This material from *The Government Contractor* has been reproduced with the permission of the publisher, Thomson Reuters. Further use without the permission of the publisher is prohibited. For further information or to subscribe, call 1-800-328-9352 or visit https://legal.thomsonreuters.com. For information on setting up a Westlaw alert to receive *The Government Contractor* in your inbox each week, call your law librarian or a Westlaw reference attorney (1-800-733-2889).

THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

FEBRUARY 26, 2025 | VOLUME 67 | ISSUE 8

¶ 40 FEATURE COMMENT: The Top FCA Developments Of 2024

2024 saw increased False Claims Act activity and recoveries along with a constitutional ruling that has the potential to lead to a reshaping of how FCA claims are pursued and enforced. Recoveries and new actions were both up as was enforcement in current trend areas from cybersecurity to pandemic-related fraud. While U.S. courts of appeals and the Supreme Court heard notable FCA cases, it was a district court in Florida that sent civil fraud tremors across the nation when it struck down the FCA's qui tam provisions for failing to comply with Article II of the Constitution. As always, this Feature Comment discusses these and other top FCA developments of the past year and looks ahead to what's in store for Government contractors in 2025.

Recovery Statistics and Notable Settlements—Department of Justice recoveries and settlements in FCA matters in fiscal year 2024 totaled just over $2.9 billion. That is the highest total in three years, with a modest increase of approximately $100,000 from FY 2023 that continues the trend of moderate increases year-over-year since 2022. Of the $2.9 billion in total recoveries, approximately $500 million was in non-relator-initiated qui tam actions, with the remaining $2.4 billion coming through qui tam actions. Of that $2.4 billion, nearly $2.2 billion was recovered in cases where the Government intervened in the qui tam lawsuit while only $217 million came from cases where relators went forward after declination. The Government has now recovered more than $78 billion since 1986, when the FCA amendments overhauled the statute and its qui tam provisions, with nearly $10 billion paid out as relator share awards. FY 2025 is on track to see an even higher recovery total as among others, the Government announced two large settlements in October 2024 that together total more than $850 million.

FY 2024 was also notable for the sheer volume of FCA filings and resolutions. The 979 qui tam lawsuits filed in FY 2024 is the highest number filed in a single year, surpassing the record set in 2013. And, while qui tam suits by relators remain the primary mechanism for FCA lawsuit filing, in FY 2024, the trend of increasing numbers of Government-initiated actions continued. In FY 2024, the Government initiated 423 FCA actions, which is second only to the 505 Government-initiated suits in 2023. As was the case last year, it appears that pandemic-related cases are a driver of the high numbers both in terms of qui tam and Government actions.

As has been the case for several years, DOJ continued its focus on key enforcement priorities, related to health care fraud, the opioid epidemic, fraud in pandemic relief programs, and violations of cybersecurity

requirements in Government contracts and grants. In FY 2024, nearly $1.67 billion, or more than half of the total recoveries of $2.9 billion, were from healthcare-related recoveries for losses in federal programs. The focus on health care, the opioid epidemic, and pandemic relief programs likely accounts for some of the increase in Government-initiated actions in 2024. That may explain some of the decrease in Department of Defense recoveries, which total only $93 million in 2024.

The Government's recoveries included significant settlements in several key enforcement areas this year, including fraud related to small business, procurement fraud, cost and pricing, cybersecurity, and more.

In the Paragon Systems Inc. (Paragon) settlement announced in November, Paragon agreed to pay over $52 million to resolve allegations that it violated the FCA and the Anti-Kickback Act by knowingly causing businesses that its corporate executives controlled to fraudulently obtain small business set-aside contracts with the Department of Homeland Security reserved for Woman-Owned Small Businesses (WOSBs), Service-Disabled Veteran Owned Small Businesses (SDVOSBs), and other classes of small businesses. Those businesses also allegedly paid more than $11 million to Paragon executives over the course of more than 300 separate payments, concealed as "consulting payments."

Similarly, in the QuarterLine Consulting Services LLC (QuarterLine) settlement, announced in January, QuarterLine and its parent company, Planned Systems International Inc. (PSI), agreed to pay $3.9 million to resolve allegations that QuarterLine made false statements about its WOSB status to obtain a Defense Health Agency task order to provide physicians to an Air Force military treatment facility. According to the settlement, QuarterLine received an indefinite-delivery, indefinite-quantity (IDIQ), multiple-award contract to provide physician, nursing, and ancillary services to supplement the medical staff at military treatment facilities. At the time of the IDIQ award in 2017, QuarterLine was a WOSB. However, in 2018, QuarterLine was acquired by PSI, which caused it to lose its WOSB status. QuarterLine allegedly failed to update its General Services Administration size certifications within 30 days of the transaction, and in 2019, re-certified its WOSB status in order to receive a set-aside task order for physician-anesthesiologists to support the military treatment facility at Joint Base San Antonio.

In April, Consolidated Nuclear Security LLC (CNS) agreed to pay $18.4 million to resolve allegations that it had knowingly submitted false claims to the National Nuclear Security Administration (NNSA) for time not actually worked at NNSA's Pantex Site in Texas, the country's primary facility for the assembly, disassembly, and retrofitting of nuclear weapons. According to the settlement, CNS self-disclosed to the Government that it believed certain production technicians had fraudulently recorded hours that they did not work on their timesheets, and those timesheets were then invoiced to NNSA.

Similarly, in December, Chemonics International Inc. (Chemonics) agreed to pay just over $3.1 million to resolve allegations that it had submitted fraudulent claims for payment to the U.S. Agency for International Development (USAID). According to the settlement, Chemonics recklessly failed to detect fraudulent charges by its subcontractor, Zenith Carex (Zenith), for certain delivery services in Nigeria, and passed the charges on to USAID under the Global Health Supply Chain-Procurement and Supply Chain Management contract. For over three years, Zenith—an in-country logistics provider—purportedly charged Chemonics for long-haul delivery services based on truck tonnage as opposed to the weight of the commodity (as required by their subcontract), resulting in overcharges to Chemonics. Zenith also overcharged Chemonics for last-mile delivery services. Chemonics apparently failed to detect these overcharges for over two years because of "systematic process and personnel failures, including inadequate financial controls, monitoring and oversight and inadequate employee training, direction and support."

In June, Sikorsky Support Services Inc. (SSSI) and Derco Aerospace Inc. (Derco) agreed to pay $70 million to resolve allegations of overcharging the Navy for spare parts and materials used to repair and maintain aircraft for training naval aviators.

 © 2025 Thomson Reuters

DOJ alleged that SSSI and Derco entered into a cost-plus-percentage-of-cost subcontract with markups on parts that was improperly concealed from the Government and resulted in overcharges. The settlement resolved a qui tam suit brought by a former employee of Derco. *U.S. ex rel. Patzer v. Sikorsky Aircraft Corp et al.*, No. 11-0560 (E.D. Wis.).

Customs fraud enforcement also remained a DOJ focus in 2024. Customs fraud often takes the form of reverse false claims where a company or individual improperly retains an overpayment or other funds that should be paid to the Government. For example, on May 2, 2024, Hahn Air Lines paid $28.6 million to settle allegations that it violated the FCA by knowingly failing to remit to the U.S. certain travel fees that Hahn Air collected from commercial airline passengers flying into or within the U.S. that should have been disbursed to various federal agencies, including Animal and Plant Health Inspection Service Agricultural Quarantine and Inspection User Fees owed to the U.S. Department of Agriculture; Customs User Fees and Immigration User Fees owed to U.S. Customs and Border Protection; and Passenger Civil Aviation Security Service Fees owed to the Transportation Security Administration. The allegations were brought in a qui tam complaint filed by a whistleblower, who received a relator's share of approximately $4.8 million.

On March 21, 2024, DOJ announced that Penta International Inc. (Penta) resolved FCA allegations that the company evaded customs duties and caused the mislabeling of chemicals imported into the U.S. from China for $3.1 million. According to the allegations, Penta representatives conspired with a Chinese vendor to mislabel chemicals entering the U.S. and falsify documents submitted to the relevant customs brokers, which resulted in an underpayment of $1.4 million in customs duties. The allegations were brought by a whistleblower via a qui tam complaint and the relator received an approximately $600,000 share of the settlement amount. The matter also had a criminal component, as Penta's owner pleaded guilty to charges of wire fraud related to the civil allegations.

With respect to pandemic-related fraud, DOJ recovered more than $250 million in FY 2024 in settlements and judgments, with Paycheck Protection Program (PPP) cases continuing to be a focal point for enforcement.

By far the most significant PPP fraud settlement of the year was the Kabbage Inc. (Kabbage) settlement, which included the resolution of two qui tam claims. The matter was particularly notable for two reasons. First, the Kabbage settlement (which actually involved two separate settlements—each of which accounted for about half of the settlement amount) gave the U.S. a claim in bankruptcy proceedings of up to $120 million, which would amount to almost 20 times the next-largest PPP fraud settlement of 2024. Second, Kabbage was a PPP loan *lender*, not a borrower. This settlement signals DOJ's interest in targeting deeper pockets and larger potential damages given that lenders may have dealt with many PPP loans.

One of the Kabbage settlements resolved allegations that Kabbage used a few methods to inflate the amounts for which borrowers would be eligible, including improperly calculating employee wage amounts by double-counting taxes, improperly calculating leave and severance payment amounts, and failing to exclude annual compensation above $100,000 per employee. DOJ alleged that Kabbage failed to remedy the errors, despite being aware of them as early as April 2020. The other Kabbage settlement resolved allegations that Kabbage knowingly failed to implement sufficient fraud controls to meet its obligations under the PPP and the Bank Secrecy Act/Anti-Money Laundering requirements. The allegedly inadequate conduct included: removing underwriting steps to allow Kabbage to process more PPP loan applications to maximize processing fees; utilizing substandard fraud checks, tools, and review procedures; and submitting thousands of potentially or actually fraudulent PPP loan applications.

PPP cases against borrowers continued in 2024 through false certification theories. For example, in Lafayette RE Management LLC (Lafayette), a residential real estate asset management firm agreed to pay $680,000 to resolve the first case in which the Government intervened involving the PPP's "economic necessity certification." In the underly-

© 2025 Thomson Reuters

ing qui tam complaint, the relator alleged that Lafayette improperly certified on its PPP loan application that current economic uncertainty made the loan request necessary to support its ongoing operations.

Cybersecurity Compliance—In 2024, DOJ remained vigilant in pursuing cybersecurity-related fraud under its Civil Cyber-Fraud Initiative (CCFI), with four settlements and a public complaint that signal that DOJ's enforcement reach extends beyond contracts tied to cybersecurity services, that a data breach is not needed as a precursor for liability, and that DOJ will continue to rely on IT employees to play a pivotal role in surfacing allegations of cybersecurity noncompliance.

In May, DOJ announced that Insight Global LLC (Insight), an international staffing and services company, agreed to pay $2.7 million to resolve FCA allegations that it failed to implement adequate cybersecurity measures to protect personal health information (PHI) and personally identifiable information (PII) under its contracts with the Pennsylvania Department of Health (PADOH) to provide staffing for COVID-19 contact tracing. The case was initiated by a qui tam complaint filed in July 2021 by Insight's former business intelligence reporting manager responsible for managing data created by contact tracers interacting with Pennsylvania residents. *U.S. ex rel. Seilkop v. Insight Global LLC*, No. 1:21-cv-1335 (M.D. Pa.). The contract with PADOH required Insight to, among other things, (i) ensure that PHI and all other information related to the services provided would be "kept confidential and secure"; (ii) use secure devices in performing the contract; and (iii) comply with federal PHI safeguarding obligations. DOJ alleged that Insight violated these provisions because Insight allowed its staff to receive PHI/PII in unencrypted emails, including emails sent by Government personnel; share passwords to access PHI/PII; and store and transmit PHI/PII via publicly accessible Google documents.

Next, in June, DOJ announced that Guidehouse Inc. (Guidehouse) and its subcontractor, Nan McKay and Associates (Nan McKay), agreed to pay $11.3 million—the largest under the CCFI to date—to resolve allegations that they knowingly failed to conduct pre-production cybersecurity testing on New York State's Emergency Rental Assistance Program (ERAP) technology product before public launch. The investigation was initiated by a qui tam lawsuit filed in March 2022 by Elevation 33 LLC, an entity owned by a former Guidehouse employee. *U.S. ex rel. Elevation 33, LLC v. Guidehouse Inc. et al.,* Case No. 1:22-cv-206 (N.D.N.Y.). Twelve hours after the ERAP was launched, a cybersecurity incident occurred, resulting in commercial search engines accessing PII from ERAP for a limited group of individuals. According to the settlements, the conditions that allowed for the incident to occur may have been detected—and thus prevented—if either Guidehouse or Nan McKay had conducted the contractually required pre-go-live cybersecurity testing. Additionally, Guidehouse acknowledged in its settlement agreement that it used a third-party data cloud software program to administer a program adjacent to the ERAP and to store PII, in violation of the contract's requirements.

Third, in October, ASRC Federal Data Solutions LLC (AFDS) agreed to pay $306,722, and waived any rights to reimbursement—including at least $877,578 in data breach remediation costs—to resolve allegations that it stored screenshots from the Centers for Medicare and Medicaid Services' (CMS) systems containing PII and potentially PHI of Medicare beneficiaries on its subcontractor's server without individually encrypting the files. The subcontractor's server was breached by a third party in October 2022 and the unencrypted screenshots were compromised. AFDS notified CMS of the breach within one hour of being notified by the subcontractor and subsequently took steps to remediate the impact. AFDS also cooperated with DOJ's investigation by promptly responding to requests for information, making employees available to be interviewed, and providing additional information about the breach, and received credit under DOJ's guidelines for taking disclosure, cooperation, and remediation into account in FCA cases, Justice Manual § 4-4.112.

Fourth, also in October, DOJ announced that Pennsylvania State University (Penn State) agreed to pay $1.25 million to resolve FCA allegations that it failed to comply with contractually mandated

© 2025 Thomson Reuters

cybersecurity requirements by DOD and NASA. The relator, the former chief information officer of Penn State's applied research laboratory, filed a qui tam complaint in October 2022. *U.S. ex rel. Decker v. Penn. State Univ.*, No. 2:22-cv-03895 (E.D. Pa.). His primary allegation was that Penn State submitted false self-attestations of compliance with cybersecurity requirements in its DOD contracts. Of note, the allegations in the settlement agreement were based on the same Defense Federal Acquisition Regulation Supplement clauses at issue in the qui tam complaint but focused on different and distinct requirements. In the settlement agreement, DOJ alleged that Penn State violated contractual requirements to (i) submit the date by which "all requirements are expected to be implemented (i.e., a score of 110 is expected to be achieved) based on information gathered from associated plan(s) of action developed in accordance with NIST SP 800-171," and (ii) utilize external cloud service providers that meet the security requirements in the FedRAMP Moderate baseline. See DFARS 252.204-7012(b)(2)(ii)(D); 252.204-7019(d)(1)(i)(F); 252.204-7020(d)(1)(F). DOJ contended that Penn State knowingly misstated the dates it expected to implement required security controls, did not adequately document its plan to implement these controls, and used a non-FedRAMP-compliant cloud service provider for certain contracts.

In addition to the four settlements, in August, DOJ filed its first complaint-in-intervention in a cybersecurity-fraud lawsuit. Two relators, now former members of Georgia Tech's Cybersecurity Team, initially filed a qui tam in July 2022 alleging that Georgia Tech failed to properly implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171 and that administration officials ignored concerns raised about the implementation of the cybersecurity controls. *U.S. ex rel. Craig v. Georgia Tech Research Corp. et al.*, No. 1:22-cv-02698 (N.D. Ga.). In the complaint-in-intervention, DOJ alleges that Georgia Tech failed to develop or implement a system security plan in violation of DOD cybersecurity regulations and NIST SP 800-171, failed to install, update, or run antivirus or incident detection software, and failed to assess systems that processed, stored, or transmitted Controlled Unclassified Information using DOD's prescribed assessment methodology. The complaint also alleges that Georgia Tech knowingly submitted an inaccurate self-assessment score regarding its compliance with NIST in order to maintain eligibility for DOD contracts. DOJ asserts that Georgia Tech was aware of the compliance requirements but chose to accommodate its "star quarterback" researchers who "pushed back" because they found the requirements cumbersome.

Corporate Whistleblower Awards Pilot Program—In August 2024, then-Deputy Attorney General Lisa Monaco unveiled DOJ's new Corporate Whistleblower Awards Pilot Program, rewarding those who voluntarily provide DOJ with "original" information that leads to a successful corporate prosecution with a potential share of the resulting forfeiture. DOJ views the program as instrumental towards a number of key objectives, among those: filling gaps in existing federal whistleblower programs; "supercharging" DOJ's corporate investigations efforts; complementing DOJ's existing tools for corporate accountability; and further incentivizing corporate investment in robust compliance programs and internal reporting systems. For whistleblowers to be eligible for a reward, the corporate prosecution must result in a forfeiture greater than $1 million and the whistleblowers cannot: be meaningfully involved in the misconduct; obtain the information through their work as a compliance officer or internal auditor; be employed by DOJ or be an immediate family member of a DOJ employee; or receive the information from an ineligible person or with intent to bypass any provision of the pilot program.

Inflationary Adjustments for 2025—As of Jan. 15, 2025, the Department of Commerce announced inflationary adjustments for civil monetary penalties for FCA violations, increasing the minimum penalty from $13,946 to $14,308 per claim and the maximum penalty from $27,894 to $28,619 per claim. DOJ is expected to soon announce that the adjustments will apply to all FCA actions.

FCA at the Supreme Court—The Supreme Court did not decide any FCA cases in 2024 on the level of *U.S. ex rel. Polansky v. Exec. Health Res.,*

© 2025 Thomson Reuters

Inc., 599 U.S. 419 (2023) or *U.S. ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023); 65 GC ¶ 156. However, the landmark *Loper Bright* decision (a non-FCA case likely to impact FCA cases involving ambiguous or vague rules) and the just-decided *Heath* are of note.

In November, the Supreme Court heard arguments in *Wis. Bell, Inc. v. U.S.*, *ex rel. Heath*, No. 23-1127. On appeal from the Seventh Circuit, *Heath* arises from a relator's allegation that Wisconsin Bell submitted false claims to the Federal Communications Commission's "Schools and Libraries Universal Service Support" (or "E-Rate") program, which draws from the Universal Services Fund. The question presented to the Court was whether requests for payment to the E-Rate program are "claims" under § 3729(c) of the FCA. Wisconsin Bell argued that the E-Rate program is distinguishable from other Government programs because the Government orders private parties to pay into a fund that is managed/distributed by a group of private entities. Relator argued that the Government still "provides" the money because it created the fund via statute and issues guidance to the fund, and the private parties managing the fund are empowered to collect and disburse funds based on the Government action creating it.

On Feb. 21, 2025, the Court issued a unanimous decision holding that the E-Rate reimbursement requests count as FCA "claims" because the Government "provided" at least a "portion" of the money applied for by transferring more than $100 million into the fund. § 3729(b)(2)(A)(ii)(I). The Court noted that even a "simple intermediary" can "provide" things to a recipient and that under the FCA's definition of a "claim," "the technical ownership of the [funds] that the Government conveyed to the Fund makes not a whit of difference." Furthermore, the Government did not act as a "passive throughway for the transmission of the $100 million," but rather "generated that money itself by extracting it from carriers and by prosecuting wrongdoing in the E-Rate program." This decision will allow relator Heath's suit to continue. The Court acknowledged that if Heath succeeds on the merits, there will likely be disputes about damages that can be recovered based on the amounts contributed directly by the Government to the fund, but left those issues to be decided by the lower courts. Because of the highly particular facts of the case, it is unclear whether *Heath* will be of significant import for most Government contractors.

While not an FCA action itself, the Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024) has already had an impact on FCA litigation. *Loper Bright* overturned *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and requires, in pertinent part: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.... Courts may not defer to an agency interpretation of the law simply because a statute is ambiguous." While the Supreme Court in *Schutte* held that a post hoc interpretation of an ambiguous statute or regulation is not a defense to FCA knowledge if the defendant did not subjectively believe it at the relevant time, *Loper Bright* now directs that courts should not defer to agency interpretations of ambiguous statutes, which may provide defenses in cases where the Government or a relator alleges scienter based on a defendant's awareness of agency guidance. *Loper Bright* may also foreshadow defenses to falsity and materiality in cases involving ambiguous provisions.

Lower courts have begun to address *Loper Bright* in certain FCA cases. See, e.g., *BNSF Railway Co. v. Ctr. for Asbestos Related Disease, Inc.,* 2024 WL 4273814 (9th Cir. Sept. 24, 2024) (acknowledging end of *Chevron* deference in affirming judgment in Medicare fraud case). For example, in *U.S. ex rel. Sheldon v. Forest Labs.*, on remand in light of the Supreme Court's decision in *Schutte*, the District of Maryland granted the defendant's motion to dismiss for failing to plead falsity and scienter by interpreting the Medicaid Drug Rebate Statute without reliance on CMS' interpretation. See *U.S. ex rel. Sheldon v. Forest Labs., LLC*, ___ F. Supp. 3d ___, 2024 WL 4544567 (D. Md. Oct. 22, 2024) (granting motion to dismiss on falsity and scienter and interpreting the Medicaid Drug Rebate Statute without reliance on agency interpretation). And in *U.S. v. Boler*, the Fourth Circuit observed that *Loper Bright* "calls into question the viability of *Auer* deference" to agency interpretations of their own regulations, signaling a potential broader

© 2025 Thomson Reuters

impact for judicial interpretation of ambiguous rules and contractual provisions going forward. 115 F. 4th 316 (4th Cir. 2024).

***Zafirov* and the Constitutionality of the FCA's Qui Tam Provisions**—Without question, one of the most notable developments this year involves the viability of the FCA's qui tam provisions themselves. In *U.S. ex rel. Zafirov v. Fla. Med. Assocs., LLC*, ___ F.Supp.3d ___, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024), Judge Kathryn Kimball Mizelle found the FCA qui tam mechanism unconstitutional, sending shockwaves through the FCA bar.

The *Zafirov* opinion turned largely on two key grounds. First, Judge Mizelle examined the authority exercised by FCA relators and the nature of the position of qui tam relator to find that relators are officers of the U.S. Under the Appointments Clause, such officers must be appointed in the constitutionally prescribed manner. Judge Mizelle reasoned that relators essentially appoint themselves to the role by filing suit under the FCA, and as such the qui tam mechanism violates the Appointments Clause. Second, Judge Mizelle found that the history of practice under the qui tam provisions was not enough to create an exception to Article II's requirements. In reaching this conclusion, Judge Mizelle notably drew upon Justice Kavanaugh's concurrence in *U.S. v. Rahimi,* 602 U.S. 680, 718 n.2 (2024) (Kavanaugh, J., concurring), reasoning that historical patterns of accepting a given provision would not justify a violation of constitutional guarantees unless "unambiguous and unbroken history" left "no doubt that the practice... has become part of the fabric of our society." See *Zafirov*, 2024 WL 4349242, at *15. For a close examination of the *Zafirov* decision, including a comparison of Judge Mizelle's reasoning with other courts that had previously considered constitutional challenges to the FCA qui tam provisions, see Crawford, McLaughlin, et al., Feature Comment, "District Court Declares False Claims Act Qui Tam Provisions Unconstitutional," 66 GC ¶ 273.

The *Zafirov* decision marks the first time that a court has ruled that the qui tam provisions of the FCA are unconstitutional. Even so, such a ruling was not entirely unexpected. This development was presaged by Justice Thomas's dissent in *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting). As covered in McLaughlin, Gorton, et al., Feature Comment, "The Top FCA Developments of 2023," 66 GC ¶ 56. Justice Thomas highlighted "serious constitutional questions" about the FCA qui tam mechanism, noting that "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the U.S. in litigation." Justices Kavanaugh and Barrett also indicated their willingness to consider an Article II challenge to the qui tam device.

In the wake of *Polansky* and now *Zafirov*, defendants are raising Article II arguments more frequently in dispositive motions and pleadings. *Zafirov* has even been raised as an argument to set aside a Civil Investigative Demand (CID). In an October 2024 petition filed in the Middle District of Florida, BMP USA Inc. and Cool Master USA LLC argued that the CID should be set aside because it was issued pursuant to a qui tam complaint that is unconstitutional, citing *Zafirov*. See Complaint at 5, *BMP USA, Inc. et al. v. U.S. Department of Justice*, No. 8:24-cv-02420. No decision has been made regarding that petition.

Both relator and the Government appealed the *Zafirov* decision in the Eleventh Circuit and briefing is well underway. An Eleventh Circuit affirmance would have a serious impact on FCA practice in the Eleventh Circuit. And no matter how the Court of Appeals rules, its decision is likely to come before a Supreme Court whose current makeup appears to have at least three of the four votes needed to grant certiorari (Justices Barrett, Kavanaugh, and Thomas). Considering the significance of the issue, it is possible that the Court would grant cert even absent a clear circuit split. While it may take another year or more for the Supreme Court to consider the issue, the door may be open for a ruling that could mark a pivotal change to FCA practice.

In light of the recent change in the administration, a question arises whether President Trump's DOJ would support the *Zafirov* ruling—or at least decline to join arguments against it. After all, two

© 2025 Thomson Reuters

of the three Supreme Court Justices to indicate willingness to consider Article II challenges to the FCA qui tam provisions were nominated by President Trump during his first term, as was Judge Mizelle, who has now struck down those provisions. So far, public indications are that DOJ will continue to oppose constitutional attacks on the qui tam device. During confirmation hearings, Sen. Chuck Grassley (R-Iowa) asked then-nominee for Attorney General Pam Bondi whether she would defend the constitutionality of the FCA. In response, Bondi noted the value of the FCA, the importance of whistleblowers, and the recoveries made on behalf of the U.S. under the FCA, stating that "of course" she would do so. That pledge will be put to the test as *Zafirov* and other similar challenges are litigated in the courts. But whatever the Government's position, the constitutionality issue highlights the intersection of the checks and balances among the three branches of Government, and *Zafirov* may ultimately set the stage for a landmark Supreme Court decision concerning a statute that has traditionally enjoyed bipartisan support.

Retaliation—In *Mooney v. Fife*, 118 F.4th 1081 (9th Cir. 2024), the Ninth Circuit made several noteworthy rulings in reversing the dismissal of an FCA retaliation claim brought by the former chief operating officer of a dermatology practice. The plaintiff raised concerns that the practice was engaged in various improper billing practices in violation of Medicare and Medicaid regulations. Later, the practice's owner terminated the plaintiff, claiming he had breached his employment agreement by sharing unrelated confidential information with another practice.

The plaintiff brought a qui tam action asserting fraud and retaliation claims. After the Government declined to intervene, the plaintiff voluntarily dismissed the FCA claim but amended the complaint to add breach of contract and breach of the covenant of good faith and fair dealing claims, in addition to the retaliation claim. The district court granted summary judgment to the defendant. With regards to the retaliation claim, the district court found that the plaintiff was hired to ensure billing compliance and report irregularities, such that his report of billing non-compliance did not put his employer on notice of protected conduct.

The Ninth Circuit reversed and remanded. Acknowledging that it had not previously held "which framework should be used in analyzing FCA retaliation claims[,]" the Ninth Circuit first held that the *McDonnell Douglas* framework used in statutes such as Title VII and the Americans with Disabilities Act applies. "Under that framework, once the employee has established a prima facie case of FCA retaliation, the burden shifts to the employer to produce a legitimate, non-retaliatory reason for the employee's termination."

The court then proceeded to address each of the three required elements of an FCA retaliation claim: (1) the employee was engaged in protected conduct; (2) the employer was on notice that the employee was engaged in such conduct; and (3) the employer discriminated against the employee because of that conduct. On the first element, the Ninth Circuit joined other circuit courts in finding that "efforts to stop 1 or more violations" of the FCA does not require that they be "calculated, or reasonably could lead, to *a viable FCA action*." The Ninth Circuit confirmed its precedent that protected conduct has a subjective and objective component but noted that the test "does not set a high bar." The employee need only in good faith believe that the employer was possibly committing fraud, and the circumstances need only be such that a reasonable employee "*might*" believe that the employer is "*possibly*" committing fraud.

As to notice, the Ninth Circuit rejected the district court's finding that a heighted notice requirement applied when the employee in question had job duties that included compliance. Finding this inconsistent with the plain language of the statute, the Ninth Circuit opined that applying a higher standard "would strip protection from the employees who are in the best position to stop, or uncover and expose" the fraud. Instead, the court held, the FCA requires that "the employer need only be aware of *an* employee's 'efforts to stop 1 or more violations of [the FCA].' "

Having found that the plaintiff satisfied the first and second elements of a prima facie claim, and with no dispute as to the third element of causation, the Court addressed whether the defendant produced a non-retaliatory reason for the

© 2025 Thomson Reuters

termination. Here, the Ninth Circuit held that the employer is not required to prove that its proffered reason was objectively true. Rather, the question was whether the employer "honestly believed" its reason for the actions—even if the reason "is foolish or trivial or even baseless." Because the court concluded that factual issues existed on this question, it remanded the retaliation claim for trial.

Excessive Fines—The Seventh Circuit rejected an excessive fines argument in an FCA case based on Anti-Kickback Statute violations last year. See *Stop Ill. Health Care Fraud, LLC v. Sayeed*, 100 F.4th 899 (7th Cir. 2024). The defendant challenged a damages award of $5.9 million, which was based on trebling of over $700,000 in false billings and a $5500 per-claim penalty on 673 individual claims. The court acknowledged that it had "not resolved whether the Eighth Amendment applies to civil penalties under the FCA." Nonetheless, the court declined to resolve that question because the "$6 million judgment... easily satisfies the proportionality test" as the defendant engaged in a years-long scheme that "seiz[ed] a disproportionate share of Medicare funds by concealing unlawful kickbacks."

Several years earlier, the Eleventh Circuit had taken a somewhat different approach to a $1.1 million damages award—concluding that the Eighth Amendment applied to FCA judgments but also holding (like the Seventh Circuit) that the penalties before it did not violate the Excessive Fines Clause. See McLaughlin, Kanu, et al., Feature Comment, "The Top FCA Developments of 2021," 64 GC ¶ 43.

Public Disclosure Bar—In *U.S. ex rel. Jacobs v. JP Morgan Chase Bank*, 113 F.4th 1294 (11th Cir. 2024), the Eleventh Circuit affirmed dismissal of a foreclosure-attorney-turned-relator's qui tam complaint that alleged JP Morgan Chase had forged mortgage loan promissory notes and submitted false reimbursement claims to Fannie Mae and Freddie Mac for loan servicing costs. According to the complaint, JP Morgan Chase concocted a scheme to fraudulently endorse these promissory notes with the names of former Washington Mutual employees to avoid repurchasing these loans (as required by federal guidelines), and then submitted payment claims to the Government for hundreds of millions of dollars for loan servicing costs incurred on these loans. The district court dismissed the complaint, finding the relator had (1) failed to state a claim with sufficient particularity under Rule 9(b); and (2) alleged claims that were barred by the FCA's public disclosure provision because online blog articles from before the lawsuit had alleged essentially the same fraud scheme. In doing so, the court also noted that the relator could not satisfy the FCA's "original source" requirement because he did not demonstrate knowledge that was "independent of and materially add[ed] to the publicly disclosed allegations or transactions."

On appeal, the Eleventh Circuit held that the relator's claims were barred by the FCA's public disclosure rule. The court easily concluded that the relator's complaint was filed after multiple online blogs had published information about the same alleged fraud scheme and that these blogs sufficiently constituted "news media" for the purposes of the public disclosure provision because they were "publicly available" and "intended to disseminate information." The court then concluded that the relator's complaint also contained substantially the same allegations as these blogs because there was "significant overlap" between the facts described. And while the Court acknowledged relator's law practice experience "shed light" on how JP Morgan Chase defends certain foreclosure actions, it rejected the argument this provided any independent information to corroborate his allegations that would make him an "original source."

Jacobs is a helpful development for defendants facing a rising tide of opportunistic plaintiffs relying on public information to build a qui tam suit.

First to File—In *Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244, 1247 (9th Cir. 2024), the Ninth Circuit, sitting en banc, reversed the district court's dismissal of a qui tam complaint on the grounds that it "related" to an earlier filed suit against the same defendants, and was therefore barred by the FCA's "first-to-file" rule, which states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 USCA § 3730(b)(5). A three-judge panel originally affirmed

© 2025 Thomson Reuters

the district court's dismissal, but sitting en banc on rehearing, the Ninth Circuit reversed decades of precedent and found that the first-to-file rule is not jurisdictional, joining the First, Second, Third, Sixth, and D.C. Circuits and solidifying a circuit split. The court cited both the text of the FCA itself, which does not use the term "jurisdiction," and recent Supreme Court decisions articulating that a statutory bar is only jurisdictional if Congress explicitly states so. Because neither was the case, the Court concluded that the first-to-file rule did not strip the district court of jurisdiction to hear the relator's claims.

The *Stein* decision has a number of procedural implications and represents another example of the changing landscape regarding defensive motions across the federal landscape. Most prominently, defendants in the Ninth Circuit may no longer move to dismiss for lack of subject-matter jurisdiction but must instead rely on Rule 12(b)(6), placing the burden of proof upon the defendant to show that the first-to-file rule applies. Relatedly, failure to raise such a challenge could result in waiver if not timely asserted.

2025 Vision—The Year Ahead for the FCA— 2025 is shaping up to be a year of uncertainty for the FCA. Not uncertainty as to whether the FCA will continue to be DOJ's number one tool for pursuing claims of fraud against the Government. Rather, uncertainty as to how DOJ and relators in turn will use that tool. Just over a month into the start of the new administration, changes in leadership, policies, and priorities strongly suggest new focus areas for FCA enforcement, from diversity, equity, and inclusion frameworks to tariffs and custom duties, among others. It's not yet clear whether current focal areas or industries might see less attention, though enforcement based on nonbinding guidance could swing downward in light of recent court decisions and related directives from the new AG. The next several months may shed light on any potential shifting enforcement priorities. And, of course, ongoing legal challenges to the FCA's qui tam provisions will be ones to watch, with at least one court of appeals, the Eleventh Circuit, likely to weigh in on the constitutional question late this year. At the same time, multiple large settlements at the end of the calendar year, including in procurement fraud matters, signal that DOJ is already well on the way to posting notable recovery totals in FY 2025.

This Feature Comment was written for The Government Contractor by* Brian Tully McLaughlin, *a partner in the Government Contracts practice group and co-chair of the firm's False Claims Act practice;* Lyndsay Gorton *and* Nkechi Kanu, *who are both partners in the Government Contracts group;* Payal Nanavati, *who is counsel in the Government Contracts and Health Care groups;* Neil Nandi, *who is counsel in the Litigation group*; Amanda McDowell, *who is an associate in the Government Contracts group; and* William Tucker, *who is an associate in the Government Contracts and Health Care groups. All authors are attorneys at Crowell & Moring LLP.

© 2025 Thomson Reuters