiliate agreed to pay $31.5 million to resolve allegations that they provided improper financial benefits to referring physicians in violation of the AKS, resulting in FCA violations. DOJ alleged that the financial benefits took the form of meals, alcohol, and cigars that were provided at a lounge on the premises of the health system, and that other remunerations took the form of subsidies, cost reductions, hardware, and grants given to other providers. In parallel with the settlement, the health system entered into a five-year Corporate Integrity Agreement with HHS-OIG.[30]

- On May 16, a health system agreed to pay approximately $3.3 million to resolve allegations that it committed FCA violations based on violations of the Physician Self-Referral Law, commonly known as the Stark Law. DOJ alleged that non-employee physicians with whom the health system and its affiliated hospitals had financial relationships referred patients to the system and its hospitals, and that the financial arrangements did not meet any of the exceptions to the Stark Law.[31]

- On May 21, a molecular diagnostics company and two laboratories agreed to resolve allegations that they participated in a scheme to submit false claims and provide kickbacks related to breast cancer lab tests. The companies together agreed to pay approximately $3.7 million. According to DOJ, the diagnostics company allegedly caused providers to submit claims for the company's tests that were not reasonably or medically necessary through standing or automatic orders, and that the claims were tainted by illegal renumeration the diagnostic company provided to the providers. DOJ alleged that the diagnostics company paid the two laboratories to participate in the scheme and refer patients for the relevant tests.[32]

- On May 30, a physician agreed to pay $3.5 million to resolve allegations that he falsely submitted claims to the COVID-19 Uninsured Program. Specifically, the government

alleged that while operating walk-up or drive-thru COVID-19 testing sites, the physician submitted claims for services performed by physicians or qualified medical professionals, when in reality the services were performed by a medical assistant.[33]

- On June 11, a hospice care provider agreed to pay $9.2 million to resolve allegations that it violated the FCA by paying kickbacks to medical directors in the form of stipends and sign-on bonuses. DOJ alleged that the compensation paid varied with the volume of referrals the physicians made.[34]
- On June 26, a provider of outpatient substance use disorder treatment agreed to pay $18.5 million to resolve allegations that it violated the FCA by paying Medicaid patients for seeking treatment from the provider. DOJ alleged that this conduct violated the AKS, and that the provider also fraudulently double-billed for treatment services.[35]

2. Government Contracting and Procurement

Resolutions with government contractors have continued to feature in DOJ's approach to the FCA, with the first half of this year producing multiple eight-figure settlements alleging violations of requirements for the disclosure of cost or pricing data.

- On January 13, a construction company agreed to pay $5.9 million to resolve FCA allegations that, in connection with work performed for U.S. Postal Service sites, it improperly failed to disclose its use of subcontractors, falsely certified work done by subcontractors as self-performed, and falsified subcontractor invoices.[36]
- On January 17, a defense contractor agreed to pay $29.74 million to resolve allegations that it submitted inflated price proposals to obtain aircraft contracts. DOJ alleged that the company did not disclose its knowledge of suppliers' pricing data when negotiating with the government, in violation of the Truth in Negotiations Act. DOJ also alleged that had the pricing data been disclosed, the government would have awarded contracts with lower values.[37]
- On April 9, a government contractor agreed to pay $21 million to resolve FCA allegations that it knowingly inflated subcontractor charges under a State Department contract to train Iraqi police forces. DOJ alleged that the contractor breached its obligations to the State Department by passing along its subcontractor's excessive, uncompetitive, and unsubstantiated rates related to hotel lodging and guard, translator, driver, and supervisor services.[38]
- On May 9, a contractor agreed to pay approximately $9.6 million to resolve FCA allegations that it overcharged the government for energy improvements. DOJ alleged that the company overcharged the government for financing costs in connection with energy savings performance contracts. The company received credit for cooperating with DOJ's investigation and for voluntarily self-disclosing the allegedly inflated financing costs. The settlement agreement states that approximately $9.1 million of the settlement is restitution, and that that same amount has already been paid, or is scheduled to be paid, as refunds and credits to the government. These figures suggest a substantially reduced damages multiplier under the FCA.[39]
- On May 22, a defense contractor agreed to pay $62 million plus interest to resolve allegations that it violated the FCA and the Truth in Negotiations Act by failing to disclose

accurate, current, and complete cost or pricing data for communications equipment it sold to various DOD agencies.[40]

3. Cybersecurity

The first half of 2025 has seen a continuation of DOJ's focus on cybersecurity-based FCA matters.

- On February 5, a company providing health care support services and its parent company agreed to pay more than $11.2 million to resolve allegations that they failed to meet cybersecurity requirements contained in a contract with DOD to administer TRICARE. DOJ alleged that the company failed to timely scan for and remedy cybersecurity vulnerabilities, ignored reports from independent parties about cybersecurity risks, and falsely attested to compliance with at least seven security controls. This settlement is the largest cybersecurity-related FCA settlement thus far in 2025, and the second largest, by less than $100,000, under DOJ's Civil Cyber-Fraud Initiative.[41]
- On March 14, a defense contractor agreed to pay $4.6 million to resolve allegations that it violated the FCA by not complying with cybersecurity requirements in Army and Air Force contracts. DOJ alleged that the contractor did not ensure its third-party email host met security requirements contained in the contract, did not implement required cybersecurity controls, and did not have a written cybersecurity plan.[42]
- On May 1, a defense contractor agreed to pay $8.4 million to resolve FCA allegations that it failed to comply with DOD cybersecurity requirements. DOJ alleged that the company failed to develop and implement a required system security plan as part of its contracting work.[43]

4. Customs

- On March 5, a multilayer wood flooring importer and its owners agreed to pay $8.1 million to resolve allegations that they knowingly and improperly evaded duties placed on multilayer wood imported from China. DOJ alleged that the company provided false information about the manufacturer of the wood and the company it came from.[44]

5. COVID-19 Relief Programs

DOJ reached a notable number of COVID relief-related resolutions in the first half of the year, suggesting that this area will remain active despite the relevant relief programs having concluded several years ago.

- On February 14, an individual who runs a consulting firm agreed to pay over $3.2 million for misusing funds received through the Economic Injury Disaster Loan program. DOJ alleged that the individual represented that the $1.9 million in funds he received through the loan program would be used solely as working capital to alleviate economic injury caused by the COVID-19 pandemic. DOJ alleged, however, that the individual violated the terms of the loan by transferring the proceeds to a personal investment account.[45]
- On February 19, a Chinese state-owned entity's subsidiary agreed to pay $14.2 million to resolve allegations that it misrepresented its affiliations, and thus its size, when obtaining a Paycheck Protection Program (PPP) loan. The company received an unspecified

amount of cooperation credit for identifying individuals involved in the alleged misconduct.[46]

- On March 13, an IT solutions company agreed to pay over $2 million to resolve claims that it falsely obtained a PPP loan by misrepresenting decreases in its gross receipts.[47]
- On March 19, an Australian company agreed to pay approximately $2.1 million to resolve FCA allegations that it falsely obtained a PPP loan by misrepresenting its number of employees.[48]
- On March 24, a health system agreed to pay $8.8 million to resolve FCA claims that it and its subsidiaries obtained PPP loans that the Small Business Administration's size limitations made the entities ineligible to receive.[49]
- On April 2, a medical group agreed to pay $2.8 million to resolve FCA allegations that it falsely reported its payroll costs to receive full forgiveness of a $6.7 million PPP loan. DOJ alleged that although the company represented that its payroll costs were sufficient for full forgiveness of the loan, its actual costs were only sufficient for forgiveness of approximately $4.9 million.[50]
- On April 3, a travel company agreed to pay $3 million to resolve FCA allegations that its affiliates made it too large for the PPP loan it received.[51]
- On April 9, an owner of companies that provide consulting services to car dealerships and related parties agreed to pay $11.8 million to resolve allegations that they falsely certified their eligibility to receive a PPP loan. DOJ alleged that, because the companies were part of a corporate group, they were ineligible to receive more than $20 million in PPP loans. After one bank canceled unfunded loans, another bank funded them, and $7,659,391 of these loans were forgiven. DOJ granted an unspecified amount of cooperation in light of the companies' owner's timely submission of materials, identification of relevant documents to the government, and cooperation with the government's investigation into other participants in the alleged conduct.[52]
- On May 5, a restaurant operator agreed to pay $7.8 million to resolve allegations that it violated the FCA by falsely certifying its eligibility for a Restaurant Revitalization Fund (RRF) grant when it knew or should have known that it operated too many locations to qualify.[53]
- On May 5, a company that is part of a global conglomerate that supplies cosmetics and nutritional supplements agreed to pay $6 million to resolve allegations that it provided false information about its employees' status and headcount in order to obtain PPP loans and loan forgiveness.[54]
- On May 29, four labor organizations agreed to pay a total of $5.1 million to resolve allegations that they obtained PPP loans they were not eligible to receive.[55]
- On June 10, three companies agreed to pay a total of $13 million to resolve allegations that they applied for PPP loans for which they were ineligible because their revenues and/or employee headcounts exceeded eligibility limits in light of the companies' affiliations with each other and with other entities.[56]
- On June 13, a company agreed to pay $2.1 million to resolve allegations that it violated the FCA by falsely representing its employee headcount in applying for a PPP loan. DOJ alleged that the company was a subsidiary of a large company with more than the number of employees at which eligibility for the loan was capped.[57]

- On June 25, a marine equipment company agreed to pay $3.86 million to resolve allegations that it obtained PPP loans by falsely certifying its employee headcount.[58]

II. LEGISLATIVE AND POLICY DEVELOPMENTS

A. FEDERAL POLICY AND LEGISLATIVE DEVELOPMENTS

The first half of 2025 has witnessed some of the most significant developments in FCA enforcement policy in the statute's modern history. In this section, we analyze those developments and their implications for companies that do business with the federal government.

1. Customs- and DEI-Related Developments

FCA developments related to tariffs and anti-discrimination compliance stand out as uses of the FCA to police compliance with Trump Administration priorities and political goals. For all of the similarities in how these two issues have come to the forefront of FCA enforcement in recent months, however, the two issues are quite different in terms of the legal theories that DOJ and relators will have to marshal to litigate cases successfully, and in terms of how much experience DOJ already has with the issues in the FCA context.

a. Use of the FCA for Customs Enforcement

DOJ has made clear that customs enforcement is among its priority uses of the FCA, with Commercial Litigation Branch Director Jamie Ann Yavelberg highlighting customs fraud as a "key area" of FCA enforcement during a recent speech.[59] DOJ's commitment to using the FCA to police customs fraud has been echoed in DOJ's criminal enforcement priorities, too. On May 12, 2025, Matthew Galeotti—the Head of DOJ's Criminal Division—published a memorandum directing the prioritization of investigations and prosecutions in ten "high-impact areas" of white-collar crime.[60] "Trade and customs fraud, including tariff evasion" was listed at number two.[61] The same day, DOJ released updates to its Corporate Whistleblower Awards Pilot Program.[62] In line with the Galeotti memorandum, the updated whistleblower program expands the subject areas qualifying for whistleblower protection to include "[v]iolations by or through companies related to trade, tariff, and customs fraud."[63]

President Trump has imposed import tariffs of unusually high amount and scope, including duties on imports from some of the United States' largest trading partners, with still more tariffs likely to be announced in the coming months. This new tariff regime raises compliance risks for a wide range of companies across a diverse set of industries. Particularly for companies that import expensive products and materials in large volumes, this can mean massive financial obligations to the government. If a *qui tam* relator or DOJ takes the view that a company has improperly avoided paying that obligation, the company could face treble damages and penalties under the FCA.[64]

As we explained in an April 2025 client alert, DOJ's current focus on FCA customs enforcement is not uncharted territory. Since 2011, there have been over 40 resolutions of FCA matters involving alleged customs violations, with nearly half of those resolutions occurring since 2023, and with total government recoveries approaching $250 million. Of the 40 resolutions, 35

involved cases initially brought by relators—a ratio largely consistent with the overall share of FCA matters that are initiated by relators compared to DOJ alone. Together, these matters have endowed DOJ with significant experience building cases around theories of product misclassification and undervaluation, as well as country of origin misrepresentation, against both importers and other companies in the import chain.[65] Amid all of this, courts have explicitly approved of the idea that unpaid tariffs are "obligations" to pay money to the United States for purposes of the "reverse" provision of the FCA.[66]

In a signal of DOJ's intent to parlay its experience with this theory into further enforcement activity, DOJ recently intervened in a *qui tam* case filed against a seller of uniforms to U.S. restaurants and health care providers, alleging customs violations.[67] The original *qui tam* complaint was filed nearly a decade ago, so DOJ's intervention affords an imperfect window into exactly what kinds of FCA customs cases DOJ will prioritize going forward. That said, the intervention is a clear signal of DOJ's increased focus on FCA customs enforcement—much as was DOJ's 2024 intervention in a cybersecurity FCA case under the auspices of the Civil Cyber-Fraud Initiative.[68]

Regardless of how often DOJ opts to intervene and on which fact patterns, relators are set to play a sustained role in bringing and litigating customs enforcement FCA cases. That is particularly true given the Ninth Circuit's June decision (covered in our recent client alert) holding that the Court of International Trade's jurisdiction over trade matters does not prohibit *qui tam* lawsuits related to alleged customs fraud in federal district court.[69] With the government as a whole increasingly focused on enforcing trade restrictions, relators—and the relators' bar—are likely to take the Ninth Circuit decision as an invitation to double-down on attempted uses of the FCA to police customs fraud. The Ninth Circuit opinion also was a notable instance in which the original *qui tam* action was brought by the defendant's competitor—a dynamic that also played out in the March resolution of customs fraud allegations against a flooring company (discussed above), and one that has a high likelihood of repeating in future customs cases.[70]

b. Use of the FCA to Enforce Administration Policy Against DEI Programs

Whereas customs fraud FCA cases build on a solid foundation of DOJ enforcement experience and are primarily about the improper avoidance of an obligation to pay money to the United States, DEI-related FCA cases have few direct enforcement precedents and are likely to occupy an area of the law where the question of what counts as an actionable misrepresentation is still up for debate.

On January 21, 2025, President Trump issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit Based Opportunity" (EO 14173).[71] EO 14173 marked an end to decades-long federal policies concerning affirmative action, and signaled the start of a new era of enforcement risks for federal contractors under the FCA.

EO 14173 requires "[t]he head of each agency [to] include in every contract or grant award . . . [a] term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the FCA.[72] Agency heads must also include "[a] term

requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[73] To our knowledge, the use of an executive order to mandate contract language about FCA materiality is unprecedented.

For as much political attention as DEI programs have garnered recently, federal contractor compliance with anti-discrimination requirements has received relatively less attention from FCA enforcers prior to the second Trump Administration, compared to areas such as health care and cybersecurity compliance. A survey of available FCA cases dealing with anti-discrimination fact patterns reveals little to distinguish this area of FCA caselaw from others. The cases tend to reflect debates over materiality similar to those that evolved throughout FCA caselaw and that reached a significant milestone with the Supreme Court's 2016 *Escobar* decision.[74]

Developments since EO 14173 highlight DOJ's focus on using the FCA to police anti-discrimination compliance, but also only bring into sharper relief the potential for hotly contested litigation over what counts as a false representation to the government. On May 19, 2025, DOJ Deputy Attorney General Todd Blanche issued a Memorandum (the "Memorandum") announcing a new Civil Rights Fraud Initiative (the "Initiative"), the purpose of which is to use the FCA to ensure that the "federal government [does] not subsidize unlawful discrimination."[75]

The Memorandum's thesis is that the FCA is "implicated" when a federal contractor or funds recipient certifies compliance with federal civil rights laws despite "knowingly violat[ing] [those] laws . . . . [or] knowingly engaging in racist preferences, mandates, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin."[76] To deal with these scenarios, the Memorandum establishes the Initiative, which "will be co-led by the Civil Division's Fraud Section, which enforces the [FCA], and the Civil Rights Division, which enforces civil rights laws."[77] The Memorandum directs "[e]ach division [to] identify a team of attorneys to aggressively pursue this work together," and directs each U.S. Attorney's Office to likewise "identify an Assistant United States Attorney to advance these efforts."[78] Notably, the Memorandum also states that the Initiative will occur in coordination with DOJ's Criminal Division, "other federal agencies that enforce civil rights requirements for federal funding recipients," and state attorneys general and local law enforcement.[79]

The Deputy Attorney General's announcement directs designated attorneys to pursue these efforts "aggressively." In addition, the DOJ "strongly encourages" private parties—*i.e.* would be *qui tam* relators under the FCA—"to protect the public interest by filing lawsuits and litigating claims under the [FCA]—and, if successful, sharing in any monetary recovery."[80]

The Initiative builds on two memoranda issued by Attorney General Pamela Bondi earlier this year. The first, entitled "Ending Illegal DEI and DEIA Discrimination and Preferences," encourages the Civil Rights Division to "investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."[81] The second, called "Eliminating Internal Discriminatory Practices," similarly prompts federal Department components to internally investigate and minimize reliance on or references to DEI.[82]

While the Blanche Memorandum speaks in terms of false certifications of compliance with anti-discrimination laws, it does little to articulate how DOJ will go about determining what counts as such a false certification. Assuming federal agencies implement the certification contemplated by EO 14173, then the most likely basis for potential FCA liability will be the so-called "express" false certification theory, which centers on the truth of the representations made in an affirmative certification of compliance with certain legal or contractual requirements.[83]

Relators are likely to seek other hooks for liability, however, especially while industry awaits actual integration into contracts of the certifications mandated by EO 14173. The implied false certification theory in particular may show up in DEI-related cases at least in the near term. In its most aggressive form—not explicitly sanctioned by the Supreme Court but also not outright rejected—that theory provides that the mere act of presenting a claim for payment to the government, while being in noncompliance with a material legal requirement, constitutes a false claim under the FCA.[84] The Court has more clearly approved of a version of the theory that finds falsity in "specific representations" about the goods or services provided to the government, combined with omissions that make the affirmative statements materially misleading.[85] In the seminal *Escobar* case, for example, the relator alleged representations that health care services were provided by certain types of clinicians, despite the clinicians themselves not having the credentials required to hold those clinical roles.[86] The analogy in the anti-discrimination context—statements about goods or services that are rendered false by a company's failure to disclose noncompliance with federal anti-discrimination laws—is difficult to conceptualize without affirmative statements that simply resemble an express certification of compliance.

Ultimately, then, we can expect relators and DOJ to rely primarily on the express false certification theory. Consistent with that, in its recent complaint-in-intervention in a health care FCA case alleging (among other things) violations of contractual requirements against discrimination based on disability, DOJ cited "assurances of compliance" with anti-discrimination laws that the defendants allegedly made.[87] In a sign that DOJ may also seek to rely on a fraudulent inducement theory in anti-discrimination FCA cases, its complaint also relied on promises of compliance with anti-discrimination laws that the defendants allegedly made in entering into their Medicare Advantage contracts with CMS.[88]

While the overarching FCA theories that relators and DOJ are likely to pursue are clear enough, the question of what it takes for an employer's or company's policies to violate anti-discrimination laws remains intensely subjective. There has been precious little guidance from federal agencies on the answer to that question. Even if answers emerge in earnest, there is no guarantee that they will be consistent. Courts will be left to resolve complicated questions of FCA scienter that will invariably arise when companies that receive funds from multiple federal agencies are forced to make decisions about their employment programs that may satisfy some agencies but not others.

2. Artificial Intelligence (AI) Whistleblower Protection Bills

Customs and DEI have been the most visible targets of escalated FCA enforcement activity thus far in 2025, but they are not the only areas where the enforcement landscape has been

shifting. A recent legislative development relevant to AI could have implications for how frequently the FCA is invoked to remedy alleged retaliation against employees.

On May 15, 2025, identical bills (hereinafter the "AI bills") were introduced in the House and Senate that would prohibit employment discrimination against whistleblowers who report AI security vulnerabilities or AI violations.[89] The AI bills focus on two kinds of AI-related violations: (1) violations of federal law related to or committed during the development, deployment, or use of AI; and (2) any failure to appropriately respond to a substantial and specific danger that AI may pose to public safety, public health, or national security.[90]

The AI bills bear a significant relationship to the FCA. For one thing, Sen. Chuck Grassley, the chief sponsor of the Senate bill, is also a leading proponent of the FCA in Congress, and served as the architect of the 1986 amendments to the statute that revised it into the framework that largely persists today.

The FCA contains its own anti-retaliation provision. This provision in theory can encompass plaintiffs claiming AI-related fraud on the government fisc, given that the FCA prohibits retaliation "because of lawful acts done by [the plaintiff] in furtherance of an action under [the *qui tam* provisions of the FCA] or other efforts to stop 1 or more violations of [the FCA]."[91] Several features of the FCA, however, make it a highly idiosyncratic tool for bringing retaliation claims:

- The FCA's anti-retaliation provision imposes a statute of limitations of three years "after the date when the retaliation occurred."[92] Given this relatively short limitations period, as well as the perceived protection afforded by the sealing provisions of the FCA, plaintiffs typically have strong incentives to bring retaliation claims at the same time as they make substantive false-claims allegations.
- The FCA, however, requires DOJ to investigate *qui tam* complaints once they are filed, and these investigations can take years. While the statute imposes a 60-day deadline for DOJ's intervention election, in practice many courts extend that deadline several times over. Active litigation of the allegations can only commence once DOJ decides whether to intervene, so there often is significant lag time between the filing of a retaliation claim and briefing and discovery on that claim.
- The FCA contains no express prohibition on waivers of retaliation claims via settlement or arbitration agreements. Some courts have filled this silence by permitting such waivers, sometimes via general waiver language alone.[93]

The AI bills would create a separate pathway for claims of retaliation against individuals who provide information to the government or their employers "regarding an AI security vulnerability or AI violation, or any conduct that the covered individual reasonably believes constitutes" such a vulnerability or violation.[94] Insofar as AI-related FCA retaliation claims could involve allegations of an underlying regulatory violation that "tainted" claims to the federal government for payment, the AI bills—if passed—could provide a distinct route for retaliation claims involving those same alleged regulatory violations. And the AI bills may serve to fill the legal and practical gaps left by the FCA as outlined above:

- The bills contain a statute of limitations that mirrors the longer limitations period for claims under the substantive provisions of the FCA: a default six-year period, plus a three-year tolling period measured from "the date on which facts material to the right of action are

known, or reasonably should have been known, by the covered individual bringing the action"; and a ten-year statute of repose from the date of the alleged violation.[95]

- The AI bills expressly provide that a retaliation claim "may not be waived or altered by any contract, agreement, policy form, or condition of employment . . . including by any agreement requiring a covered individual to engage in arbitration, mediation, or any alternative dispute resolution process prior to seeking relief under" the bills' provisions.[96]
- The AI bills would require a claimant to file a complaint with the Department of Labor first, but would permit the claimant to file suit in district court if the Department does not issue a final decision on the complaint within 180 days of its filing.[97] If the Department does choose to investigate the complaint, it would have a limited period in which to do so, without the possibility of an extension.[98]

3. DOJ-HHS FCA Working Group

Just after the half-year mark, on July 2, DOJ announced the DOJ-HHS FCA Working Group, which aims to "strengthen[] the[] ongoing collaboration" between those agencies "to advance priority enforcement areas."[99] The Working Group will be comprised of representatives from the HHS Office of General Counsel, CMS's Center for Program Integrity, HHS-OIG, and DOJ's Civil Division.[100]

In announcing the Working Group, DOJ also stated that its priority enforcement areas will include (1) Medicare Advantage, (2) drug and device pricing, (3) access to care, including violations of network adequacy requirements, (4) kickbacks, (5) medical device defects that affect patient safety, and (6) manipulation of Electronic Health Records systems.[101] The Working Group is also tasked with "discuss[ing] considerations bearing on whether . . . DOJ shall move to dismiss a *qui tam* complaint" under its statutory authority to do so.[102] In its announcement, DOJ "encourage[d] whistleblowers to identify and report violations of the [FCA] involving priority enforcement areas."[103]

The announcement of the Working Group is notable primarily for its continuity with what defense practitioners have known to be true about the Civil Frauds Section's enforcement priorities over the last several years. The emphasis on Medicare Advantage, pricing, and kickbacks in particular rings true with the broad arc of DOJ enforcement across recent administrations. As recently as May 1, DOJ filed a complaint-in-intervention in an FCA case alleging AKS violations by several Medicare Advantage plan sponsors and insurance brokers.[104] At the same time, the inclusion of violations of network adequacy requirements as a priority is a new development. In discussing the Working Group at a recent conference, Civil Division Deputy Assistant Attorney General Brenna Jenny acknowledged this and stated that the Working Group will (among other things) consider "early whether novel legal theories are viable and supported by leadership."[105] It remains to be seen whether the Working Group will lead to a change in the extent to which DOJ credits such theories in its investigations, and the effect that any change in that regard may have on the volume and nature of *qui tam* cases that flow to DOJ in the first instance.

B. STATE LEGISLATIVE DEVELOPMENTS

In the first half of 2025, four states—Massachusetts, Connecticut, California, and Pennsylvania—have enacted or considered significant changes to their false claims laws.

1. Massachusetts and Connecticut FCA Amendments Affecting Private Equity Firms

In Massachusetts, as we discussed in a February client alert, the legislature enacted an amendment to the Commonwealth's FCA that imposes liability on any "beneficiary" of an "inadvertent submission of a false claim" to the Commonwealth or of "an overpayment from" the Commonwealth who "discovers the falsity of the claim or the receipt of overpayment" and does not disclose the claim or overpayment within 60 days of the date on which the beneficiary "identifie[s]" either one.[106] This is a significant development, particularly because the statute does not define what it means to "identify" a violation that triggers the 60-day notice requirement. While the amendment seems to use "identify" interchangeably with the word "knowing," there is a lingering ambiguity that will have to be resolved through litigation. In the meantime, as we explained in more detail in our prior client alert, the ambiguity highlights the importance for private equity firms of appropriately calibrating pre- and post-closing diligence in transactions involving companies that derive revenue from the Commonwealth's coffers. In Connecticut, a bill pending in the state legislature's Public Health Committee would make materially similar amendments to Connecticut's FCA.[107]

2. California Bill Regarding FCA Tax Claims

The California legislature is currently reconsidering Senate Bill 799, which would amend the California FCA to limit the applicability of the statute's bar on tax-related claims.[108] The bill would permit the application of the California FCA to "claims, records, obligations, or statements made under the [California] Revenue and Taxation code," provided that (1) the damages pled in the FCA action exceed $200,000, and (2) the defendant's taxable income (if an individual), gross receipts less returns and allowances (if a corporation), or sales (if any type of person) equal at least $500,000.[109] The legislation also would amend the California FCA's anti-retaliation provision to protect whistleblowers who disclose internal company documents in breach of contractual or other obligations of confidentiality.[110]

If this bill passes, it would add California to the list of non-federal jurisdictions that have recently amended their false claims laws to include tax-based claims. The District of Columbia did so in 2020, but only as to "claims, records, or statements" under the District's tax code—not as to "obligations."[111] In 2023, New York became the first state to amend its FCA to cover persons who improperly fail to file a tax return in the state, without a relator or the State needing to prove an actual false "claim, record, or statement."[112] California's bill could have similar implications insofar as it would capture "obligations" under the State's tax code and thus bring tax-based claims explicitly within the scope of the "reverse" provision of the California FCA.[113]

3. Pennsylvania Considers Bill That Would Adopt Significant Portions of the Federal FCA

HHS-OIG offers a financial incentive to states that enact false claims laws that meet certain specified criteria.[114] To qualify for the incentive, HHS-OIG must determine that the state's FCA is "at least as effective" as the federal FCA at rewarding and facilitating *qui tam* actions.[115]

The most recent state to enact a qualifying statute was Connecticut, in February 2024.[116] Pennsylvania may soon become the next state to do so. Commonwealth Senator Lindsey Williams (D) has sponsored Senate Bill 38, which proposes the adoption of much of the text and congressional intent of the federal FCA—including as to triggers for liability, penalty amounts, and the sealing of an initial *qui tam* filing to enable the government to investigate.[117]

III. CASE LAW DEVELOPMENTS

A. Supreme Court Rules on the Definition of "Claim" in the Telecommunications E-Rate Context

On February 21, the Supreme Court issued its ruling in a case involving the E-Rate program, which provides subsidies for telecommunications services for schools and libraries in the form of restrictions on rates charged to those entities. *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 145 S. Ct. 498 (2025). Those subsidies are paid from a fund managed by a private corporation and funded by contributions from telecommunications carriers, which contributions are paid directly to the fund and do not go into the federal treasury. *Id.* at 502. The relator in the *Wisconsin Bell* case alleged that the defendant fraudulently overcharged subsidized schools in violation of the FCA. *Id.* at 503. On appeal to the Supreme Court, the question presented was whether a request for E-Rate reimbursement qualifies as a "claim" under the FCA. *Id.* at 505.

In a unanimous decision, the Court answered that question in the affirmative. Relying on the FCA's requirement that the United States provide "any portion" of the funds sought through an allegedly false claim, the Court held that the government "provided" the E-Rate funds at issue because the U.S. Treasury deposited more than $100 million into the fund, using monies that the Federal Communications Commission and the Treasury collected from carriers as well as monies that DOJ itself collected through legal actions related to the E-Rate program. *Id.* at 505–06. The Court grounded its holding in the "any portion" language contained in the FCA's definition of "claim," without reaching the question of whether "the Government provides all E-Rate funds by exercising regulatory control over the program." *Id.* at 508.

While the decision's primary implications concern the E-Rate program itself, the Court's holding can be expected to have ramifications for any government program whose funds can be traced back to private contributions, at least to the extent that those funds flow through the Treasury. At the same time, it remains an open question whether a "claim" would have existed in the *Wisconsin Bell* case had the Treasury contributed none of the funds. Similarly, it remains to be seen how courts will go about calculating harm to the government—and thus FCA damages—when Treasury funds constitute only a portion of the funds that a defendant allegedly receives in violation of the statute.

B. Government Appeals District Court Ruling Holding the FCA *Qui Tam* Provisions Unconstitutional

As noted in our 2024 Year-End False Claims Act Update, the U.S. District Court for the Middle District of Florida issued a first-of-its-kind ruling that the FCA's *qui tam* provisions are unconstitutional. The court found that relators act as "Officers of the United States" and must therefore be appointed under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. *See United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 2024 WL 4349242, at *1, *4 (M.D. Fla. Sept. 30, 2024).

In its brief appealing the decision to the Eleventh Circuit, DOJ made four primary arguments. ***First***, DOJ argued that relators do not exercise executive power but instead pursue a private interest in a share of the government's recovery, as recognized in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), where the Supreme Court held that relators have Article III standing as partial assignees of the government's claim, not as agents of the executive branch. Brief of Intervenor-Appellant at 13–14, *United States ex rel. Zafirov v. Fla. Med. Assocs.*, *LLC*., Nos. 24-13581, -13583 (11th Cir. Jan. 6, 2025) (hereinafter "*Zafirov* Brief"). ***Second***, DOJ emphasized that the FCA preserves executive control over *qui tam* lawsuits. Even in declined cases, the government retains authority to—among other things—veto settlements, intervene at a later stage, or dismiss the case under 31 U.S.C. § 3730(c)(2)(A). *Id.* at 17–18, 29–30. ***Third***, DOJ argued that relators do not hold a "continuing position" under *Lucia v. SEC*, 585 U.S. 237, 245 (2018); their role is limited to a single case and is personal in nature, and they receive no salary, have no access to government files, and cannot be replaced by others if they withdraw. *Zafirov* Brief, at 23, 30–32, 38. ***Fourth***, DOJ invoked historical practice, noting that early Congresses enacted numerous *qui tam* statutes. DOJ argued that because the Supreme Court in *Stevens* found this history "well nigh conclusive" in the Article III context, the same history supports the statute's validity under Article II. *Id.* at 40–41.

As discussed in our 2024 Year-End Update, although Justices Thomas, Kavanaugh, and Barrett have expressed skepticism about the constitutionality of the *qui tam* provisions, it remains unclear whether and when the Supreme Court will take up the issue. In the meantime, any lingering doubt as to whether DOJ itself supports the constitutionality of the *qui tam* provisions has been resolved not only by the government's brief in the *Zafirov* appeal, but also by the explicit way in which DOJ has continued to publicly encourage relators to bring cases—particularly health care cases and cases alleging DEI-related violations of federal contracting requirements (*see* above).

C. First Circuit Adopts "But-For" Causation Standard Advanced by Sixth and Eighth Circuits in FCA Cases Premised on Anti-Kickback Statute Violations

In a February opinion, which we discussed in a separate client alert, the First Circuit opined on a question of statutory interpretation that is the subject of an ongoing circuit split: what causation standard applies when the government alleges that a violation of the AKS renders a claim false under the FCA? The court concluded that "but-for" causation is required, joining the Sixth and Eighth Circuits while rejecting the Third Circuit's looser approach. *United States v. Regeneron Pharms., Inc.*, 128 F.4th 324 (1st Cir. 2025).

The case arose from allegations that a drug manufacturer made over $60 million in donations to a charitable foundation that provided copayment assistance to Medicare patients who were prescribed the manufacturer's high-cost drug used to treat wet age-related macular degeneration. The government claimed these donations were disguised kickbacks intended to

induce prescriptions of the drug, and that resulting Medicare claims were thus "false or fraudulent" under the FCA. *Id.* at 326–27.

The district court granted summary judgment for the manufacturer, concluding that the government failed to show that the alleged kickbacks were the but-for cause of the claims. The First Circuit affirmed, holding that the 2010 AKS amendment, which states that claims "resulting from" AKS violations are false under the FCA, requires actual causation. *Id.* at 328.

The First Circuit emphasized that "resulting from" is a term of art that typically imposes a but-for causation requirement. *Id.* at 329. It declined to adopt the Third Circuit's looser standard from *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89 (3d Cir. 2018), which allows FCA liability where a patient is merely "exposed" to an illegal inducement. *Regeneron*, 128 F.4th at 328. Instead, the First Circuit aligned itself with the Sixth and Eighth Circuits, which have adopted the but-for standard. *See United States ex rel. Martin v. Hathaway*, 63 F.4th 1043 (6th Cir. 2023); *United States ex rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828 (8th Cir. 2022).

The court also distinguished this causation requirement from the "false certification" theory of FCA liability, under which a claim may be false if it falsely certifies compliance with the AKS. According to the court, that theory remains viable and does not require but-for causation. *Regeneron*, 128 F.4th at 333–34. However, where the government proceeds under the 2010 amendment's provision that any claims resulting from an AKS violation are *per se* false under the FCA, it must show that the kickback actually caused the claim. *Id.* at 334.

As we explained in our February alert regarding the decision, while the First Circuit's opinion provides clarity on the "resulting from" language in the AKS, the court's remarks on the false certification theory could lead to an uptick in cases asserting that illegal kickbacks "tainted" downstream claims for payment for health care goods and services. Relators and DOJ will continue perceiving that theory as a path of lower resistance than the "resulting from" theory, and given that, it remains to be seen how quickly the seemingly inevitable Supreme Court review of the "resulting from" question occurs.

D. Eleventh Circuit Holds that Dismissal of a FCA Retaliation Suit Bars a Subsequent *Qui Tam* Lawsuit

In March 2025, the Eleventh Circuit affirmed the district court's dismissal of a *qui tam* action, holding that *res judicata* barred the relator's FCA lawsuit because it involved the same parties and cause of action as a previously dismissed FCA retaliation claim. *Milner v. Baptist Health Montgomery*, 132 F.4th 1354 (11th Cir. 2025). In the underlying *qui tam*, filed in 2020, Milner alleged that the defendants engaged in a scheme to overprescribe opioids and fraudulently bill Medicare and Medicaid. *Id.* at 1356–57. The district court dismissed the *qui tam* action with prejudice as to Milner, holding that it was barred by *res judicata*, in particular because the FCA retaliation lawsuit that Milner had filed in December 2019 had already been dismissed with prejudice and "share[d] the same parties and the same cause of action." *Id.* at 1357.

The Eleventh Circuit's affirmance of the *qui tam* case turned on Milner's full participation in both cases, and on the court's conclusion that both actions arose from the same nucleus of operative

facts. Milner's retaliation and *qui tam* claims concerned the same time period (2014–2017), the same location (the hospital), and the same conduct (opioid overprescription and fraudulent billing). *Id.* at 1362. The court rejected Milner's argument that the lawsuits involved different legal rights, emphasizing that *res judicata* applies even when the legal theories differ, so long as the claims arise from the same factual predicate. *Id.*

This ruling creates a split with the Seventh Circuit's decision in *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009), where it held that a personal employment action does not preclude a subsequent *qui tam* action because of the "special status of the United States" in *qui tam* actions. *Milner*, 132 F.4th at 1359 (quoting *Lusby*, 570 F.3d at 852). In the immediate term, this circuit split is likely to create additional incentives for *qui tam* plaintiffs to plead substantive FCA claims and FCA retaliation claims at the same time.

E. Fifth Circuit Joins Second and Fourth Circuits in Holding No Evidentiary Hearing Required for Government Dismissal of FCA Claims

In April 2025, the Fifth Circuit affirmed the dismissal of a *qui tam* action in *Vanderlan v. United States*, holding that the government may voluntarily dismiss a relator's FCA action over the relator's objections and without an evidentiary hearing. 135 F.4th 257, 262, 265–67 (5th Cir. 2025). Vanderlan, a physician, filed a *qui tam* action under the FCA, alleging that the defendant violated the Emergency Medical Treatment and Labor Act (EMTALA) and fraudulently billed the government. *Id.* at 263. After years of litigation, the government moved to dismiss the case under 31 U.S.C. § 3730(c)(2)(A), citing concerns that the lawsuit interfered with the Office of Inspector General's (OIG) efforts to resolve EMTALA-related claims through administrative channels. *Id.* at 264. The district court granted the motion without specifying whether the dismissal was with or without prejudice. *Id.*

The Fifth Circuit rejected Vanderlan's argument that he was entitled to an evidentiary hearing before dismissal. It held that § 3730(c)(2)(A) requires only a hearing on the briefs—not a live evidentiary hearing. *Id.* at 266. The district court allowed multiple rounds of briefing, held a live hearing, and permitted Vanderlan to submit evidence. *Id.* at 267. This far exceeds the statute's requirements. *Id.* This decision aligns the Fifth Circuit with all three of the other circuit courts (the Second, Fourth, and Sixth) that have considered this question following the Supreme Court's decision in *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023). *See Brutus Trading, LLC v. Standard Chartered Bank*, 2023 WL 5344973 (2d Cir. Aug. 21, 2023); *United States ex rel. Doe v. Credit Suisse AG*, 117 F.4th 155 (4th Cir. 2024); *United States ex rel. USN4U, LLC v. Wolf Creek Fed. Servs.*, 2025 WL 1009012 (6th Cir. Mar. 31, 2025).

F. Tenth Circuit Holds That the FCA's Public Disclosure Bar Does Not Confer Right to Appeal Under the Collateral Order Doctrine

In March 2025, the Tenth Circuit dismissed an interlocutory appeal in *United States ex rel. Fiorisce, LLC v. Colorado Technical University, Inc.*, holding that the FCA's public disclosure bar does not confer a right to avoid trial and therefore does not qualify for immediate review under the collateral order doctrine. 130 F.4th 811, 814, 820–21 (10th Cir. 2025).

Fiorisce, LLC, a special purpose relator entity formed by a former faculty member at Colorado Technical University (CTU), brought a *qui tam* action under the FCA, alleging that CTU fraudulently billed the federal government for educational content never provided to students. Specifically, Fiorisce claimed that CTU's Intellipath platform bypassed required instructional hours by allowing students to skip coursework through diagnostic tests, while CTU still claimed full credit hour funding from the Department of Education. *Id.* at 815.

CTU moved to dismiss the complaint under the FCA's public disclosure bar, arguing that the allegations were substantially similar to prior public disclosures and that Fiorisce was not an "original source." *Id.* The district court denied the motion, finding that Fiorisce's claims were not "substantially the same" as prior disclosures and that Fiorisce likely qualified as an original source. *Id.* at 816. CTU appealed, asserting jurisdiction under the collateral order doctrine. *Id.*

The Tenth Circuit rejected CTU's argument, emphasizing that the collateral order doctrine is a narrow exception to the final judgment rule and applies only when the order (1) "conclusively determine[s] the disputed question," (2) "resolves an important issue completely separate from the merits," and (3) is "effectively unreviewable on appeal from a final judgment." *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The court focused on the third factor, concluding that CTU had not shown that denial of its motion was effectively unreviewable after final judgment. *Id.* at 818.

The Tenth Circuit held that the FCA's public disclosure bar does not guarantee a right to avoid trial as claims may still proceed if the government intervenes, opposes dismissal, or the relator qualifies as an original source. *Id.* at 820. The court also rejected CTU's arguments that separation-of-powers concerns, jurisdictional implications, or government efficiency justified immediate appeal. *Id*. at 821. It noted that Congress amended the FCA in 2010 to remove jurisdictional language from the public disclosure bar, rendering it non-jurisdictional. *Id* at 822.

We can expect the Tenth Circuit's decision to lead to an intensification of efforts to frame appeals of public disclosure bar–related dismissals in terms of broader interlocutory appeal requirements, which focus on litigation efficiency and judicial economy and typically do not require that the order being appealed from be effectively unreviewable following final judgment. *See* 28 U.S.C. § 1292.

IV. CONCLUSION

We will monitor these developments, along with other FCA legislative activity, settlements, and jurisprudence throughout the year and report back in our 2025 False Claims Act Year-End Update.

Please click on the link below to view the complete update and endnotes on Gibson Dunn's website:

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