

---

## *False Claims Act: 2020 Year-in-Review*

FEBRUARY 3, 2021

### *Report Editors*

[Christopher E. Babbitt](#) and [Matthew Benedetto](#)

### *Contributors*

[Jeanine Alvarez](#), [Justin Baxenberg](#), [Nelson Castano](#), [Thomas F. Costello](#), [Karin Dryhurst](#), [Mandy Fatemi](#), [Joseph Gay](#), [Hyun-Soo Lim](#), [Marissa W. Medine](#), [Jonathan E. Paikin](#), [Elizabeth Purcell Phillips](#), [Rieko H. Shepherd](#), and [Charles C. Speth](#)

## TABLE OF CONTENTS

<b>Introduction: Highlights and Trends</b>	<b>1</b>
<b>FCA Implications of the Federal Response to the Coronavirus Pandemic</b>	<b>2</b>
The FCA in a Time of National Crisis	2
CARES Act Enforcement and Oversight Authorities	4
Primary Funding Areas and Resulting FCA Risks	8
The Paycheck Protection Program	8
Federal Reserve Lending Facilities and Airline Subsidies	15
Healthcare Funding	18
Operation Warp Speed	21
<b>Key FCA Developments in 2020 By Topic</b>	<b>22</b>
Pleading and Rule 9(b)	22
Falsity	22
Materiality	22
Scienter	23
Causation	23
Damages	23
First-To-File and Public Disclosure Bar	23
DOJ's Dismissal Authority	24
Retaliation	26
Corporate Veil-Piercing	26
Litigation Funding	26
Qualified Immunity	27
<b>2020 Case Law Developments By Circuit</b>	<b>27</b>
D.C. Circuit: Veil-Piercing	27
First Circuit: Public Disclosure; Retaliation; Damages	28
Second Circuit: Materiality; First-To-File; Public-Disclosure; DOJ Dismissal Authority	30
Third Circuit: Falsity; First-to-File Bar	33
Fourth Circuit: Qualified Immunity; Scienter	36
Fifth Circuit: Materiality	38
Sixth Circuit: Public Disclosure	39
Seventh Circuit: DOJ Dismissal Authority; Anti-Kickback Statute	41
Eighth Circuit: Retaliation; Rule 9(b): Relator's Knowledge	43
Ninth Circuit: First-to-File Bar; Falsity; DOJ Dismissal Authority	45
Tenth Circuit: Materiality	48
Eleventh Circuit: Retaliation; Causation; Litigation Funding	49
<b>About WilmerHale's False Claims Act Practice</b>	<b>52</b>
Contact Information For More on False Claims Act Matters	54
Washington DC	54
New York	54
Boston	54
Los Angeles	54
Denver	54

## *Introduction: Highlights and Trends*

The Department of Justice (DOJ) announced on January 14, 2021 that it had recovered \$2.2 billion in False Claims Act (FCA) settlements and judgments in its 2020 fiscal year.<sup>1</sup> While that figure is down considerably from prior years, the decline may be explained in part by the disruption caused by the coronavirus pandemic. The government's total recovery since the 1986 amendments has now reached a staggering \$64 billion.<sup>2</sup>

The federal courts remained active in developing the law on a number of important topics for FCA practitioners, including on issues subject to entrenched—and expanding—circuit splits. The split among the circuits is especially stark with respect to the government's statutory right to seek dismissal of qui tam actions under 31 U.S.C. § 3730(c)(2)(A), with the Seventh Circuit in 2020 becoming the first to hold that the government must formally intervene in qui tam actions before seeking their dismissal. This holding added a new dimension to the split that had previously divided the D.C. and Ninth Circuits. A circuit split is also emerging between the Third, Ninth, and Eleventh Circuits on the critical question of whether an “objective falsehood” is required for FCA liability, which affects whether matters of judgment (such as physicians' clinical opinions on medical necessity) can form the basis of an FCA claim. A petition for certiorari is pending on the question.

More generally, courts continue to wrestle with the implications of the Supreme Court's watershed decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), which continues to reverberate more than four years after it was decided—affecting decisions at the pleading stage, at summary judgment, and even post-trial.

This year was especially tough on plaintiffs alleging retaliation under the FCA, as multiple circuits rejected the more lenient “substantial motivating factor” test in favor of a more stringent “but-for causation” test, requiring plaintiffs to establish that they would not have suffered adverse employment consequences but for their FCA-protected activities. The Eighth Circuit went a step further, holding that plaintiffs must establish that any adverse employment actions were motivated “solely” by their FCA-protected activity.

Before turning to the case law developments, however, we have devoted a substantial portion of our Year in Review to the FCA implications of the coronavirus pandemic—and the federal response to it. As with the housing and financial crisis in 2007-2008, which triggered not only substantial federal government spending but also engendered significant oversight and enforcement actions for many years, including under the FCA, the pandemic has resulted in the injection of billions of federal dollars into the U.S. economy across multiple sectors, including small business, financial

---

<sup>1</sup> Press Release, US Dep't of Justice, *Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020* (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

<sup>2</sup> *Id.*

services, and healthcare. Congress also created a number of oversight bodies that are charged with ensuring that the pandemic relief programs are not abused. For its part, DOJ has already begun prosecuting individuals alleged to have fraudulently represented their eligibility for small business loans to offset the financial disruptions of the pandemic. But in addition to criminal inquiries, the civil FCA promises to be a potent tool—both for federal regulators and qui tam plaintiffs—to address potential fraud on the federal government in connection with the range of programs created in response to the pandemic.

## ***FCA Implications of the Federal Response to the Coronavirus Pandemic***

### **THE FCA IN A TIME OF NATIONAL CRISIS**

Since the Civil War, when the FCA was enacted, and especially since the 1986 amendments were adopted, the FCA has been used as an effective tool to fight fraud against the government in times of national crisis. For instance, after Hurricane Katrina in 2005, there was a spike in FCA claims brought against government contractors in connection with the alleged fraudulent procurement of disaster relief funds.<sup>3</sup> In the wake of the 2008 housing and financial crises, numerous FCA cases were brought against large banks (and recipients of federal bailout money) in connection with their mortgage lending conduct, resulting in multimillion and multibillion-dollar settlements with qui tam plaintiffs and DOJ.<sup>4</sup>

It is no surprise, then, that the coronavirus pandemic—and the massive response of the federal government—presents similar opportunities for unscrupulous individuals and companies to try to take advantage of a public health emergency. The pandemic also presents risk for those individuals and entities that legitimately seek to avail themselves of federal recovery funding and loan programs.

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act (or “the Act”), a \$2 trillion stimulus package that included loans and other

---

<sup>3</sup> Scott F. Roybal & Matthew T. Lin, *Guard Against False Claims as Massive Government Spending Rolls Out to Combat COVID-19*, NAT'L L. REV. (Mar. 19, 2020), <https://www.natlawreview.com/article/guard-against-false-claims-massive-government-spending-rolls-out-to-combat-covid-19>; see also US Dep't of Justice, Hurricane Katrina Fraud Task Force Second Year Report to the Attorney General (Sept. 2007), <https://www.justice.gov/sites/default/files/criminal-disasters/legacy/2012/07/30/09-04-07AG2ndyrprogprpt.pdf>.

<sup>4</sup> As of October 21, 2020, the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) has recovered more \$11 billion dollars, including \$900 million in fiscal year 2019 alone. See SIGTARP, Semiannual Report to Congress October 1, 2019 – March 31, 2020, at 2, 47 (Apr. 30, 2020), [https://www.sig tarp.gov/Quarterly%20Reports/April\\_30\\_2020\\_Report\\_to\\_Congress.pdf](https://www.sig tarp.gov/Quarterly%20Reports/April_30_2020_Report_to_Congress.pdf).

financial assistance to distressed companies and individuals.<sup>5</sup> The CARES Act provided for “Economic Impact Payments to American households of up to \$1,200 per adult for individuals whose income was less than \$99,000 (or \$198,000 for joint filers) and \$500 per child under 17 years old.”<sup>6</sup> It also established the Paycheck Protection Program (PPP), implemented by the U.S. Small Business Administration (SBA), which provides small businesses with forgivable loans to pay up to 8 weeks of payroll costs. The PPP authorized up to \$659 billion toward job retention and certain other expenses.<sup>7</sup> Small business owners were also eligible to apply for an Economic Injury Disaster Loan advance of up to \$10,000, which provided economic relief to businesses experiencing a temporary loss of revenue.<sup>8</sup>

Other businesses were eligible to receive non-forgivable loans under Title IV of the CARES Act. The Treasury Secretary was authorized to use \$454 billion for direct loans and other investments in programs or facilities established by the Federal Reserve, which were intended to “provid[e] liquidity to the financial system that supports lending to eligible businesses, States, or municipalities.”<sup>9</sup> The CARES Act also offered incentives to employers and job creators, including employee retention credits and payroll tax deferrals.<sup>10</sup>

The CARES Act also provided over \$100 billion to healthcare providers for healthcare innovation and \$175 billion for healthcare-related expenses or lost revenue due to COVID-19.

Last, the CARES Act established the \$150 billion Coronavirus Relief Fund, making available funds to state and local governments to cover expenses that were necessary expenditures incurred due to the public health emergency.<sup>11</sup>

On June 5, 2020, President Trump signed the Paycheck Protection Program Flexibility Act of 2020, which amended provisions of the PPP relating to PPP loan maturity, deferral of PPP loan

---

<sup>5</sup> CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), <https://www.congress.gov/116/plaws/publ136/PLAW-116publ136.pdf>.

<sup>6</sup> US Dep’t of the Treasury, The CARES Act Provides Assistance to Workers and Their Families, <https://home.treasury.gov/policy-issues/cares/assistance-for-american-workers-and-families> (last accessed Jan. 21, 2021).

<sup>7</sup> US Dep’t of the Treasury, The CARES Act Provides Assistance to Small Businesses, <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> (last accessed Jan. 21, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> Matthew D. Benedetto, Elizabeth Purcell Phillips & Joseph Michael Levy, *False Claims Act Exposure Risks for Industries Fighting COVID-19*, WilmerHale (May 29, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200529-covid-19-fca-risks-for-industries-fighting-the-pandemic>.

<sup>10</sup> US Dep’t of the Treasury, The CARES Act Preserves Jobs for American Industry, <https://home.treasury.gov/policy-issues/cares/preserving-jobs-for-american-industry> (last accessed Jan. 21, 2021).

<sup>11</sup> US Dep’t of the Treasury, The CARES Act Provides Assistance for State, Local, and Tribal Governments, <https://home.treasury.gov/policy-issues/cares/state-and-local-governments> (last accessed Jan. 21, 2021).

payments, and forgiveness of PPP loans.<sup>12</sup> On July 4, 2020, President Trump signed a law reauthorizing lending under the PPP through August 8, 2020.<sup>13</sup> And on December 27, 2020, President Trump signed a COVID-19 relief bill that amended various aspects of the PPP, including reauthorizing lending to March 31, 2021, increasing the program's total funding to more than \$800 billion, and establishing a "second draw" program for existing PPP borrowers to receive a second PPP loan.<sup>14</sup>

Last, divisions of the U.S. Department of Health and Human Services (HHS), including the Centers for Disease Control and Prevention (CDC), the National Institutes of Health (NIH), and the Biomedical Advanced Research and Development Authority (BARDA), partnered with the Department of Defense (DoD) to create Operation Warp Speed (OWS). OWS has engaged with private firms and other federal agencies with the goal of producing and delivering, on an accelerated timeline, 300 million doses of COVID-19 vaccinations.<sup>15</sup> To fund OWS, Congress provided almost \$10 billion.<sup>16</sup>

## CARES ACT ENFORCEMENT AND OVERSIGHT AUTHORITIES

In addition to providing various sources of funding, described in greater detail in the following section, the CARES Act also created several new watchdog entities with broad oversight and investigative authority. These include the Office of the Special Inspector General for Pandemic

---

<sup>12</sup> See *Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules*, 85 Fed. Reg. 66,214, 66,215 (Oct. 19, 2020).

<sup>13</sup> See *Id.*

<sup>14</sup> See Trump Whitehouse Archives, Bill Announcement (Dec. 27, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/bill-announcement-122720/>; Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. F, §§ 311, 323(a) (2020), <https://www.congress.gov/bill/116th-congress/house-bill/133/text/enr>. Title III of Div. F of the Consolidated Appropriations Act is referred to as the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. *Id.* § 301.

<sup>15</sup> US Dep't of Health and Human Services, Fact Sheet: Explaining Operation Warp Speed, <https://www.hhs.gov/coronavirus/explaining-operation-warp-speed/index.html> (last accessed Jan. 22, 2021).

<sup>16</sup> *Id.*

Recovery (SIGPR),<sup>17</sup> the Pandemic Response Accountability Committee (PRAC),<sup>18</sup> and a five-member congressional oversight commission.<sup>19</sup> The CARES Act also directs the Comptroller General of the United States, who heads the Government Accountability Office (GAO), to conduct monitoring and oversight of the exercise of authority and the receipt, disbursement and use of funds made available by the Act.<sup>20</sup>

In addition to these new authorities, Congress has continued to exercise traditional oversight over the funds and programs included in the CARES Act through the House Committee on Oversight and Reform, the Committee on Financial Services, Energy and Commerce, and Small Business, and the House Select Subcommittee on the Coronavirus Crisis, which was formed on April 23, 2020.<sup>21</sup>

Additional executive agency oversight bodies have been created in the wake of the CARES Act. On September 30, 2020, DOJ announced the creation of the National Rapid Response Strike Force of the Health Care Fraud Unit “to investigate and prosecute fraud cases involving major health care providers.”<sup>22</sup> And as recently as December 4, 2020, HHS announced the False Claims

---

<sup>17</sup> The SIGPR is charged with auditing and investigating loans, loan guarantees and other investments made by the Secretary of the Treasury under Title IV of the CARES Act. CARES Act § 4018. Consistent with other inspectors general, the SIGPR has significant oversight and investigative capabilities, including the ability to subpoena documents from private parties pursuant to section 6(a)(4) of the Inspector General Act of 1978. See *id.* § 4018(d). SIGPR published its first quarterly report to Congress on September 30, 2020. See Office of the Inspector General for Pandemic Recovery, Quarterly Report to the United States Congress (Sept. 30, 2020), [https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020\\_0.pdf](https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020_0.pdf). SIGPR also recently published a strategic plan for fiscal years 2021 to 2023. See Office of the Inspector General for Pandemic Recovery, Strategic Plan: Fiscal Years 2021-2023 (Dec. 2, 2020), <https://www.sigpr.gov/sites/sigpr/files/2020-12/SIGPR-Strategic-Plan-FYs-2021-23.pdf>.

<sup>18</sup> PRAC is a new committee of inspectors general from various federal departments and agencies created to promote transparency and support oversight of CARES Act funds by: (i) detecting and preventing fraud, waste, abuse and mismanagement and (ii) identifying and mitigating major risks that cut across program and agency boundaries. CARES Act § 15010(b). PRAC published its first semiannual report to Congress in October 2020. See Pandemic Response Accountability Committee, Semiannual Report to Congress: April 1, 2020 – September 30, 2020 (Oct. 2020), <https://www.pandemicoversight.gov/media/file/pandemic-response-accountability-committee-semiannual-report-congress>. PRAC has also published its strategic plan through 2025. See Pandemic Response Accountability Committee, Strategic Plan: 2020 – 2025 (July 2020), <https://www.pandemicoversight.gov/media/file/prac-strategic-plan>.

<sup>19</sup> The commission will conduct oversight of the Treasury Department and the Board of Governors of the Federal Reserve as they implement the CARES Act’s economic stabilization provisions. CARES Act § 4020(a)–(b).

<sup>20</sup> *Id.* § 19010(b). On November 30, 2020, the GAO released a report with recommendations to Congress to better address the COVID-19 pandemic. See GAO, Report No. GAO-21-191, COVID-19: Urgent Actions Needed to Better Ensure an Effective Federal Response (Nov. 30, 2020), <https://www.gao.gov/reports/GAO-21-191/>.

<sup>21</sup> See Select Subcommittee on the Coronavirus Crisis, About, <https://coronavirus.house.gov/about> (last accessed Jan. 22, 2021).

<sup>22</sup> Press Release, US Dep’t of Justice, *National Health Care Fraud and Opioid Takedown Results in Charges Against 345 Defendants Responsible for More than \$6 Billion in Alleged Fraud Losses* (Sept. 30, 2020), <https://www.justice.gov/opa/pr/national-health-care-fraud-and-opioid-takedown-results-charges-against-345-defendants>.

Act Working Group, which will coordinate with DOJ and the Office of Inspector General (OIG) to “protect government funds by identifying potential False Claims Act violations and referring them to DOJ and OIG.”<sup>23</sup>

Companies receiving CARES Act assistance should be mindful of the risks presented by participation in a federal program, including investigations and potential enforcement actions conducted by these entities, particularly those related to the FCA. The oversight mechanisms put in place in response to the 2007-08 financial crisis illustrate how these risks may unfold. Like the CARES Act, the 2008 Emergency Economic Stabilization Act (EESA)<sup>24</sup> created oversight entities to police the use of economic relief funds, including a Congressional Oversight Panel and a Special Inspector General for the Troubled Asset Relief Program (SIGTARP), which has recovered more than \$11 billion since 2009 including through the filing of FCA actions.<sup>25</sup> Subsequent legislation also formed the Recovery Accountability and Transparency Board to audit stimulus spending and prevent and detect waste, fraud and mismanagement.<sup>26</sup> The Recovery Board was also highly active, with probes resulting in more than 1,600 criminal convictions, pleas and judgments, and \$157 million in recoveries, forfeitures, seizures and estimated savings.<sup>27</sup>

Because the CARES Act and related legislation provide more than three times the amount of funding made available by the EESA, and this funding is available to a much wider range of recipients, watchdogs like the SIGPR and PRAC have an incredibly wide purview. This may lead to a substantially larger number of FCA investigations and lawsuits than what followed the financial crisis.

Indeed, DOJ has already initiated several criminal actions and investigations since the passage of the CARES Act, typically involving charges against individuals who provided false information in order to obtain millions of dollars in PPP loans, or those who used PPP funds for purposes quite

---

<sup>23</sup> Press Release, US Dep’t of Health and Human Services, *HHS Announces False Claims Act Working Group to Enhance Efforts to Combat Fraud and Focus Resources on Bad Actors* (Dec. 4, 2020), <https://www.hhs.gov/about/news/2020/12/04/hhs-announces-false-claims-act-working-group-enhance-efforts-combat-fraud-and-focus-resources-bad-actors.html>.

<sup>24</sup> Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765 (codified at 12 U.S.C. §§ 5201-5261).

<sup>25</sup> 12 U.S.C. § 5231, 5233; *see also* SIGTARP, About Us, <https://www.sig tarp.gov/Pages/aboutus.aspx> (last accessed Jan. 22, 2021). SIGTARP remains highly active, continuing to conduct criminal and civil investigations and independent audits. SIGTARP’s fiscal year 2019 recoveries alone totaled \$900 million. *Id.*

<sup>26</sup> American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115, § 1521.

<sup>27</sup> *See* Charles C. Clark, *Historic Effort to Track Stimulus Spending Wraps Up*, GOV’T EXEC. (Sept. 28, 2015), <https://www.govexec.com/oversight/2015/09/historic-effort-track-stimulus-spending-wraps/122129/>.



clearly unauthorized by the CARES Act.<sup>28</sup> For example, seven individuals were charged with wire fraud and conspiracy to commit wire fraud for allegedly participating in a scheme to obtain approximately \$16 million in PPP loans by filing at least 80 fraudulent PPP applications. These individuals then allegedly spent the money on luxury items like Porsche and Lamborghini automobiles.<sup>29</sup> Five others were charged for their alleged participation in a scheme to file fraudulent loan applications seeking more than \$1.1 million in PPP loans in the names of businesses with no actual operations or employees.<sup>30</sup> And in yet another scheme, five individuals were charged with fraudulently obtaining more than \$4 million in PPP loans and using them, in part, to purchase luxury vehicles.<sup>31</sup>

The Securities and Exchange Commission (SEC) has also investigated fraud in relation to PPP loans. In March 2020, the SEC formed a Coronavirus Steering Committee to coordinate the Division of Enforcement's response to coronavirus-related enforcement issues.<sup>32</sup> The Committee's mandate is to "proactively identify and monitor areas of potential misconduct, ensure appropriate allocation of our resources, avoid duplication of efforts, coordinate responses as appropriate with other state and federal agencies, and ensure consistency in the manner in which the women and men of the Division address coronavirus-related matters."<sup>33</sup> In furtherance of these efforts, in May 2020, the SEC reportedly began sending requests for documents to recipients of PPP loans to ensure that they were making all required disclosures, as PPP loan recipients must disclose adverse material information that required it to seek PPP funds in the first place, and a financially stable loan recipient may not falsely represent that a PPP loan was "necessary."<sup>34</sup> The SEC also halted trading in the securities of companies that made unsupported claims about COVID-19 drugs

---

<sup>28</sup> Stephen J. Cox, US Att'y, E.D. Tex., *Combating CARES Act Fraud: Ensuring Economic Relief for Americans Through Law Enforcement Efforts* (July 8, 2020), <https://www.justice.gov/usao-edtx/pr/combating-cares-act-fraud-ensuring-economic-relief-americans-through-law-enforcement>; Katie Benner, *Justice Dept. Announces Dozens of Fraud Charges in Small-Business Aid Program*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/09/10/us/politics/ppp-fraud-coronavirus.html?searchResultPosition=5>.

<sup>29</sup> Press Release, US Dep't of Justice, *Seven Charged in Connection with a COVID-Relief Fraud Scheme Involving more than 80 Fraudulent Loan Applications Worth Approximately \$16 Million* (Nov. 17, 2020), <https://www.justice.gov/opa/pr/seven-charged-connection-covid-relief-fraud-scheme-involving-more-80-fraudulent-loan>.

<sup>30</sup> Press Release, US Dep't of Justice, *Five Charged in Connection with COVID-Relief Fraud Scheme* (Oct. 22, 2020), <https://www.justice.gov/opa/pr/five-charged-connection-covid-relief-fraud-scheme>.

<sup>31</sup> Press Release, US Dep't of Justice, *Five Charged in Connection with an over \$4 Million Paycheck Protection Program Fraud Scheme* (Aug. 6, 2020), <https://www.justice.gov/opa/pr/five-charged-connection-over-4-million-paycheck-protection-program-fraud-scheme>.

<sup>32</sup> Steven Peikin, Co-Director, Division of Enforcement, *Keynote Address: Securities Enforcement Forum West 2020* (May 12, 2020), <https://www.sec.gov/news/speech/keynote-securities-enforcement-forum-west-2020>.

<sup>33</sup> *Id.*

<sup>34</sup> Vincent P. Schmeltz III & David Slovick, *U.S. Securities and Exchange Commission Launches Investigations into PPP Loans*, NAT'L L. REV. (May 19, 2020), <https://www.natlawreview.com/article/us-securities-and-exchange-commission-launches-investigations-ppp-loans>.

and screening methods.<sup>35</sup> Last, the SEC has brought enforcement actions against companies and individuals, including actions against issuers purporting to manufacture COVID-19-related products and actions against issuers that made statements related to the impact of COVID-19 on their businesses.<sup>36</sup>

## PRIMARY FUNDING AREAS AND RESULTING FCA RISKS

The CARES Act made available more than \$2 trillion in federal loans, grants and other financial assistance to a wide range of industries that have been affected by the COVID-19 pandemic.<sup>37</sup> As noted above, CARES Act funding dwarfs the federal response to the 2007–2008 financial crisis, when approximately \$800 billion of federal stimulus and recovery funds were authorized by Congress.<sup>38</sup> On December 27, 2020, President Trump signed into law the Consolidated Appropriations Act of 2021,<sup>39</sup> containing an additional \$900 billion in stimulus funding.<sup>40</sup>

As during the 2007–2008 financial crisis, the availability of federal aid presents risk for those who seek to participate in these programs.<sup>41</sup> The civil FCA requires companies and individuals seeking federal funds to be truthful and accurate in representations they make about their eligibility for those funds.

### The Paycheck Protection Program

Title I of the CARES Act established the PPP, which is administered by the SBA.<sup>42</sup> The PPP created a fund of \$659 billion to provide forgivable loans to eligible small businesses that spend the money on enumerated expenses, including payroll, rent, and utilities. On December 27, 2020, President Trump signed into law a second stimulus bill appropriating an additional \$147.45 billion to

---

<sup>35</sup> *Id.*

<sup>36</sup> Michael G. Bongiorno, Christopher Davies, Jessica Lewis, Sierra Shear & Hyun-So Lim, *COVID-19: A Review of the Second Wave of Securities Fraud Enforcement Actions*, WilmerHale (Dec. 30, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20201230-covid-19-a-review-of-the-second-wave-of-securities-fraud-enforcement-actions>.

<sup>37</sup> Letter from Phillip L. Swagel, Director, Congressional Budget Office, to the Honorable Mike Enzi, Chairman, Committee on the Budget, United States Senate (Apr. 27, 2020), <https://www.cbo.gov/system/files/2020-04/hr748.pdf>.

<sup>38</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

<sup>39</sup> See Trump Whitehouse Archives, Bill Announcement (Dec. 27, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/bill-announcement-122720/>; Consolidated Appropriations Act, 2021, Pub. L. 116-260 (2020), <https://www.congress.gov/bill/116th-congress/house-bill/133/text/enr>.

<sup>40</sup> See *id.*

<sup>41</sup> See Matthew Benedetto & Liz Phillips, *What History Tells Us About the Importance of the False Claims Act in a Time of Pandemic*, WilmerHale (May 11, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200511-covid-19-what-history-tells-us-about-the-importance-of-the-false-claims-act-in-a-time-of-pandemic>.

<sup>42</sup> CARES Act § 1102.

the PPP, extending the program to March 31, 2021.<sup>43</sup> To participate in the PPP, borrowers and lenders alike must make multiple certifications to the SBA and thus face potential risk of FCA liability. For instance, a borrower or lender may run afoul of the FCA if it knowingly makes a false certification that it is compliant with the PPP's eligibility rules.<sup>44</sup>

The SBA has issued multiple rounds of guidance in the form of Frequently Asked Questions (FAQs) and Interim Final Rules (IFRs) to help participants in the PPP understand and mitigate various risks,<sup>45</sup> but that guidance was provided, in certain instances, after loan applications were submitted and loan proceeds were disbursed. Guidance has constantly changed over the past eight months, resulting in 25 IFRs and multiple other FAQs and procedural notices seeking to clarify the program.<sup>46</sup>

The guidance provided by the SBA and the Treasury Department may provide some comfort to PPP participants that government regulators are unlikely to second-guess participants' conduct, and the FCA itself requires more than an honest mistake for liability to attach. But both borrowers and lenders must be prepared for scrutiny down the road, with respect to both the loan origination process and submission of loan forgiveness applications. SBA guidance also does not preclude the filing of FCA lawsuits by private plaintiffs.<sup>47</sup> Indeed, a January 11, 2021 report from the SBA Inspector General found at least \$3.6 billion in PPP loans to potentially ineligible borrowers.<sup>48</sup>

---

<sup>43</sup> The recent \$900 billion stimulus package passed by Congress on December 21, 2020, and signed into law by President Trump on December 27, 2020, increased the allocation of funds to the PPP to over \$800 billion, the PPP alone now rivaling the size of the entire stimulus provided in the wake of the 2007-08 financial crisis. See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, § 323(a).

<sup>44</sup> 31 U.S.C. § 3729(a)(1)(B). Under the FCA, "knowingly" is defined as (i) "actual knowledge of the information"; (ii) "deliberate ignorance of the truth or falsity of . . . information"; or (iii) "reckless disregard of the truth or falsity of . . . information." *Id.* § 3729(b)(1)(A). It requires "no proof of specific intent to defraud." *Id.* § 3729(b)(1)(B).

<sup>45</sup> The SBA has continued to update its FAQs, most recently on Dec. 9, 2020, available at: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>. SBA has also released separate Forgiveness FAQs, last updated Oct. 13, 2020, available at: <https://home.treasury.gov/system/files/136/PPP--Loan-Forgiveness-FAQs.pdf>.

<sup>46</sup> A complete list of guidance can be found on the US Dep't of Treasury website for the PPP at: <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> (last accessed Jan. 22, 2021).

<sup>47</sup> These private plaintiffs, called "relators," may receive a cut of the government's total recovery, ranging from 15 to 30 percent depending on whether the United States intervenes in the case. 31 U.S.C. § 3730(d).

<sup>48</sup> SBA Inspector Gen., Report No. 21-06, Paycheck Protection Program Loan Recipients on the Department of Treasury's Do Not Pay List (Jan. 11, 2021), <https://www.sba.gov/sites/default/files/2021-01/SBA%20OIG%20Report%2021-06.pdf>.

The next day, DOJ announced its first settlement with a PPP borrower to resolve allegations that the borrower misrepresented its eligibility for PPP funding and therefore violated the FCA.<sup>49</sup> The Eastern District of California obtained the settlement with SlideBelts Inc., an internet retail company and debtor in bankruptcy, and Brigham Taylor, the company's president and CEO, which agreed to pay \$100,000 in damages and penalties and had already repaid the \$350,000 PPP loan it had fraudulently obtained.<sup>50</sup> As part of the settlement, SlideBelts and Taylor admitted that they made false statements that the company was not in bankruptcy in order to obtain the PPP loan.<sup>51</sup>

### *PPP Loan Origination*

Under the PPP, borrowers were required to certify in good faith at the time of loan origination (1) that the loan request was “necessary” to “support ongoing operations” in light of then-current economic conditions; (2) “that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;” (3) that the borrower did not already have a PPP loan application pending with SBA; and (4) that, for the period from February 15, 2020 to December 31, 2020,<sup>52</sup> the borrower had not already received a PPP loan.<sup>53</sup> The stimulus bill, signed into law on December 27, 2020, creates a “second draw” program that allows for certain borrowers who previously received a PPP loan to receive a second PPP loan, although it would be subject to different rules and eligibility requirements.<sup>54</sup>

In addition, lenders that participated in the PPP were also required to certify to the SBA that they confirmed borrower eligibility, as well as that they complied with the Bank Secrecy Act.<sup>55</sup> Subsequent SBA guidance has made clear that lenders could rely on borrower attestations, although lenders must have “review[ed]” payroll documentation submitted by borrowers in support

---

<sup>49</sup> Press Release, US Atty's Off., E.D. Cal., *Eastern District of California Obtains Nation's First Civil Settlement for Fraud on Cares Act Paycheck Protection Program* (Jan. 12, 2021), <https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> The covered period for PPP loans was extended to March 31, 2021, as part of the stimulus bill signed into law by President Trump on December 27, 2020. The SBA has not yet released updated interim final rules or loan applications, but the certifications will likely change to reflect the March 31, 2021 date.

<sup>53</sup> CARES Act § 1102(a)(2) (amending Section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)).

<sup>54</sup> See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, § 311.

<sup>55</sup> The lender is permitted to rely on the certifications of the borrower to “determine the eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness.” *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20,811, 20,812 (Apr. 15, 2020); see also US Dep't of the Treasury, Paycheck Protection Program (PPP) Information Sheet: Lenders, <https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf> (last accessed Jan. 22, 2021).

of their loan application.<sup>56</sup> The scope of the term “review” remains open to interpretation, even after months of the program’s existence.

These certification requirements raise multiple issues that are relevant to potential FCA exposure. For example, businesses seeking PPP loans must have certified that the loan was “necessary” to support “ongoing operations” due to then-current economic conditions. Businesses could have been uncertain about the exact meaning of the term “necessary,” and the meaning of that term itself may have changed in the past several months, especially as the pandemic moved through multiple “waves,” each resulting in economic distress caused variously by travel restrictions, state “stay at home” orders, and/or outright retail shutdowns.

In an attempt to clarify this important term, the SBA, in consultation with the Treasury Department, has stated that any borrower receiving a PPP loan with an original principal amount under \$2 million may enjoy a safe harbor from SBA audits, enforcement and criminal referral.<sup>57,58</sup> A borrower seeking a loan under this amount “will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”<sup>59</sup>

While this safe harbor certainly provides some comfort in terms of a potential SBA audit or enforcement action, it does not eliminate FCA risk. *First*, the safe harbor itself does not mention the FCA. Indeed, the first civil FCA settlement that DOJ has obtained in connection with PPP loan fraud involved a loan amount of \$350,000. *Second*, this particular FAQ does not preclude the filing of FCA lawsuits by *private persons* against entities that received a PPP loan under \$2 million. *Third*, agency guidance documents do not have the same binding legal effect as do agency rules, and because these FAQs likely constitute only guidance, the FAQs would not provide a complete shield to FCA liability. It is DOJ policy that guidance documents neither create binding requirements that do not already exist by statute or regulation nor can be used by DOJ litigators, where a defendant is noncompliant with such guidance, to prove liability under the FCA.<sup>60</sup> But

---

<sup>56</sup> See US Dep’t of Treasury, Paycheck Protection Program Loans Frequently Asked Questions, Question 1 (Dec. 9, 2020), <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (PPP Loans FAQs (Dec. 9, 2020)) (“[A]s the PPP Interim Final Rule indicates, lenders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs.”).

<sup>57</sup> *Id.* Question 46.

<sup>58</sup> In addition, the SBA promulgated an interim rule that provides a safe harbor to borrowers who paid off their loans by May 14, 2020, and that deadline was subsequently extended to May 18, 2020. *Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request*, 85 Fed. Reg. 29,845, 29,846 (May 19, 2020), <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Extension-of-Limited-Safe-Harbor-with-Respect-to-Certification-Concerning-Need-for-PPP-Loan-Request.pdf>; PPP Loans FAQs (Dec. 9, 2020), Questions 46, 47.

<sup>59</sup> PPP Loans FAQs (Dec. 9, 2020), Question 46.

<sup>60</sup> Memorandum from the Associate Att’y Gen., US Dep’t of Justice to Heads of Civil Litigating Components, United States Attorneys (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.

such enforcement policies would not similarly limit private plaintiffs (or in fact DOJ itself if the source of the alleged noncompliance was the CARES Act or its implementing regulations). Based on the recently announced civil FCA settlement with SlideBelts, a PPP borrower and debtor in bankruptcy, DOJ appears to have concluded that the source of SlideBelt's noncompliance was the implementing regulations of the CARES Act, which provided that a debtor in bankruptcy was not eligible for PPP loan funding.<sup>61</sup> *Fourth*, subsequent SBA guidance has stated that “[f]or a PPP loan of any size, SBA may undertake a review at any time in SBA's discretion,”<sup>62</sup> suggesting that even loans under \$2 million may still face some SBA scrutiny.

This safe harbor, of course, does not insulate borrowers who received loans greater than \$2 million. Those borrowers must have had an “adequate basis” for the loan.<sup>63</sup> And the potential FCA risk is only amplified by Treasury Secretary Mnuchin's comments last year that companies receiving more than \$2 million will face close scrutiny.<sup>64</sup>

### *PPP Loan Forgiveness*

The PPP's loan forgiveness process allows a PPP loan to be forgiven if 60 percent of the amount of the loan was dedicated to payroll expenses, among other lengthy requirements.<sup>65</sup> Borrowers are required to make several additional certifications when applying for loan forgiveness. For example, the borrower must truthfully and accurately complete a loan forgiveness calculation.<sup>66</sup> The borrower must also certify that the funds were used properly and that the borrower verified the payments for both payroll and nonpayroll expenses.<sup>67</sup>

---

<sup>61</sup> *Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act—Interim Final Rule*, 86 Fed. Reg. 3692, 3698 (Jan. 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-14/pdf/2021-00451.pdf>.

<sup>62</sup> *Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities; Interim Final Rule*, 85 Fed. Reg. 33,010, 33,012 (June 1, 2020) (emphasis added).

<sup>63</sup> PPP Loans FAQs (Dec. 9, 2020), Question 46.

<sup>64</sup> Andrew Kragie, *Small-Biz Loans Over \$2M Up For Review, Mnuchin Warns*, LAW360 (Apr. 28, 2020), <https://www.law360.com/articles/1268416/small-biz-loans-over-2m-up-for-review-mnuchin-warns>.

<sup>65</sup> *Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to First Interim Final Rule*, 85 Fed. Reg. 36,308, 36,310-11 (June 16, 2020); see also *Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness*, 85 Fed. Reg. 33,004 (June 1, 2020) (as amended by 85 Fed. Reg. 38,304 (June 26, 2020)).

<sup>66</sup> Paycheck Protection Program Loan Forgiveness Application Revised June 16, 2020, <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>.

<sup>67</sup> *Id.*

In an effort to address borrower confusion, the SBA released two “streamlined” versions of its initial forgiveness application—an “EZ” application<sup>68</sup> for borrowers that were able to meet additional certifications related to hours and wage reductions, and a “Simple” application<sup>69</sup> for borrowers with PPP loans of \$50,000 or less. This resulted in **three** separate forgiveness applications, each with varying certifications and requirements. Though the forms are less burdensome than the initial forgiveness application, borrowers and lenders alike remain uncertain about several requirements—including whether they are eligible to use the simplified forms in the first place.

The PPP forgiveness process is likely to change further for borrowers with PPP loans under \$150,000. Under the stimulus bill signed into law on December 27, 2020, loans of \$150,000 or less shall be forgiven if the recipient provides a certification to its lender (to be not more than one page and established by SBA within 24 days of enactment) and retains records relevant to the certification.<sup>70</sup> This will reduce the amount of documentation lenders are required to review, in turn reducing their exposure to FCA liability.

PPP loan forgiveness procedures nevertheless present FCA risk. Although the First PPP Interim Final Rule includes a safe harbor for lenders in connection with loan forgiveness requests, this safe harbor also omits reference to potential FCA liability. On top of this, borrower forgiveness calculations are quite complex, which amplifies risks for borrowers and raises questions about the degree of due diligence that a lender must undertake upon receiving those calculations—even with the safe harbor in place.<sup>71</sup>

On June 22, 2020, the SBA posted the Interim Final Rule on Revisions to the Loan Forgiveness and Loan Review Procedures Interim Final Rules (June 22 IFR), which provided additional details on PPP lenders’ forgiveness obligations. The June 22 IFR provided that “[l]enders are expected to perform a good-faith review, in a reasonable time, of the borrower’s calculations and supporting documents concerning amounts eligible for loan forgiveness.”<sup>72</sup> The IFR stated that “[i]f the lender identifies errors in the borrower’s calculation or material lack of substantiation in the borrower’s supporting documents, the lender should work with the borrower to remedy the issue.”<sup>73</sup> Lenders

---

<sup>68</sup> Paycheck Protection Program PPP Loan Forgiveness Application Form 3508EZ, <https://home.treasury.gov/system/files/136/PPP-Forgiveness-Application-3508EZ.pdf> (last accessed Jan. 22, 2021).

<sup>69</sup> Paycheck Protection Program PPP Loan Forgiveness Application Form 3508S, <https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-3508S.pdf> (last accessed Jan. 22, 2021).

<sup>70</sup> See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, § 307.

<sup>71</sup> See US Dep’t of Treasury, Paycheck Protection Program Loan Forgiveness Application Revised June 16, 2020, <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>.

<sup>72</sup> 85 Fed. Reg. 38,304, 38,310 (June 26, 2020).

<sup>73</sup> *Id.*

must, among other things, also “confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs.”<sup>74</sup>

Violations of these rules may all result in FCA liability, against not only borrowers but lenders as well. As set forth in a July 23, 2020 SBA Procedural Notice,<sup>75</sup> when submitting Forgiveness Applications to the SBA, lenders must expressly confirm that (1) the submission accurately reflected the lender’s decision regarding the borrower’s loan forgiveness application; (2) the information provided by the lender to SBA with the submission accurately reflected the lender’s records for the PPP loan; (3) the lender made its decision in accordance with the requirements set forth in Part III.2.a. of the PPP Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, as amended;<sup>76</sup> (4) the PPP loan had not been cancelled or repaid; and (5) the lender had not issued a previous loan forgiveness decision to SBA for this PPP loan, unless this was a resubmission following a rejection or a reconsideration of a denial without prejudice.<sup>77</sup>

Additional SBA guidance has created further confusion. For example, the Interim Final Rule on Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules removed the “good-faith review” requirement language for applications submitted using the “Simple” forgiveness application form.<sup>78</sup> Although likely intended to simplify the process for lenders, this omission leaves unclear what type of review is required to satisfy its requirements, with which lenders must certify compliance when submitting forgiveness applications to SBA.

In addition, the stimulus bill signed by President Trump on December 27 includes a “hold harmless” provision for PPP lenders. This provision provides that an enforcement action may not be taken against a lender that relies on borrower certifications or documentation, but only if the lender (1) acts in good faith based on that reliance; and (2) complies with all other relevant Federal, State, local, and other statutory and regulatory requirements.<sup>79</sup> This provision codifies into statute similar language in the Interim Final Rules, clarifying that it applies to both loan origination and forgiveness.<sup>80</sup> It is also broader than the original “hold harmless” provision in the CARES Act,

---

<sup>74</sup> *Id.* at 38,309.

<sup>75</sup> SBA Procedural Notice on Procedures for Lender Submission of Paycheck Protection Program Loan Forgiveness Decisions to SBA and SBA Forgiveness Loan Reviews, Control No. 5000-20038 (July 23, 2020), <https://www.sba.gov/sites/default/files/2020-07/5000-20038.pdf>.

<sup>76</sup> These are the provisions discussed in the above paragraph.

<sup>77</sup> See SBA Procedural Notice, Procedures for Lender Submission of Paycheck Protection Program Loan Forgiveness Decisions to SBA and SBA Forgiveness Loan Reviews, at 5-6 (July 23, 2020), <https://www.sba.gov/sites/default/files/2020-07/5000-20038.pdf>.

<sup>78</sup> *Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules*, 85 Fed. Reg. 66,214, 66,216 (Oct. 19, 2020).

<sup>79</sup> See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, § 305.

<sup>80</sup> See *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20,811, 20,815 (Apr. 15, 2020) (“The Administrator will hold harmless any lender that relies on such borrower documents and attestation from a borrower.”).



which applied only to actions brought under section 47(e) of the Small Business Act.<sup>81</sup> However, though this provision may give some comfort to PPP lenders, it would not preclude the filing of FCA lawsuits from private plaintiffs. Moreover, significant FCA risks remain, since enforcement agencies may determine that a lender either did not act in good faith or failed to comply with other relevant requirements that give rise to FCA liability.

### **Federal Reserve Lending Facilities and Airline Subsidies**

In addition to the small business loans made available under Title I of the CARES Act, other businesses were also eligible to receive loans under Title IV. An eligible business under Title IV was defined broadly as any “United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act.”<sup>82</sup> Loans made under Title IV cannot be reduced through loan forgiveness.<sup>83</sup>

#### *Federal Reserve Facilities*

The CARES Act permitted the Treasury Secretary to use \$454 billion for direct loans and other investments in programs or facilities established by the Federal Reserve.<sup>84</sup> The purpose of these loans was to “provid[e] liquidity to the financial system that supports lending to eligible businesses, States, or municipalities.”<sup>85</sup> Among the facilities established by the Federal Reserve was the Main Street Lending Program, which was intended to provide credit support to small and medium-sized businesses.<sup>86</sup> On November 19, 2020, Treasury Secretary Mnuchin announced that he would not extend the deadline of many of the Federal Reserve facilities, including the Main Street Lending Program, past their December 31, 2020 expiration date.<sup>87</sup> As a result, the Federal Reserve stopped accepting applications under this facility on December 14, 2020.<sup>88</sup> Following Secretary

---

<sup>81</sup> CARES Act § 1106(h).

<sup>82</sup> *Id.* § 4002(4).

<sup>83</sup> *Id.* § 4003(d)(3).

<sup>84</sup> *Id.* § 4003(b)(4).

<sup>85</sup> *Id.*

<sup>86</sup> Federal Reserve, Main Street Lending Program Frequently Asked Questions, A.1 (Apr. 30, 2020), <https://www.federalreserve.gov/monetarypolicy/files/main-street-lending-faqs.pdf>. Other facilities established by the Federal Reserve include the Municipal Liquidity Facility; the Commercial Paper Funding Facility; the Primary Dealer Credit Facility; the Money Market Mutual Fund Liquidity Facility; the Primary Market Corporate Credit Facility; the Secondary Market Corporate Credit Facility; the Term Asset-Backed Securities Loan Facility; Paycheck Protection Program Liquidity Facility; Central Bank Liquidity Swaps; and the Temporary Foreign and International Monetary Authorities Repo Facility. See Federal Reserve, Coronavirus Disease 2019 (COVID-19) Funding, Credit, Liquidity, and Loan Facilities, <https://www.federalreserve.gov/funding-credit-liquidity-and-loan-facilities.htm> (last accessed Jan. 22, 2021).

<sup>87</sup> Steve Leisman, *Borrowers Looking to Use Fed’s Main Street Lending Program Run into Dead End*, CNBC (Dec. 8, 2020), <https://www.cnbc.com/2020/12/08/borrowers-looking-to-use-feds-main-street-lending-program-run-into-dead-end.html>.

<sup>88</sup> *Id.*

Mnuchin's announcement, businesses began using the Main Street Lending Program at a record pace, drawing almost \$2.7 billion in loans during the week ending December 16, 2020, thus bringing the total amount of outstanding Main Street loans to \$10 billion.<sup>89</sup> These facilities terminated on December 31, 2020, thus rescinding any unused funding—roughly \$429 billion as of December 2020.<sup>90</sup>

The Main Street Lending Program included three facilities: the Main Street New Loan Facility, the Main Street Priority Loan Facility, and the Main Street Expanded Loan Facility. Each of the three facilities used the same lender- and borrower-eligibility criteria, and under each, the lenders and borrowers were required to make a number of certifications, presenting wide risks for FCA liability in the event that any knowingly false certifications were made.

For example, under the Main Street New Loan Facility, the lender was required to attest that the proceeds of the loan would not be used to repay or refinance pre-existing loans or lines of credit made by the lender to the borrower and that the lender would not “cancel or reduce any existing lines of credit outstanding” to the borrower.<sup>91</sup> The borrower, in turn, had to make a number of attestations about its eligibility, including that the loan proceeds were “necessary” in light of current conditions and that they would be used to “make reasonable efforts to maintain its payroll and retain its employees” during the term of the loan; that the borrower would not use the loan proceeds to repay other loan balances; and that it would not repay other debt of equal or lower priority until it had repaid the loan in full.<sup>92</sup>

A mid-sized business (defined as one with between 500 and 10,000 employees) receiving assistance under Federal Reserve programs had to make certain certifications beyond the “necessity” and workforce-retention certifications discussed above.<sup>93</sup> For instance, the mid-sized borrower had to certify that it was a U.S.-domiciled business; that it would not offshore or outsource any jobs for the term of the loan plus two years; and that it would remain “neutral” in any union organizing effort for the term of the loan.<sup>94</sup> It is noteworthy that only mid-sized businesses had to make certifications regarding union organization. And only mid-sized businesses had to agree not

---

<sup>89</sup> Dan Burns, *Fed's Main Street Lending Sees Record Volume in Closing Days*, REUTERS (Dec. 17, 2020), <https://www.reuters.com/article/us-usa-fed-mainstreet/feds-main-street-lending-sees-record-volume-in-closing-days-idUSKBN28R3CG>.

<sup>90</sup> See Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. N, § 1005(3) (2020), <https://www.congress.gov/bill/116th-congress/house-bill/133/text/enr> (amending CARES Act § 4029 by adding subsec. (c)). There is an exception for any “loan submitted, on or before December 14, 2020, to the Main Street Lending Program’s lender portal for the sale of a participation interest in such loan, provided that the Main Street Lending Program purchases a participation interest in such loan on or before January 8, 2021 . . . .” *Id.*

<sup>91</sup> Federal Reserve, Main Street New Loan Facility Term Sheet (Apr. 9, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a7.pdf>.

<sup>92</sup> *Id.*

<sup>93</sup> CARES Act § 4003(c)(3)(D)(i).

<sup>94</sup> *Id.*

to outsource or offshore jobs. Thus, it seems that mid-sized businesses bore the weight of certain congressional policy goals also advanced by the CARES Act.

The Federal Reserve did not require a mid-sized business borrower to in fact restore its workforce. Failure to restore a workforce, however, could be used as evidence that the borrower made a false certification to obtain the loan—even if the borrower did in fact intend to restore the workforce when the certification was made but intervening circumstances made such restoration financially impracticable.

#### *Loans to Air Carriers and Businesses Critical to National Security*

Title IV of the CARES Act also provided a total of \$46 billion in funds to make loans to air carriers and businesses critical to maintain national security.<sup>95</sup> On September 29, 2020, the Department of the Treasury announced that it closed loans to seven large passenger airlines under this provision.<sup>96</sup> Treasury’s authority to make these loans terminated on December 31, 2020.

The Treasury Secretary had to ensure that any loan agreement with these businesses contained various provisions.<sup>97</sup> For instance, the agreement must have provided that, until 12 months after the loan or loan guarantee is not outstanding, the business will not purchase an equity security listed on a national securities exchange of the business and the business will not pay dividends or make capital distributions.<sup>98</sup> The business must have also agreed that, “to the extent practicable,” until September 30, 2020, it would not reduce its employment levels by more than 10 percent of what the level was as of March 24, 2020.<sup>99</sup> Finally, the Secretary must have determined that “the continued operations of the business [were] jeopardized.”<sup>100</sup>

These requirements pose slightly different FCA risks. For example, the Secretary was tasked with determining that the business had incurred, or was expected to incur, losses that jeopardized the business, on the basis of information provided by the business. The Treasury Department has not said how exactly the Secretary made these determinations. But there can be no question that any

---

<sup>95</sup> *Id.* § 4003(b)(1)-(3).

<sup>96</sup> Press Release, US Dep’t of the Treasury, *Treasury Concludes Loans to Seven Major Airlines, Supports Additional Relief for Aviation Industry Workers* (Sept. 29, 2020), <https://home.treasury.gov/news/press-releases/sm1140>. As of December 2020, \$21.9 billion of loans have been obligated. See GAO, Report No. GAO-21-198, *Financial Assistance: Lessons Learned from CARES Act Loan Program for Aviation and Other Eligible Businesses* (Dec. 2020), <https://www.gao.gov/assets/720/711174.pdf>.

<sup>97</sup> CARES Act § 4003(c)(2).

<sup>98</sup> *Id.* § 4003(c)(2)(E), (F).

<sup>99</sup> *Id.* § 4003(c)(2)(G).

<sup>100</sup> *Id.* § 4003(c)(2)(I).

false statement made knowingly by a borrower to the Treasury Department could be the basis for a criminal referral or a potential FCA action.

Also notable under Title IV is that the Secretary is “authorized to designate financial institutions, including but not limited to depositories, brokers, dealers, and other institutions, as financial agents of the United States” in order to perform “all reasonable duties as the Secretary determines necessary to respond to the coronavirus.”<sup>101</sup> The financial institutions will be paid with federal funds.<sup>102</sup> Therefore, in addition to the potential exposure arising from lending conduct, as described above, financial institutions may also face FCA liability if they are designated as agents of the United States and do not perform their duties truthfully.<sup>103</sup>

## Healthcare Funding

### *Funding for Healthcare Providers*

Title III of the CARES Act focused on the country’s healthcare system and created opportunities for companies to contract with the government to combat COVID-19. The Act expanded the ability of healthcare companies that manufacture medical devices and diagnostics to contract with the government for COVID-19-relief innovation, and it also provided over \$100 billion to healthcare providers for expenses or lost revenue attributable to the pandemic. These programs were designed to reinforce the country’s healthcare system and to promote innovation to fight the virus. But they also present additional risk for FCA liability.

### Healthcare Innovation

Title III expanded the ability of the HHS Secretary to enter into agreements with the private sector to foster “flexible, strategic partnership[s] between the government and industry” in support of coronavirus-related biomedical innovation.<sup>104</sup> The CARES Act expanded the ability of the HHS Secretary to enter into these agreements to combat a public health emergency.

This expansion provided additional opportunities for healthcare innovators to partner with the government, and HHS has actively solicited proposals for development and licensure of

---

<sup>101</sup> *Id.* § 4003(g).

<sup>102</sup> *Id.* § 4003(g)(2).

<sup>103</sup> As of December 2020, one bank has entered into a financial agency agreement with the U.S. Department of the Treasury under § 4003(g) of the CARES Act. See US Dep’t of the Treasury, Doing Business with OFS, <https://www.treasury.gov/initiatives/financial-stability/procurement/faa/Pages/faa.aspx>; see also Financial Agency Agreement for Custodian and Infrastructure Services for Programs Under the Coronavirus Aid, Relief, and Economic Security Act between the U.S. Department of the Treasury and The Bank of New York Mellon (Apr. 14, 2020), <https://home.treasury.gov/system/files/136/BNY-Mellon-Custodian-FAA-for-CARES-Act-Custodian-EXECUTED-04-14-2020.pdf>.

<sup>104</sup> US Dep’t of Health and Human Services, Public Health Emergency, Other Transaction Agreements, <https://www.phe.gov/about/amcgotar/Pages/default.aspx> (last accessed Jan. 22, 2021).

coronavirus diagnostics, vaccines and medicines.<sup>105</sup> Indeed, shortly after the passage of the CARES Act, HHS entered into a number of multimillion-dollar partnerships for development of coronavirus vaccines. Those who seek to enter into a partnership with the government were asked to submit a “brief description of [the] product or technology, accompanied by a slide deck, manuscript, publications, or other non-confidential information.”<sup>106</sup> Any false statements made by a prospective innovation partner regarding its bona fides, its product or its technology, which the company knows would be material to the government’s decision to enter into the partnership, may subject the healthcare innovator to FCA risk.

This sort of partnership with HHS also raises a different type of FCA risk than that presented by the loan programs discussed above. We have already discussed how a false statement made knowingly to the SBA or to the Treasury Department that is material to the government’s decision to approve a CARES Act loan may present FCA risk, and that risk analysis would be the same here. However, this sort of entrepreneurial private-public partnership also raises questions about the ultimate efficacy of the proposed innovation and the sorts of representations by an ambitious innovator that could potentially run afoul of the FCA. Specifically, some courts have recognized the “worthless services” theory of FCA liability, which “allows a *qui tam* relator to bring claims for violations of the FCA premised on the theory that the defendant received reimbursement for products or services that were worthless.”<sup>107</sup> If, for instance, a biotech or pharmaceutical company received funding through this HHS partnership and ultimately developed and manufactured a test, drug or device that did not work, that company could find itself on the wrong end of an FCA lawsuit under a “worthless services” theory. The United States or a private plaintiff could allege not only that the test, drug or device did not work, but that it had “no medical value” and was “so deficient that for all practical purposes it [was] the equivalent of no performance at all.”<sup>108</sup> Title III of the CARES Act promotes biotech innovation, but it does not sanction healthcare fraud.

#### CARES Act Provider Relief Fund

The CARES Act also appropriated \$100 billion to a Provider Relief Fund for “eligible health care providers for health care related expenses or lost revenues that are attributable to coronavirus.”<sup>109</sup>

---

<sup>105</sup> Press Release, US Dep’t of Health and Human Services, *HHS Solicits Proposals for Development of Medical Products for Novel Coronavirus* (Mar. 6, 2020), <https://www.hhs.gov/about/news/2020/03/06/hhs-solicits-proposals-for-development-of-medical-products-for-novel-coronavirus.html>.

<sup>106</sup> US Dep’t of Health and Human Services, Request a USG Coronawatch Meeting, <https://www.medicalcountermeasures.gov/Request-BARDA-TechWatch-Meeting> (last accessed Jan. 22, 2021).

<sup>107</sup> *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 709 (7th Cir. 2014).

<sup>108</sup> *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011).

<sup>109</sup> CARES Act, Div. B, Title VIII, Department of Health and Human Services, Office of the Secretary, Public Health and Social Services Emergency Fund. On April 24, 2020, the President signed a law that provided an additional \$75 billion for this purpose. See Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620, Div. B, Title I

Healthcare-provider recipients of such payments, including hospitals and doctors, have mandatory reporting requirements and must sign an electronic attestation confirming receipt of funds and their agreement to certain terms and conditions.<sup>110</sup>

The terms and conditions, in turn, require healthcare providers to make a number of certifications. These certifications include that the provider billed Medicare in 2019; provides diagnoses, testing or care for individuals with “possible or actual cases of COVID-19;” and is not currently terminated or excluded from participating in Medicare or other federal healthcare programs.<sup>111</sup> The provider must also certify that the funds “will only be used to prevent, prepare for, and respond to coronavirus,” and not to pay other unrelated expenses.<sup>112</sup> There is no required certification concerning actual funding needs.

It remains unclear how HHS will determine whether a healthcare provider has used CARES Act funds “to prevent, prepare for, and respond to coronavirus” or whether HHS will require additional documentation to substantiate such a certification.

Moreover, the ambiguity of the phrase “possible or actual cases of COVID-19” presents further FCA risk because neither the CARES Act nor the Terms and Conditions define what it means to be a “possible case of COVID-19,” though the Provider Relief Fund FAQs state that “HHS broadly views every patient as a possible case of COVID-19.”<sup>113</sup> This ambiguity may give rise to FCA risk.

However, an FCA plaintiff must prove the elements of falsity and knowledge to succeed on an FCA claim. Courts are split on whether the alleged false statement must represent an “objective falsehood.” Both the Third Circuit and the Ninth Circuit held last year, in “medical necessity” cases involving federal healthcare programs, that proof of an “objective falsehood” is not required in order to succeed on an FCA claim. In *United States v. Care Alts.*, 952 F.3d 89, 100–101 (3d Cir. 2020), the Third Circuit “reject[ed] the objective falsehood standard,” concluding instead that a “claim may

---

(2020). The Provider Relief Fund has obligated over \$135 billion to providers affected by the coronavirus as of October 22, 2020. See US Dep’t of Health and Human Services, Reporting Requirements Policy Update (Oct. 22, 2020), <https://www.hhs.gov/sites/default/files/reporting-requirements-policy-update.pdf>. The deadline for providers to apply for the latest round of funding (the “Phase 3 General Distribution”) was November 6, 2020. US Dep’t of Health and Human Services, CARES Act Provider Relief Fund: For Providers, <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/for-providers/index.html> (last accessed Jan. 22, 2021).

<sup>110</sup> US Dep’t of Health and Human Services, CARES Act Provider Relief Fund: For Providers, <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/for-providers/index.html> (last accessed Jan. 22, 2021).

<sup>111</sup> US Dep’t of Health and Human Services, Acceptance of Terms and Conditions, <https://www.hhs.gov/sites/default/files/terms-and-conditions-provider-relief-20-b.pdf> (last accessed Jan. 22, 2021).

<sup>112</sup> *Id.*

<sup>113</sup> US Dep’t of Health and Human Services, Provider Relief Fund General Information (FAQs), Overview, Who is eligible to receive payments from the Provider Relief Fund? (Modified Dec. 4, 2020), <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/provider-relief-fund-general-info/index.html#pr-overview> (last accessed Jan. 22, 2021).

be 'false' under a theory of legal falsity, where it fails to comply with statutory and regulatory requirements." The Court explicitly rejected the "bright-line rule that a doctor's clinical judgment cannot be 'false.'" *Id.* at 98. The Ninth Circuit similarly held that the FCA does not include a requirement of proving "objective falsity" in the Medicare reimbursement context. *Winter ex rel. United States v. Gardens Reg'l Hosp. and Med. Ctr., Inc.*, 953 F.3d 1108, 1113 (9th Cir. 2020). The Courts agreed that any alleged false statement must be capable of being verified as false. See *Winter*, 953 F.3d at 1119 (a medical opinion can be false if "not honestly held, or if it implies the existence of facts—namely, that inpatient hospitalization is needed to diagnose or treat a medical condition, in accordance with accepted standards of medical practice—that do not exist."); *Care Alts.*, 952 F.3d at 97 ("FCA falsity simply asks whether the claim submitted to the government as reimbursable was in fact reimbursable, based on the conditions for payment set by the government."). Healthcare providers who have received Provider Relief Funds should thus be prepared clinically to support any diagnoses in order to avoid FCA liability.

### Operation Warp Speed

OWS is another public-private partnership initiated by the U.S. government, aiming to produce and deliver 300 million doses of safe and effective vaccines beginning in January 2021.<sup>114</sup> The vaccine developed by Moderna Therapeutics, which received nearly \$1 billion from OWS to develop the vaccine, is already being distributed across the country after receiving Emergency Use Authorization from the FDA on December 18, 2020.<sup>115</sup> OWS is "part of a broader strategy to accelerate the development, manufacturing, and distribution of COVID-19 vaccines, therapeutics, and diagnostics (collectively known as countermeasures)."<sup>116</sup> It is a partnership among divisions of HHS, including CDC, NIH, and BARDA, and DoD.<sup>117</sup> Congress has directed almost \$10 billion to this effort. This includes more than \$6.5 billion designated for countermeasure development through BARDA and \$3 billion for NIH research.<sup>118</sup>

\*\*\*

The FCA was passed by a Civil War Congress in the midst of a national crisis. It remains, more than 150 years later during the current public health crisis, a potent anti-fraud tool available to both federal regulators and private plaintiffs under the Act's qui tam provisions. Those individuals and companies that have availed themselves of CARES Act funding and programs need to be mindful

---

<sup>114</sup> US Dep't of Health and Human Services, Fact Sheet: Explaining Operation Warp Speed, <https://www.hhs.gov/coronavirus/explaining-operation-warp-speed/index.html> (last accessed Jan. 22, 2021).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

of the FCA risks that participation in those programs creates. History tells us that the FCA will be used to remedy any misconduct.

## ***Key FCA Developments in 2020 By Topic***

We have summarized the key developments of the year on important FCA topics immediately below. A fuller treatment of the decisions follows in a more detailed summary of the major 2020 developments from each circuit.

### **Pleading and Rule 9(b)**

In a decision affirming the dismissal of a qui tam complaint on Rule 9(b) grounds, the Eighth Circuit embraced the view that Rule 9(b) does not allow a relator to “detail a private scheme to defraud” and then “speculate” that false claims must have been submitted as a result; rather, the relator must provide sufficient “indicia of reliability” to establish the submission of false claims. *United States ex rel. Benaissa v. Trinity Health*, 963 F.3d 733, 740 (8th Cir. 2020). The Court recognized the difficulties that its decision posed for potential relators outside of a defendant’s billing department—readily observing that “an insider might have an easier time obtaining information about billing practices and meeting the pleading requirements under the FCA.” 963 F.3d at 741 (citations and quotation marks omitted).

### **Falsity**

The Third and Ninth Circuits each rejected the view that an “objective falsehood” is required to state a claim under the FCA, holding that medical judgments can form the basis of FCA liability. See *United States ex rel. Druding v. Care Alts.*, 952 F.3d 89, 95-97 (3d Cir. 2020), and *Winter ex rel. United States v. Gardens Reg’l Hosp. and Med. Ctr., Inc.*, 953 F.3d 1108, 1113 (9th Cir. 2020). In particular, the Ninth Circuit explained that opinions are actionable where they are “not honestly held” or “impl[y] the existence of facts that do not exist.” *Winter ex rel. United States*, 953 F.3d at 1117. A petition for certiorari is pending with respect to the Third Circuit’s decision. The petition presents the question: “Whether a physician’s honestly held clinical judgment regarding hospice certification can be ‘false’ under the False Claims Act based solely on a reasonable difference of opinion among physicians.” See Pet. for Writ of Certiorari, *Care Alts. v. United States ex rel. Druding*, No. 20-371 (S. Ct. Sept. 16, 2020).

### **Materiality**

The Second Circuit held that, for purposes of determining materiality in the context of a fraudulent inducement case, courts should look at the government’s decision to enter the relevant contract in the first instance, not just at its decision to pay claims under the contract—rejecting the view that only the latter should be considered as the relevant “payment decision” under *Escobar*. *United States v. Strock*, 982 F.3d 51, 59 (2d Cir. 2020).



The Tenth Circuit affirmed summary judgment in favor of the defendant on materiality grounds, explaining that the focus under *Escobar* is whether there is “some quotient of potential influence on the [government] decisionmaker”—and, on the particular facts of the case, concluded that the government’s “inaction in the face of detailed allegations from a former employee suggest[ed] immateriality.” *United States ex rel. Janssen v. Lawrence Mem’l Hosp.*, 949 F.3d 533, 540-42 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 376 (Oct. 5, 2020). The Court also agreed that separate instances of regulatory noncompliance were immaterial, as they were “precisely the type of garden variety compliance issues that the demanding materiality standards of the FCA are meant to forestall.” 949 F.3d at 544-45.

### **Scienter**

The Fourth Circuit affirmed the dismissal of a qui tam complaint, holding that allegations of regulatory violations, coupled with conclusory allegations that false claims were submitted “knowingly,” without more, are insufficient to plausibly allege scienter—emphasizing the lack of any allegations that would indicate that defendants knew of the potential violation and questioning whether the regulation even applied in the circumstances at issue. *United States ex rel. Complin v. N. Carolina Baptist Hosp.*, 818 F. App’x 179, 181 (4th Cir. 2020).

### **Causation**

The Eleventh Circuit sustained significant portions of a jury verdict in favor of the relator in a decision formally adopting the “proximate causation” standard for 31 U.S.C. § 3729(a)(1)(A)(2). The court of appeals explained that “proximate causation is a useful and appropriate standard by which to determine whether there is a sufficient nexus between the defendant’s conduct and the submission of a false claim.” *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1107 (11th Cir. 2020).

### **Damages**

The First Circuit provided guidance on when relators may seek damages based on the full contract price of a fraudulently tainted contract, rather than only on the difference in value between the full contract price and the actual value of the goods or services provided—holding that damages based on the full contract price are typically available only where the contractor provides “no tangible benefit to the government and the intangible benefit is impossible to calculate.” *United States ex rel. Concilio de Salud Integral De Loiza, Inc. v. J.C. Remodeling, Inc.*, 962 F.3d 34, 43 (1st Cir. 2020).

### **First-To-File and Public Disclosure Bar**

The First Circuit held that a relator may qualify as an original source based on information learned from colleagues via word of mouth, even where he was not a direct participant in the events in

question and was not aware of the fraud until it was winding down. See *United States ex rel. Banigan v. PharMerica Inc.*, 950 F.3d 134 (1st Cir. 2020).

The Second Circuit ruled that, for cases subject to the pre-2010 public disclosure bar, courts must first address whether the jurisdictional bar applies before applying the first-to-file bar, which the Court has held is *not* jurisdictional, but rather goes to the merits of whether the relator has stated a claim. See *United States ex rel. Hanks v. United States*, 961 F.3d 131 (2d Cir. 2020). The Third Circuit likewise held that the first-to-file bar is not jurisdictional, joining the D.C., First, and Second Circuits in so holding—and further entrenching the split with the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, which have held that the bar is jurisdictional. See *In re Plavix Mktg., Sales Practices and Prods. Liab. Litig. (No. II)*, 974 F.3d 228, 231-32 (3d Cir. 2020)

The Sixth Circuit issued two decisions in 2020 applying the public-disclosure bar to affirm the dismissal of qui tam suits. While the cases arose from circumstances that made application of the bar straightforward (each involving relators bringing cases closely related to previously resolved FCA suits), the Sixth Circuit’s practical standard for determining whether a qui tam suit involves “substantially the same” allegations as those that have been publicly disclosed, as required by 31 U.S.C. § 3730(e)(4)(A), is notable in the breadth it affords the statutory bar. Specifically, the Sixth Circuit said the test is whether the publicly disclosed information would be “sufficient to set the government on the trail of the alleged fraud without the relator’s assistance.” *United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516, 524 (6th Cir. 2020).

In a procedurally unusual case implicating the FCA’s first-to-file bar, the Ninth Circuit dismissed an appeal for lack of jurisdiction where the party formally pursuing the appeal was a former relator who had been dropped from the proceedings below for tactical purposes only to see the district court dismiss the case on first-to-file grounds as a result of the tactical maneuvering. *United States ex rel. Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237 (9th Cir. 2020). The case serves as a cautionary tale for relators who engage in tactical conduct with respect to the nominal parties formally pursuing the claims.

### **DOJ’s Dismissal Authority**

The Second, Seventh, and Ninth Circuits each issued important decisions regarding the government’s statutory right to dismiss qui tam suits under 31 U.S.C. § 3730(c)(2)(A)—an issue that has garnered significant attention among FCA practitioners since DOJ issued the so-called Granston Memo in January 2018, delineating the factors DOJ would use to evaluate whether to seek dismissal of a qui tam suit.<sup>119</sup>

---

<sup>119</sup> Memorandum from Michael D. Granston, Dir., Comm. Litig. Br., Fraud Section, US Dep’t of Justice, to Att’ys, Comm. Litig. Br., Fraud Section (Jan. 10, 2018), <https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf>.

The FCA's statutory dismissal provision is unusual in that it allows the government to seek dismissal of qui tam suits over the relator's objection; as the Seventh Circuit has explained: "The power of a non-party to force dismissal of another's lawsuit is otherwise unheard of in our law." *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 842 (7th Cir. 2020). And the issue has led to an entrenched circuit split on the proper standard to apply in adjudicating motions to dismiss under this provision—with the D.C. Circuit holding that the government has an "unfettered" statutory right of dismissal, *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), and the Ninth and Tenth Circuits holding that that the government must point to a "valid government purpose" for dismissal and a "rational relation between dismissal and accomplishment of that purpose," *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *United States ex rel. Ridenour v. KaiserHill Co.*, 397 F.3d 925, 936 (10th Cir. 2005).

In one of two major decisions this year regarding the government's dismissal authority, the Ninth Circuit dismissed DOJ's appeal from the *denial* of the government's motion to dismiss—holding that DOJ was not entitled to appeal under the collateral order doctrine and thus denying the appeal for lack of appellate jurisdiction. *United States v. Acad. Mortg. Corp.*, 968 F.3d 996 (9th Cir. 2020). The district court had denied the government's motion to dismiss on the ground that the government had failed to meet its burden of establishing a "valid governmental purpose" for dismissal, as the government had not investigated the relator's claims and therefore in the district court's view, could not carry out a meaningful cost-benefit analysis to support dismissal. 968 F.3d at 1000. The government directly appealed the denial rather than seeking district court certification to pursue an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Ninth Circuit noted that denials of motions to dismiss are generally not immediately appealable and held that, even under the FCA, they did not fit within the narrow class of orders subject to immediate appeal under the collateral order doctrine.

In the second major decision regarding the government's dismissal authority, the Seventh Circuit broke with both the D.C. and Ninth Circuit tests—instead holding that: (i) the government must intervene before it can exercise its dismissal authority, and (ii) having intervened, the government has an "unrestricted substantive right" under Fed. R. Civ. P. 41(a) to dismiss cases, subject only to the general constraints on executive authority imposed by the Constitution. *United States ex rel. CIMZNHCA*, 970 F.3d at 850-53. Before reaching the merits, however, the court of appeals first had to solve a "jurisdictional problem" in the case, which arose on the government's appeal from a denial of its motion to dismiss and, as noted, denials of motions to dismiss are ordinarily not immediately appealable. The Court solved the jurisdictional problem by constructively treating the government's motion to dismiss as a *motion to intervene* (and dismiss), as denials of motions to intervene are immediately appealable. In doing so, the Court was able to entertain the appeal without expanding the narrow class of rulings subject to interlocutory appeal under the collateral order doctrine.

In *United States ex rel. Borzilleri v. AbbVie, Inc.*, 2020 WL 7039048 (2d Cir. Dec. 1, 2020), the Second Circuit affirmed a district court's grant of the government's motion to dismiss under 31 U.S.C. § 3730(c)(2)(A) without deciding whether to adopt the D.C. or Ninth Circuit standards, as the motion would have prevailed under either.

## Retaliation

The First and Eleventh Circuits each held that the more rigid “but-for” causation standard rather than the more lenient “substantial motivating factor” standard applied to FCA retaliation claims—joining one side of an entrenched circuit split on the question. See *Lestage v. Coloplast Corp.*, 982 F.3d 37, 47 (1st Cir. 2020); *Nesbitt v. Candler Cty.*, 945 F.3d 1355 (11th Cir. 2020). As the law currently stands, the First, Third, Fourth, Fifth, and Eleventh Circuits have held that FCA plaintiffs must establish that their FCA-protected activities were a “but-for” cause of the alleged acts of retaliation; by contrast, the D.C. Circuit, as well as the Sixth and Seventh Circuits, have held that plaintiffs need only establish that their FCA-protected activities were a “substantial motivating factor” for the alleged retaliation.

The Eighth Circuit held that a plaintiff alleging retaliation under the FCA must establish that “the retaliation was motivated *solely* by [the plaintiff's] protected activity” in order to state a prima facie case on summary judgment that would shift the burden to the defendant under the *McDonnell Douglas* burden-shifting framework that courts have applied in the FCA context. *Sherman v. Berkadia Comm. Mortg. LLC*, 956 F.3d 526, 532 (8th Cir. 2020) (emphasis added). The Court explained that this causal link is “tighter than that required in other types of retaliation and discrimination claims [that] use the same *McDonnell Douglas* framework.” *Id.*

## Corporate Veil-Piercing

The D.C. Circuit allowed DOJ to pierce the corporate veil to hold an owner personally liable for damages resulting from corporate FCA violations, even though the owner was not found directly liable for the FCA violations themselves. *United States v. Dynamic Visions Inc.*, 971 F.3d 330 (D.C. Cir. 2020). While the particular circumstances of this case are unlikely to recur in large-scale FCA matters (the case involved a small, individually owned firm that failed to observe corporate formalities), the D.C. Circuit demonstrated a willingness to allow veil piercing to prevent a party from profiting off the submission of false claims by a wholly-owned company.

## Litigation Funding

The Eleventh Circuit held that a relator who had assigned a small percentage of her recovery to a litigation funding firm retained a sufficient interest in the case for Article III standing, reasoning that she retained sole authority over the litigation, that the United States had suffered injury, and that the relator was an assignee of the United States under the qui tam provisions of the FCA. *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1102 (11th Cir. 2020).

## Qualified Immunity

The Fourth Circuit held that qualified immunity may not be invoked by government officials as a defense to FCA liability—entertaining an interlocutory appeal from the defendants whose motion to dismiss was denied, but ultimately holding that qualified immunity was unavailable as a defense, because the same showing of intentionality or recklessness required to establish FCA liability would overcome the defense of qualified immunity. *United States ex rel. Citynet, LLC v. Gianato*, 962 F.3d 154, 159-60 (4th Cir. 2020).

## *2020 Case Law Developments By Circuit*

### D.C. Circuit: Veil-Piercing

#### *United States v. Dynamic Visions Inc.*, 971 F.3d 330 (D.C. Cir. 2020)

The D.C. Circuit largely affirmed the district court's decision on summary judgment to pierce the corporate veil and hold the owner of a corporate defendant personally liable for damages.

#### *About the Case*

DOJ brought an FCA action against a home health care provider and its sole owner and CEO for allegedly submitting false claims to the District of Columbia Medicaid program after an audit found that Dynamic Visions, Inc. submitted claims for repayment despite regularly failing to prepare a Plan of Care (POC) for its patients as required by Medicaid regulations to which it had certified compliance. 971 F.3d at 333. An ensuing FBI investigation revealed that the sole owner and CEO of the company had been funneling money from the corporate accounts into his own private accounts.

The defendants failed to comply with discovery and other procedural orders and were subjected to sanctions that limited the evidence they were able to introduce and resulted in constructive admissions of most of the government's factual assertions at summary judgment. The district court therefore found that there were no genuine disputes regarding Dynamic Visions' failure to comply with its Medicaid obligations. Given the small size of the company (with only six employees) and the ubiquitous nature of the compliance failures, the district court also held that the company was "at least reckless" in submitting unauthorized claims. 971 F.3d at 335. The district court granted summary judgment to the government. Although there was insufficient evidence that the owner was personally aware of the submission of false claims to hold him directly liable, the district court determined that the corporate veil should be pierced.

The D.C. Circuit affirmed in significant part. The Court had little trouble finding the evidence sufficient to affirm that Dynamic Visions had violated the FCA. With respect to piercing the corporate veil, the Court acknowledged that the owner appeared to have a "past history of

compliance” with regulatory requirements, but agreed that “it would be unjust to allow [the owner] to retain funds wrongfully taken from, and now owed to, the government.” 971 F.3d at 339.

#### *Implications for Future FCA Cases*

Although the particular combination of factors in this case may not regularly recur in large-scale FCA matters—*i.e.*, a small company, individual ownership and control, and a lack of corporate formalities—the D.C. Circuit demonstrated a willingness to allow veil piercing to prevent an individual from profiting from the submission of false claims by a company he wholly owns. This could have implications for corporate parents, particularly where the parents receive funds directly from subsidiaries found to have violated the FCA.

#### **First Circuit: Public Disclosure; Retaliation; Damages**

##### ***United States ex rel. Banigan v. PharMerica Inc.*, 950 F.3d 134 (1st Cir. 2020)**

The First Circuit reversed the district court’s dismissal of a qui tam action against PharMerica, Inc., holding that the “original source” exception to the public disclosure bar applied to the relator—reasoning that knowledge learned through word of mouth could still qualify as “direct” knowledge for purposes of the exception.

#### *About the Case*

Two former employees of pharmaceutical company Organon filed a qui tam suit against Organon, PharMerica (a long-term care company), and other companies based on an alleged scheme to incentivize physicians to change patients’ prescriptions to Organon products. The district court dismissed the action under the public disclosure bar, which precludes qui tam actions arising from allegations that have been publicly disclosed in specified circumstances, unless the relator is “an original source” of the information. 31 U.S.C. § 3730(e)(4).

The First Circuit reversed, holding that one of the relators was an “original source” with respect to the fraud. 950 F.3d at 137. The Court explained that, under the version of the public disclosure bar in effect at the time, an “original source” must have both “direct and independent knowledge” of the information on which the allegations are based. While an earlier FCA action against PharMerica involving the same scheme triggered the public disclosure bar, the Court concluded that the relator had direct and independent knowledge of the fraud through emails and conversations with colleagues separate from that litigation. The Court rejected PharMerica’s argument that the relator’s knowledge of the fraud through his colleagues and his lack of awareness of the scheme until it was “winding down” disqualified him as an “original source.” 950 F.3d at 145.

### *Implications for Future FCA Cases*

The First Circuit clarified the meaning of “direct” knowledge for the purpose of determining whether a relator was an “original source,” explaining that knowledge need not be gained from participation or observation of the fraud; learning about a fraud by word of mouth may be sufficient.

### ***Lestage v. Coloplast Corp.*, 982 F.3d 37 (1st Cir. 2020)**

The First Circuit affirmed an award of compensatory damages to an employee following a jury trial on her retaliation claim—while clarifying that employees must show that their FCA-protected activities were the “but-for” cause of the retaliation they allege and not merely a “substantial motivating factor.”

### *About the Case*

The plaintiff was a key account manager for Coloplast, a medical device company, who joined other individuals in a qui tam action against Coloplast and several of its competitors and clients. She alleged that she was placed on leave and denied access to her company email account as a result of a demand from one of the clients named as a defendant—and that while she received her full salary and bonus while on leave, she was placed on “markedly lesser” accounts when she returned to work after her company settled the underlying qui tam claims. 982 F.3d at 48.

After a jury trial, the employee was awarded \$762,525 in compensatory damages, and the district court denied the defendant’s subsequent motions for judgment as a matter of law and a new trial. Coloplast argued that the trial court erred in instructing the jury that it could find for the employee if she proved that her participation in the qui tam suit was a “substantial motivating cause” of each adverse employment action. 982 F.3d at 44. Coloplast had not objected to this instruction at the time of trial.

The First Circuit affirmed the trial verdict, despite agreeing with the defendant that the FCA’s prohibition on employers’ discrimination against an employee “because of” his or her protected conduct under 31 U.S.C. § 3730(h)(1) must be evaluated under the more stringent “but-for” causation standard. The Court explained that, while the jury instruction was erroneous, in the absence of a preserved claim of instructional error from the defendant, the instruction was not plain error because the First Circuit had never decided the causation standard. 982 F.3d at 45.

### *Implications for Future FCA Cases*

The First Circuit said for the first time that the causation standard for retaliation claims is the more stringent “but-for” standard, rather than the more lenient “substantial motivating factor” standard, joining the Third, Fourth, Fifth, and Eleventh Circuits. See *DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 73 (3d Cir. 2018); *United States ex rel. Cody v. ManTech Int’l, Corp.*, 746 Fed. App’x 166, 176-

77 (4th Cir. 2018) (unpublished opinion); *United States ex rel. King v. Solvay Pharms., Inc.*, 871 F.3d 318, 333 (5th Cir. 2017); *Nesbitt v. Candler Cty.*, 945 F.3d 1355, 1359 (11th Cir. 2020). By contrast, the D.C. Circuit, as well as the Sixth and Seventh Circuits, continue to apply the more lenient standard. See *Singleton v. Howard Univ.*, 939 F.3d 287, 293 (D.C. Cir. 2019); *United States ex rel. Ziebell v. Fox Valley Workforce Dev. Bd., Inc.*, 806 F.3d 946, 953 (7th Cir. 2015); *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000).

***United States ex rel. Concilio De Salud Integral De Loíza, Inc. v. J.C. Remodeling, Inc.*, 962 F.3d 34 (1st Cir. 2020)**

The First Circuit affirmed the district court's order denying the relator leave to pursue damages in the amount of the full contract price, where relator had not shown that it received no value whatsoever for the work performed by the defendant.

*About the Case*

The relator, a non-profit organization that receives federal funds to provide primary healthcare services for the uninsured, alleged that the contractor that waterproofed the roof of its facilities had misrepresented the product used for the work, thereby illegally appropriating federal funding. Before trial, the relator moved for leave to amend the pretrial order to permit it to pursue damages in the amount of the full contract price. The district court denied the motion.

The First Circuit held that the district court did not abuse its discretion by declining to allow the relator to pursue damages in the amount of the full contract price. The First Circuit noted that damages in the amount of the full contract price are typically permitted under the FCA only where the contractor provided “no tangible benefit to the government and the intangible benefit is impossible to calculate.” 962 F.3d at 43-44 (citing *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009)). The Court distinguished such cases from the instant case, where the defendant was alleged to have made a misrepresentation that merely affected the quality of the services it provided.

*Implications for Future FCA Cases*

The First Circuit's decision provides guidance regarding the limited circumstances in which an FCA plaintiff may pursue damages in the amount of the full contract price.

**Second Circuit: Materiality; First-To-File; Public-Disclosure; DOJ Dismissal Authority**

***United States v. Strock*, 982 F.3d 51 (2d Cir. 2020)**

The Second Circuit held that, for purposes of determining materiality under *Escobar* in the context of a fraudulent inducement case, the government's “payment decision” included both its decision to enter into a contract in the first instance and its decision to pay the contractual claims.



### *About the Case*

The government brought suit under the FCA and federal common law against Strock Contracting, Inc., its owner, and one of his employees, alleging that they created Veteran Enterprise Company, Inc. (VECO) to improperly obtain millions of dollars of federal government contracts reserved for service-disabled veteran-owned small businesses (SDVOSB). 982 F.3d at 56.

The district court dismissed the government's amended complaint, ruling that the government failed to adequately plead that the alleged misrepresentations regarding VECO's qualifying SDVOSB status were material to the government's decision to pay VECO's claims, or that the defendants had the requisite scienter. 982 F.3d at 58. The Second Circuit reversed in part on the ground that the lower court "relied on an unduly restrictive understanding of the FCA materiality analysis set out in *Escobar*." 982 F.3d at 56-57.

The Second Circuit held that, in the context of fraudulent inducement cases, the government's "payment decision" under *Escobar* consisted of the decision to award the contracts in the first instance as well as the decision to pay claims under the contracts. *Id.* The Court found that the government's conduct, both at the time of the contractual award and when claims are submitted under the contract, was "highly relevant to *Escobar*'s materiality analysis." 982 F.3d at 61.

While the Second Circuit acknowledged that SDVOSB compliance was not an express condition for *each payment* under the contracts with the defendants, it concluded that the government's express designation of SDVOSB compliance as a condition of contract *eligibility* weighed in favor of finding materiality. *Id.* In so holding, the Court noted that the complaint listed steps the government took to ensure an applicant qualified as an SDVOSB prior to awarding a contract and described how contracting officers would not have awarded contracts to VECO if they had been aware it was not an eligible SDVOSB. 982 F.3d at 64. The Court thus found that the government sufficiently alleged that defendants' misrepresentations were material to the government's contracting decision. *Id.*

The Second Circuit also held that the government had adequately alleged that the defendants acted with the requisite scienter based on the "elaborate steps" taken to give the impression that VECO complied with SDVOSB requirements. 982 F.3d at 66.

### *Implications for Future FCA Cases*

The Second Circuit rejected a narrow reading of the relevant "payment decision" for purposes of evaluating materiality under *Escobar*. *Strock* held that in the fraudulent inducement context courts must evaluate materiality both at contract formation and when the government decides to pay the contractual claims.

***United States ex rel. Hanks v. United States*, 961 F.3d 131 (2d Cir. 2020)**

The Second Circuit vacated the district court’s dismissal of a whistleblower’s suit on first-to-file grounds, directing the court to first decide whether the applicable pre-2010 version of the FCA’s public disclosure bar—which was jurisdictional—required dismissal.

*About the Case*

The relator alleged that various healthcare providers, physician oncology practices, and group purchasing organizations, among others, conspired with Amgen to purchase the company’s drugs at discounted rates while knowing that the company would not report the discounts to government agencies. 961 F.3d at 134. The district court dismissed the claims, citing the FCA’s first-to-file bar, 31 U.S.C. § 3730(b)(5). Specifically, the district court found that other plaintiffs in various lawsuits had previously raised the relator’s “core allegations.” 961 F.3d at 134. The district court also held that Fed. R. Civ. P. 9(b) barred the claims “for failure to allege fraud with sufficient particularity.” *Id.*

On appeal, the Second Circuit found that the district court “elided the issue of whether the FCA’s public disclosure bar, 31 U.S.C. § 3730(e)(4), deprived the court of jurisdiction.” *Id.* The Second Circuit vacated the district’s court’s decision and remanded the case, holding that federal courts were not allowed to assume subject-matter jurisdiction. *Id.*

The defendants-appellees contended that the FCA’s first-to-file bar constituted a “threshold, nonmerits issue,” which allowed the district court to decide the issue without first addressing the jurisdictional question presented under the public disclosure bar. 961 F.3d at 137 (internal citations omitted). The Second Circuit disagreed, holding that the FCA’s first-to-file bar “[is] not jurisdictional and instead bears on the merits of whether a plaintiff has stated a claim.” *Id.* (quoting *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85 (2d Cir. 2017)). While the Second Circuit noted that the jurisdictional question was “relatively straightforward”—*i.e.*, whether the relator qualified as an original source—it ruled that it was the district court’s responsibility to make this determination in the first instance. 961 F.3d at 138.

*Implications for Future FCA Cases*

For cases governed by the pre-2010 version of the public-disclosure bar, *Hanks* requires courts to address the bar before deciding whether the first-to-file bar forecloses the suit.

***United States ex rel. Borzilleri v. AbbVie, Inc.*, 2020 WL 7039048 (2d Cir. Dec. 1, 2020)**

In this unpublished summary order, the Second Circuit affirmed a district court’s ruling granting the government’s motion to dismiss a qui tam suit in which it declined to intervene.

## *About the Case*

The relator appealed a 2019 ruling granting the government’s motion to dismiss his FCA case, which claimed that several drug manufacturers and pharmacy benefit managers engaged in an unlawful kickback scheme to defraud Medicare Part D. 2020 WL 7039048, at \*1. The government investigated the allegations, declined to intervene, and—exercising its statutory dismissal authority under 31 U.S.C. § 3730(c)(2)(A)—moved to dismiss the case, arguing that (1) the case would likely require a large amount of government resources; (2) the United States was unlikely to gain any material recovery from the claims; and (3) the relator was an inappropriate advocate on behalf of the government. 2020 WL 7039048, at \*1. The district court granted the government’s motion and dismissed the FCA claims with prejudice but dismissed his state law claims without prejudice. *Id.*

The Second Circuit acknowledged the circuit split on the proper standard to apply to government motions to dismiss under § 3730(c)(2)—*i.e.*, whether the government has an “unfettered” right to dismiss cases (as the D.C. Circuit has held), or must instead show a “valid government purpose” for dismissal and “a rational relation between dismissal and accomplishment of [that] purpose” (as the Ninth and Tenth Circuits have held). 2020 WL 7039048, at \*1. The Second Circuit declined to decide the appropriate standard, saying that the relator would have failed under either.

In particular, the Second Circuit agreed with the district court that the costs and burdens of any future investigations the government might have incurred represented a valid government purpose for seeking dismissal. *Id.* Once the government shows that it had a valid purpose for seeking dismissal, the relator must demonstrate that dismissal would be “fraudulent, arbitrary and capricious, or illegal.” 2020 WL 7039048, at \*2 (quoting *United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1145). The Second Circuit held that the relator failed to make such a showing. *See id.*

## *Implications for Future FCA Cases*

While the Second Circuit side-stepped a circuit split over the question of which standard should apply when the government seeks to dismiss qui tam actions, its decision demonstrates the deference most courts give to the government when exercising its statutory dismissal authority.

## **Third Circuit: Falsity; First-to-File Bar**

### ***United States ex rel. Druding v. Care Alts.*, 952 F.3d 89 (3d Cir. 2020)**

The Third Circuit reversed the district court’s grant of summary judgment in favor of a hospice care provider accused of fraudulently billing Medicare and Medicaid by routinely altering patients’ Medicare certifications to reflect eligibility. In reversing, the circuit court held that medical judgments can form the basis of FCA liability and rejected the “objective falsehood” requirement for establishing the essential element of falsity.

## *About the Case*

Former employees of Care Alternatives, a hospice care provider, brought an FCA action against the company, alleging that it directed employees to improperly alter patients' Medicare certifications to reflect eligibility. 952 F.3d at 91. The former employees retained an expert who studied the records of a sample of patients and concluded that thirty-five percent of the patients were inappropriately certified. 952 F.3d at 94. In turn, Care Alternatives' expert testified that a reasonable physician would have found all the patients in the sample to have been eligible for hospice care. *Id.* According to the district court, the former employees needed to provide evidence of an "objective falsehood," and clinical judgments, which are subjective, cannot be considered "false" under the FCA. *Id.* The Court reasoned that a difference of opinion between experts was therefore insufficient to create a triable dispute of fact as to the element of falsity and granted summary judgment in favor of Care Alternatives. *Id.*

The Third Circuit reversed, declining to adopt the district court's objective falsity standard for three reasons. First, under common law an opinion can be found to have been "false." 952 F.3d at 95 (citing *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015)). Second, the objective falsity standard conflates the elements of falsity and scienter by requiring evidence that physicians were making knowingly false determinations, when in practice these two questions should be considered separately. 952 F.3d at 96. Finally, the district court's decision to limit FCA falsity to findings of factual falsity—where the facts contained within a claim are untrue—runs contrary to Third Circuit decisions that have recognized legal falsity—where a claimant falsely certifies that it complied with a mandatory statute or regulation—as a valid basis for an FCA claim. 952 F.3d at 97 (citing *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 486 (3d Cir. 2017); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3d Cir. 2011); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 411 (3d Cir. 2004)). The former employees could thus show falsity by demonstrating that Care Alternatives did not submit certifications that actually supported the alleged medical prognoses, relying on the disagreement between experts to do so. 952 F.3d at 97.

The Third Circuit also rejected the district court's bright-line rule that doctors' clinical judgments cannot be "false," citing a Sixth Circuit case finding that such a bright-line rule fails to hold accountable physicians who purposely misdiagnose patients in order to bill for an unnecessary treatment. 952 F.3d at 98 (citing *United States v. Paulus*, 894 F.3d 267 (6th Cir. 2018)). It is therefore for the jury to decide whether physicians committed fraud, and expert testimony may be used to make this decision. *Id.*

## *Implications for Future FCA Cases*

This decision creates a circuit split with the Eleventh Circuit, which recently adopted both the "objective falsity" requirement and the view that clinical judgments cannot be untrue. *Id.* at 99-100 (citing *United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019) (*Aseracare III*)). As noted

elsewhere in the Year in Review, the Ninth Circuit joined the Third Circuit in 2020 to reject the “objective falsity” requirement, see *Winter ex rel. United States*, 953 F.3d at 1113, and a petition for certiorari is pending with respect to the Third Circuit’s decision.

***In re Plavix Mktg., Sales Pracs. and Prods. Liab. Litig. (No. II)*, 974 F.3d 228 (3d Cir. 2020)**

The Third Circuit vacated the district court’s dismissal of an FCA qui tam action, holding that the district court erred in concluding that the FCA’s first-to-file rule does not allow parties to add, remove, or swap relators.

*About the Case*

Three individuals formed a Delaware limited liability partnership to sue two pharmaceutical companies as a qui tam relator. 974 F.3d at 230. The pharmaceutical companies moved to dismiss the case after one of the individuals was replaced in the partnership, arguing that the replacement violated the FCA’s first-to-file bar on interventions because the replacement resulted in a new, distinct partnership. 974 F.3d at 231.

The district court dismissed the case, relying on Delaware partnership law to conclude that the partnership became a distinct legal entity when the partner was replaced. *Id.* In addition, like the Tenth Circuit, the district court read *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009) as holding that any nonparty that attempts to join an FCA lawsuit is “interven[ing]” within the meaning of the first-to-file bar. 974 F.3d at 231 (citing *United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242 (10th Cir. 2017)).

On appeal, the Third Circuit first addressed whether the first-to-file bar is a jurisdictional question, which would dictate whether the pharmaceutical companies’ challenge was a motion to dismiss under Rule 12(b)(6) or Rule 12(b)(1). 974 F.3d at 231-32. The Third Circuit sided with the D.C., First, and Second Circuits in holding that the first-to-file bar is not jurisdictional because Congress did not clearly state that it was, and the bar on intervention applies only *after* jurisdiction has been established. 974 F.3d at 232.

The Third Circuit also held that the text of the first-to-file bar, which says that “no person other than the Government may intervene” in a qui tam action, 31 U.S.C. § 3730(b)(5), clearly allows nonparties to join existing suits. 974 F.3d at 233. The statute only prohibits new parties from entering a case through intervention, which is when a nonparty invokes a legal procedure in order to become a party, and not through other processes such as joinder, substitution of parties, or amendment of a complaint. 974 F.3d at 235.

### *Implications for Future FCA Cases*

This case brings the Third Circuit into line with the D.C., First, and Second Circuits, which have held that the first-to-file rule is not jurisdictional, and into conflict with the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, which maintain that the rule is jurisdictional. Because a jurisdictional objection may be raised at any time, this ruling is relevant to when a first-to-file objection may be raised; it is also relevant to whether a district court may consider matters outside the pleadings pursuant to Fed. R. Civ. P. 12(b)(1) or is limited to the four corners of the complaint and materials fairly incorporated by reference pursuant to Fed. R. Civ. P. 12(b)(6). And it may be relevant to the parties' relative burdens, as the plaintiff bears the burden of persuasion on jurisdiction, while the burden of showing that a complaint fails to state a claim falls on the defendant.

*Plavix II* also clears the way for parties to add, remove, or swap relators so long as the change can be framed as not being an intervention governed by Fed. R. Civ. P. 24.

### **Fourth Circuit: Qualified Immunity; *Scienter***

#### ***United States ex rel. Citynet, LLC v. Gianato*, 962 F.3d 154 (4th Cir. 2020)**

The Fourth Circuit held that qualified immunity may not be invoked by government officials as a defense to FCA liability.

#### *About the Case*

The relator alleged that certain West Virginia state officials knowingly submitted false statements and records to the United States in connection with applying for and spending grant funds under the federal Broadband Technology Opportunities Program, which seeks to expand broadband access in rural and underserved communities. 962 F.3d at 156-57. Two of the defendants moved to dismiss the complaint, arguing that the complaint failed adequately to allege FCA violations; that as state officials sued personally for acts in furtherance of their official duties, they were not “persons” within the meaning of the FCA; and that they were entitled to qualified immunity. 962 F.3d at 157. The district court largely denied the portions of the motion to dismiss premised on the failure to adequately allege FCA violations, but deferred ruling on the issue of qualified immunity, reasoning that the lack of evidence about whether defendants acted with actual knowledge of falsity, deliberate ignorance, or reckless disregard of falsity complicated the qualified immunity analysis. *Id.* Defendants filed an interlocutory appeal.

The Fourth Circuit vacated the district court's decision with instructions to deny the portion of the motion to dismiss that was based on qualified immunity. 962 F.3d at 161. First, the Court concluded that interlocutory review was appropriate. Denials of motions to dismiss based on qualified immunity ordinarily are subject to interlocutory appellate review, but there is an exception in instances where the defense needs further factual development. The Court found that exception

inapplicable here, because the applicability of the qualified immunity defense to FCA claims was a pure issue of law. 962 F.3d at 158-59.

Next, the Court turned to a question that the Fourth Circuit had “yet to address”: “whether qualified immunity,” which shields federal and state officials from monetary damages arising from constitutional or statutory violations, “may be invoked as a defense to claims brought under the FCA.” 962 F.3d at 159. The Court observed that the showing of intentional or reckless falsity necessary to establish liability under the FCA would be the same showing necessary to overcome the defense of qualified immunity. 962 F.3d at 159-60. The Court also noted that qualified immunity’s purpose of safeguarding the government is not served by applying it to cases alleging violations against the government. 962 F.3d at 160. The Fourth Circuit therefore held as a matter of law that qualified immunity may not be invoked as a defense to liability under the FCA.

Finally, the Court declined the defendants’ request to exercise pendent appellate jurisdiction to review the district court’s determination that state officials sued in their personal capacities for acts taken in the course of their official duties qualify as “persons” within the meaning of the FCA. 962 F.3d at 160-61.

#### *Implications for Future FCA Cases*

Even though proving an FCA claim and overcoming a qualified immunity defense both may require showing intentional or reckless conduct, qualified immunity is characterized as an immunity from suit and incorporates procedural protections such as interlocutory appeal. Thus, even if the substantive showing is the same for both issues, the Fourth Circuit’s rejection of the qualified immunity defense for FCA claims confirms that these additional protections are not available within the Fourth Circuit for federal and state officials sued in their personal capacities.

#### ***United States ex rel. Complin v. N. Carolina Baptist Hosp.*, 818 F. App’x 179 (4th Cir. 2020)**

The Fourth Circuit affirmed the dismissal of a qui tam complaint, holding that allegations of regulatory violations coupled with conclusory allegations that false claims were submitted “knowingly,” without more, are insufficient to plausibly allege scienter.

#### *About the Case*

The defendant hospitals provided medical care and services to their employees through a self-funded health benefit plan. 818 F. App’x at 181. The relator alleged that, although the benefit plans were subject to Medicare’s “Related-Party Rule,” which requires the hospitals to treat the costs of providing care to their employees as “related-party transactions” that Medicare reimburses only based on actual, out-of-pocket costs, the defendants instead sought reimbursement based on the amount they charged for the care. *Id.* An exception for plans administered by a third-party administrator did not apply, according to the relator, because the administrator here was only a

plan supervisor with ministerial duties. *Id.* The district court granted the defendants' motion to dismiss on the ground that the complaint failed to plausibly allege scienter. 818 F. App'x at 181-82.

The Fourth Circuit upheld the dismissal. Citing *Escobar's* instruction that scienter is a "rigorous" element of an FCA claim, the Court held that disregarding a federal regulation is insufficient, by itself, to violate the FCA. 818 F. App'x at 183 (citing *Escobar*, 136 S. Ct. at 2002). Noting that a plaintiff must set forth specific facts that support the inference of scienter, the Court highlighted the lack of any allegations that would indicate that defendants knew of the potential violation of the Related-Party Rule, and concluded that the relator's general and conclusory allegations that the defendants acted "knowingly" were insufficient. 818 F. App'x at 183-84. It was particularly inappropriate to infer scienter from the alleged regulatory violation in this case because it was not clear that the alleged regulation even applied to the transactions in question. 818 F. App'x at 184.

#### *Implications for Future FCA Cases*

*Complin* illustrates how *Escobar's* reference to the "strict enforcement" of the "rigorous" scienter requirement provides a basis for dismissing claims based on novel or contested interpretations of ambiguous statutory or regulatory requirements.

#### **Fifth Circuit: Materiality**

##### ***United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 F. App'x 237 (5th Cir. 2020)**

Applying *Escobar*, the Fifth Circuit affirmed dismissal of a case where the relator had inadequately alleged materiality.

#### *About the Case*

The relator alleged that her former employer, a service that contracted with the Mississippi Division of Medicaid, violated the FCA by using licensed practical nurses for care-management activities that required the expertise of licensed registered nurses. The government declined to intervene. The district court concluded that the relator had inadequately pled materiality under the *Escobar* standard because the relator's allegations did not show that the service provider's staffing decisions were material based on the defendant's Medicaid contracts. Specifically, the relator had not: (1) identified "a specific provision" in any of the contracts requiring that the position be staffed by a registered nurse, (2) identified "any specific federal or state statute or regulation mandating that a registered nurse provide those services," or (3) "otherwise establish[ed]" that proper staffing of the position "was a material term of the contracts." 810 F. App'x at 241.

The Fifth Circuit agreed, highlighting that the contracts did not specifically require the services at issue to be performed by a licensed registered nurse. *Id.* The relator argued that the contracts required the defendant to "strictly adhere to all applicable federal and state law (statutory and case law), regulations and standards . . . including . . . the policies, rules, and regulations of the



Mississippi Division of Medicaid,” and that the staffing decision was a violation thereof. *Id.* (internal quotation marks omitted). Assuming *arguendo* that the relator accurately characterized the law, the Fifth Circuit held that such “broad boilerplate language generally requiring a contractor to follow all laws” is “the same type of language *Escobar* found too general to support a FCA claim.” 810 F. App’x at 242 (internal quotation marks omitted). Moreover, the Fifth Circuit noted that the Mississippi Division of Medicaid continued to pay the defendant and renewed its contract with the defendant after being informed of the staffing decision, which “substantially increase[d]” the burden on the relator to establish materiality. *Id.* Agreeing with the district court that amendment would be futile, the Fifth Circuit affirmed the district court’s decision to dismiss the case with prejudice.

#### *Implications for Future FCA Cases*

This decision demonstrates *Escobar’s* admonition that materiality is a rigorous standard, such that relators cannot rely on boilerplate compliance provisions to show that a particular violation was material. And it highlights the difficulty of demonstrating materiality when the government continues or renews a contractual relationship after being informed of an alleged violation.

#### **Sixth Circuit: Public Disclosure**

##### ***United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836 (6th Cir. 2020)**

The Sixth Circuit affirmed the dismissal of a qui tam complaint under the pre- and post-2010 versions of the public-disclosure bar, citing prior qui tam complaints raising substantially the same allegations against a corporate affiliate of the defendant.

#### *About the Case*

The relator alleged that Heartland Hospice and related entities defrauded the government by submitting false claims to Medicare and Medicaid for hospice care for patients who were not terminally ill. 960 F.3d at 840-41.

The government declined to intervene, and Heartland moved to dismiss on the ground that the complaint was barred by prior public disclosures—including a prior set of qui tam cases against a related corporate entity that had been voluntarily dismissed. The district court held that the complaint was not prohibited by the public-disclosure bar but dismissed the complaint for failure to state a claim under the FCA’s heightened pleading standard. 960 F.3d at 842.

The Sixth Circuit affirmed on the ground that the case was barred by the public-disclosure bar. 960 F.3d at 843. Because the complaint covered activity that occurred before and after the 2010 amendments to the FCA public-disclosure bar, the Sixth Circuit analyzed the complaint under both pre- and post- amendment versions of the provision. *Id.* Under the pre-2010 version of the statute, “claims that were ‘based upon’ allegations or transactions that had already been publicly disclosed” were barred. 960 F.3d at 847 (quoting 31 U.S.C. § 3730(e)(4)(A) (1986)). The 2010 amendment

“bars claims ‘if *substantially the same* allegations or transactions’ have been publicly disclosed.” *Id.* (quoting 31 U.S.C. § 3730(e)(4)(A) (2010)).

While the Sixth Circuit explained that the amended version of the public-disclosure bar is “more sensitive to differences” between the qui tam complaint and prior disclosures, the Sixth Circuit held that the complaint failed even under the “more lenient” post-2010 standard. 960 F.3d at 851. Specifically, the court concluded that the relator’s allegations merely “add[ed] some new details to describe essentially the same scheme by the same corporate actor” as alleged in the previously dismissed qui tam suits and were therefore barred. *Id.*

Although the Court noted that “[t]his might have been the type of case in which new allegations materially add to what has been publicly disclosed”—such that the relator could qualify as an “original source”—it declined to pursue this analysis, as the relator had waived the argument. 960 F.3d at 843-44.

#### *Implications for Future FCA Cases*

The case reflects a relatively straightforward application of the public-disclosure bar—and underscores the benefits of asserting the defense in district court in appropriate cases (even where a complaint may also have Rule 9(b) vulnerabilities), as it ultimately provided the basis for affirmance on appeal even though it did not succeed below.

#### ***United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516 (6th Cir. 2020)**

The Sixth Circuit affirmed the dismissal of a qui tam complaint under the public-disclosure bar where the allegations concerned conduct covered by a corporate integrity agreement resulting from a prior FCA settlement.

#### *About the Case*

The relator filed a qui tam action against a cardiologist, his medical practice, and others, alleging the performance of unnecessary medical procedures that were billed to Medicare. A prior qui tam suit against two of the defendants resulted in a settlement that included a corporate integrity agreement under which an independent monitor was required to review the defendants’ submissions to the federal healthcare programs. The relator alleged that, nonetheless, the defendant cardiologist was “simply up to his old tricks” again. 981 F.3d at 521.

The United States declined to intervene, and defendants moved to dismiss under the public-disclosure bar, 31 U.S.C. § 3730(e)(4). *Id.* The district court granted the motion. *Id.*

The Sixth Circuit affirmed. It first ruled that the corporate integrity agreement qualified as a “Federal report” within the meaning of 31 U.S.C. § 3730(e)(4)(A) and was therefore a publicly

disclosed source. 981 F.3d at 522. It then found that there was “substantial identity” between the relator’s complaint and the publicly disclosed information. 981 F.3d at 523. In so holding, the Sixth Circuit framed the operative test as whether the publicly disclosed information would be “sufficient to set the government on the trail of the alleged fraud without the relator’s assistance.” 981 F.3d at 524 (quoting *United States ex rel. Reed v. KeyPoint Gov’t Sols.*, 923 F.3d 729, 744 (10th Cir. 2019)).

Finally, the Sixth Circuit held that the relator did not qualify as an “original source,” as he “merely provid[ed] additional instances of the same type of fraud” during the period covered by the corporate integrity agreement. 981 F.3d at 527-28.

#### *Implications for Future FCA Cases*

The Sixth Circuit’s articulation of the standard for determining whether allegations are “substantially the same” for purposes of the public-disclosure bar—whether the publicly disclosed information would be “sufficient to set the government on the trail of the alleged fraud without the relator’s assistance”—supports an expansive application of the bar in practice.

#### **Seventh Circuit: DOJ Dismissal Authority; Anti-Kickback Statute**

##### ***United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020)**

The Seventh Circuit reversed the district court’s denial of the government’s motion to dismiss a qui tam complaint under 31 U.S.C. § 3730(c)(2)(A)—and, in affirming the government’s broad right to dismiss qui tam suits, broke with the two tests for adjudicating such motions that had emerged in other circuits by requiring the government to intervene in a case before exercising its dismissal authority, creating a new front in the circuit split on the issue.

#### *About the Case*

This case involved a corporate relator, CIMZNHCA, LLC, formed for the purpose of pursuing qui tam suits against pharmaceutical companies for violations of the FCA. 970 F.3d at 839. The government declined to intervene and instead moved to dismiss the case under 31 U.S.C. § 3730(c)(2)(A), representing that it had investigated the claims and concluded that pursuit of them would be contrary to the public interest. 970 F.3d at 840. The district court denied the government’s motion. *Id.* The government filed a motion to reconsider, which the district court denied, and subsequently appealed to the Seventh Circuit. *Id.*

The Seventh Circuit first considered whether it had jurisdiction—a critical issue, as denials of motions to dismiss are ordinarily *not* immediately appealable. To solve “the jurisdictional problem,” the Seventh Circuit decided to “treat the government’s motion to dismiss as a motion both to intervene and then to dismiss under § 3730(c)(3) because intervention was, in substance, what the government sought and *what the False Claims Act requires.*” 970 F.3d at 849 (emphasis added).

In so holding, the Seventh Circuit became the first appellate court to require the government to formally intervene to exercise its statutory right of dismissal. As it is well established that denials of motions to intervene *are* immediately appealable, the Court also rejected the Ninth Circuit's holding in *United States ex rel. Thrower v. Acad. Mortg. Corp.*, 968 F.3d 996 (9th Cir. 2020) that the denial of a dismissal under 31 U.S.C. § 3730(c)(2)(A) is a collateral order that the government cannot appeal as of right. 970 F.3d at 842.

On the merits, the Seventh Circuit rejected the two standards that had emerged to decide motions to dismiss under § 3730(c)(2)(A)—*i.e.*, the D.C. Circuit's view that the government has an “unfettered” statutory right of dismissal, *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), and the Ninth Circuit's view that the government must point to a “valid government purpose” for dismissal and a “rational relation between dismissal and accomplishment of that purpose,” *United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1145. Instead, the Seventh Circuit held that, once the government intervenes, it is entitled to dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i), which allows a plaintiff to dismiss an action before the opposing party files an answer to the complaint or a motion for summary judgment. 970 F.3d at 850-53. Emphasizing “the government's unrestricted substantive right under Rule 41(a),” the Court declined to impose any specific limits on the government's dismissal authority, though it agreed in principle that the government would be limited by generally applicable constitutional constraints on executive authority (*e.g.*, the government could not violate the Equal Protection or Due Process clauses), none of which was implicated in this case. *Id.*

#### *Implications for Future FCA Cases*

The Seventh Circuit's decision adds a third dimension to the circuit split that has so far divided the Ninth and Tenth Circuits from the D.C. Circuit. While the standard adopted by the Seventh Circuit is ultimately quite deferential to the government, its decision is the first of any circuit to require the government to intervene in any *qui tam* case in connection with its motion to dismiss—adding a procedural step that other circuits had declined to impose, albeit one that should be easy for the government to take in appropriate cases.

#### ***Stop Illinois Health Care Fraud, LLC v. Sayeed*, 957 F.3d 743 (7th Cir. 2020)**

The Seventh Circuit reversed a judgment in favor of the defendant following a bench trial on the ground that the district court did not sufficiently explain its conclusions and thus may have applied an unduly narrow understanding of the Anti-Kickback Statute's bar on compensation for patient referrals.

#### *About the Case*

The relator alleged that Management Principles, Inc. (MPI) and its associates operated an unlawful patient referral scheme in violation of the Anti-Kickback Statute and the FCA. The complaint

alleged that MPI made monthly payments under a contract with a non-profit entity and paid the non-profit's staff in gift cards for the ability to access patient records. 957 F.3d at 745. MPI allegedly used the information in those patient records to solicit business from Medicare-eligible seniors, in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2). *Id.* The non-profit settled the case and the MPI defendants proceeded to a bench trial. After presentation of the relator's case, the district court entered judgment in MPI's favor, reasoning that the relator failed to introduce evidence showing that MPI's payments to HCI were "intended to induce patient referrals." 957 F.3d at 748.

The Seventh Circuit vacated the district court's judgment and remanded for further proceedings. 957 F.3d at 751. The court concluded that the district court did not employ a sufficiently "inclusive understanding of a referral" in its analysis of the Anti-Kickback Statute claims, and thus overlooked that the monthly payments may have been hidden compensation for access to patient files the defendants could then exploit for referrals. 957 F.3d at 750. It explained: "[T]he definition of a referral under the [AKS] is broad, encapsulating both direct and indirect means of connecting a patient with a provider. It goes beyond explicit recommendations to include more subtle arrangements. And the inquiry is a practical one that focuses on substance, not form." *Id.*

#### *Implications for Future FCA Cases*

The Seventh Circuit's ruling on the Anti-Kickback Statute's prohibition on compensation for referrals is a reminder of the broad reach of that statute and signals an explicit willingness to look for "subtle arrangements," regardless of their form, that may violate the prohibition.

#### **Eighth Circuit: Retaliation; Rule 9(b): Relator's Knowledge**

##### ***Sherman v. Berkadia Comm. Mortg. LLC, 956 F.3d 526 (8th Cir. 2020)***

The Eighth Circuit affirmed the grant of summary judgment to the defendant in an FCA retaliation case on the ground that the plaintiff could not establish that he was terminated "solely" because of his FCA-protected activity.

#### *About the Case*

The plaintiff sued his former employer, a real estate lender, under the FCA's retaliation provision, alleging that he was terminated for raising concerns internally about the company's compliance with HUD regulations. The plaintiff had been hired as an underwriter and, in that role, had succeeded in reducing his employer's HUD rejection rate. 956 F.3d 526, 529. However, the relationship ultimately deteriorated. The company retained an outside consultant to assess and mediate the plaintiff's relationship with other employees. 956 F.3d at 530. The consultant found that the plaintiff's team was taking twice as long as the industry average to process loan applications and concluded that the plaintiff was "not driving[] positive change" and "hates collaboration." 956 F.3d at 530-31. The plaintiff was ultimately terminated via documentation citing

his unwillingness to collaborate, his habit of magnifying conflict, and his inability to develop an underwriting team that met the company's expectations. 956 F.3d at 531. The district court granted summary judgment in the employer's favor. *Id.*

The Eighth Circuit affirmed. Applying the *McDonnell Douglas* burden-shifting framework, the Court concluded that the plaintiff had failed to establish a prima facie case of retaliation, which requires that "the retaliation was motivated *solely* by [the plaintiff's] protected activity." 956 F.3d at 532 (emphasis added). It explained that this causal link is "tighter than that required in other types of retaliation and discrimination claims [that] use the same *McDonnell Douglas* framework." *Id.* The record failed to create a genuine issue of material fact as to whether this tight causal link existed because, although management was sometimes critical of the plaintiff's suggestions regarding compliance with HUD regulations, there was also evidence that they disapproved of other aspects of his job performance. 956 F.3d at 533. Thus, a reasonable jury would therefore be unable to find that the employee was fired *solely* because of his FCA-protected activity. *Id.*

#### *Implications for Future FCA Cases*

By requiring retaliation plaintiffs to make a prima facie showing that they were retaliated against "solely" because of their FCA-protected activity, the Eighth Circuit's decision will make it more difficult for plaintiffs with records of performance issues to succeed in bringing FCA retaliation claims.

#### ***United States ex rel. Benaissa v. Trinity Health*, 963 F.3d 733 (8th Cir. 2020)**

The Eighth Circuit affirmed the dismissal of a relator's qui tam and retaliation claims, with an expansive discussion of the burdens that Rule 9(b) imposes on relators—particularly those without first-hand knowledge of a defendant's billing practices.

#### *About the Case*

A trauma surgeon at Trinity Health filed a qui tam action alleging that Trinity paid five physicians for illegally referring patients for additional services, in violation of the Stark and Anti-Kickback laws, and that the physicians performed unnecessary surgeries to justify their high salaries. 963 F.3d 733, 737. He alleged that every claim submitted by the five physicians constituted a false or fraudulent claim under the FCA because the claims were tainted by violations of the Stark and Anti-Kickback laws, that Trinity made false statements material to false or fraudulent claims, and that he was terminated in retaliation for his complaints. *Id.* The district court granted Trinity's motion to dismiss. *Id.*

The Eighth Circuit affirmed. The relator conceded that he had not alleged "representative examples" of false claims that were presented for payment, but rather asked: "which is more likely[,] that Trinity did not submit any claims for the services associated with these physicians or

that Trinity submitted at least some claims for such services?” 963 F.3d at 739-40. The Eighth Circuit rejected this approach under Rule 9(b), which does not allow a relator to “detail a private scheme to defraud” and then “speculate” that false claims must have been submitted as a result; rather, the relator must provide sufficient “indicia of reliability” to establish the submission of false claims—indicia that the relator, as a physician with no “firsthand knowledge of Trinity’s billing practices,” was unable to provide. 963 F.3d at 740.

The Eighth Circuit recognized the difficulties that its decision posed for potential relators outside of a defendant’s billing department—noting that “an insider might have an easier time obtaining information about billing practices and meeting the pleading requirements under the FCA.” 963 F.3d at 741 (citations and quotation marks omitted). However, it emphasized that there is “no requirement that a relator must be a member of a [defendant’s] billing or financial-services department,” provided they can provide “reliable indicia that lead to a strong inference that claims were actually submitted.” *Id.*

The court of appeals also affirmed dismissal of the relator’s retaliation claim because his internal complaints were about medical propriety and ethics and he did “not allege that he connected his complaints to a concern over improper billing or the submission of false claims to the government,” so he failed to establish that Trinity knew he was engaged in a protected activity. 963 F.3d at 742.

#### *Implications for Future FCA Cases*

This decision underscores the difficulty that relators who lack first-hand knowledge of a defendant’s billing practices face in meeting the FCA’s pleading requirements.

#### **Ninth Circuit: First-to-File Bar; Falsity; DOJ Dismissal Authority**

##### ***United States ex rel. Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237 (9th Cir. 2020)**

The Ninth Circuit dismissed an appeal for lack of jurisdiction where the party formally pursuing the appeal was a former relator who had been dropped from the proceedings below for tactical purposes.

#### *About the Case*

Alexander Volkhoff, LLC filed a qui tam complaint against defendants alleging that they fraudulently and unlawfully marketed their medications. 945 F.3d 1237, 1240. After defendants filed a motion to dismiss, Volkhoff’s counsel filed an amended complaint alleging the same claims but replacing Jane Doe, the sole owner of Volkhoff, as the relator. *Id.* Volkhoff and Jane Doe acknowledged that the replacement was a tactical decision to avoid dismissal of Doe’s retaliation claim, which could not be brought by the LLC. *Id.* The district court dismissed the amended complaint because

replacing Jane Doe as the relator violated the first-to-file bar. *Id.* Volkhoff appealed, arguing that both the LLC and Jane Doe were appealing the district court's dismissal. *Id.*

The Ninth Circuit concluded that it did not have jurisdiction over Volkhoff's appeal because of the rule that only parties to a lawsuit may appeal a decision. 945 F.3d at 1241. Nonparties' appeals may be heard, but only in "exceptional circumstances," when the nonparty participated in the district court proceedings and "the equities of the case weigh in favor of hearing the appeal." *Id.* (quoting *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 804 (9th Cir. 2002); *Hilao v. Estate of Marcos*, 393 F.3d 987, 992 (9th Cir. 2004)). The Ninth Circuit concluded this standard was not met, given the tactical choices made by the parties. The Ninth Circuit also concluded that it did not have jurisdiction over Jane Doe because she was not named in the notice of appeal. 945 F.3d. at 1243.

#### *Implications for Future FCA Cases*

While the circumstances of the case are unusual, it highlights the procedural perils associated with tactical choices regarding the naming of parties and the amendment of pleadings under the FCA.

#### ***Winter ex rel. United States v. Gardens Reg'l Hosp. and Med. Ctr., Inc.*, 953 F.3d 1108 (9th Cir. 2020)**

The Ninth Circuit reversed the district court's dismissal of a qui tam case—and held that false certifications of "medical necessity" by physicians are actionable under the FCA, rejecting the view that an "objective falsehood" is required.

#### *About the Case*

The relator, the former director of care management at Gardens Regional Hospital, filed a qui tam action alleging the submission of Medicare claims falsely certifying that patients' inpatient hospitalizations were medically necessary. 953 F.3d 1108, 1112. The district court dismissed the case on the ground that the FCA requires an "objectively false representation," and statements of medical necessity are "subjective medical opinions . . . [that] cannot be proven to be objectively false." 953 F.3d at 1113.

The Ninth Circuit reversed and remanded, holding that "objective" falsity was not required by the FCA's text and that doctors' clinical opinions "must be judged under the same standard as any other representation." *Id.* A clinical opinion can still trigger FCA liability if it is either "not honestly held[] or if it implies the existence of facts . . . that do not exist." 953 F.3d at 1119. The Court noted that its conclusion did not conflict with the Eleventh Circuit's decision in *United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019) (holding that a clinical judgment of terminal illness warranting hospice benefits cannot be deemed false when there is *only* a reasonable disagreement between experts as to the accuracy of that conclusion) because the Eleventh Circuit opinion



recognized that medical opinions can be false, and also because the hospice-eligibility determinations at issue in *AseraCare* are uniquely entitled to deference. *Id.*

The Ninth Circuit found that the relator had plausibly alleged false certifications of medical necessity because she had identified a scheme wherein Medicare admissions increased after a change in management; she identified suspect trends among patients being unnecessarily treated overnight and provided statistics showing increased hospitalizations; she identified sixty-five false claims “in great detail”; and her assessments of medical necessity were made plausible in light of her job duties at the hospital. 953 F.3d at 1120-21.

#### *Implications for Future FCA Cases*

The Ninth Circuit now joins the Third Circuit’s view that the FCA does not require “objective falsehood.” While the Court recognized that its holding would expand the range of potentially actionable conduct—in particular, to include liability for clinical judgments—it emphasized the Supreme Court’s admonition from *Escobar*: “Instead of adopting a circumscribed view of what it means for a claim to be false or fraudulent, concerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of the Act’s materiality and scienter requirements.” 953 F.3d at 1117 (quoting *Escobar*, 136 S. Ct. at 2002).

#### ***United States v. Acad. Mortg. Corp.*, 968 F.3d 996 (9th Cir. 2020)**

The Ninth Circuit dismissed the government’s appeal from an order denying its motion to dismiss, holding that DOJ was not entitled to appeal under the collateral order doctrine and thus denying the appeal for lack of appellate jurisdiction.

#### *About the Case*

The government declined to intervene in a qui tam action filed against a mortgage lender accused of certifying loans for Federal Housing Administration insurance that did not meet the government’s requirements. 968 F.3d 996, 1000. After declining to intervene, the government sought dismissal of the action under 31 U.S.C. § 3730(c)(2)(A) on the basis that it would be burdened by discovery requests if the case proceeded, and that the potential recovery did not justify the costs of proceeding with the litigation. *Id.* The district court denied the motion because the government did not meet its burden of demonstrating “a valid governmental purpose” related to the dismissal. *Id.* (citing *United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1145). According to the district court, the government failed to show a rational relationship between dismissal and the valid governmental purpose because it did not investigate the relator’s claims in the amended complaint and therefore could not have meaningfully carried out a cost-benefit analysis to determine whether it would be in the public interest to spend time and resources on the litigation. *Id.* The government appealed the district court’s denial, asserting jurisdiction under the collateral order doctrine. *Id.*

The Ninth Circuit held that it lacked jurisdiction because the district court's denial fell outside of the "small set of prejudgment orders" that are considered to be "too important to be denied immediate review." 968 F.3d at 1002 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009)). The collateral order doctrine allows appellate review when the district court's decision is: (1) conclusive on the issue, (2) resolves an important question separate from the merits, and (3) is "effectively unreviewable" after final judgment. *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The Ninth Circuit held that the government failed on the second element, because its interest in avoiding costly discovery is not important enough to justify a collateral order appeal in a case where it did not intervene. 968 F.3d at 1005-06 (citing government interests that the collateral order doctrine has been found to protect). The Court was unmoved by the concern that refusing an immediate appeal would render orders denying a motion to dismiss under § 3730(c)(2)(A) "effectively unreviewable," because there is an "extraordinarily low likelihood of an erroneous denial of a motion to dismiss under § 3730(c)(2)(A)." 968 F.3d at 1008. Additionally, the Court reasoned, there are other tools available for the government to mitigate potential harms flowing from an erroneous denial of a motion to dismiss, such as intervening in the case and seeking to quash or modify discovery requests. 968 F.3d at 1009. Other safety valves, such as interlocutory appeals under 28 U.S.C. § 1292(b) and writs of mandamus are also available to address denials of motions to dismiss that "implicate interests more important than run-of-the-mill litigation burdens." *Id.*

#### *Implications for Future FCA Cases*

The case highlights key points of substance and procedure related to DOJ motions to dismiss. Substantively, it underscores the importance of the standard for adjudicating DOJ motions to dismiss; while all of the prevailing standards are deferential to the government, the Ninth Circuit's *Sequoia Orange* standard is less deferential than the D.C. Circuit's *Swift* standard—and leaves district courts with sufficient latitude to deny such motions. Procedurally, the case illustrates the need for the government to seek permission from the district court under 28 U.S.C. § 1292(b) before appealing the denial of a motion to dismiss.

#### **Tenth Circuit: Materiality**

***United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533 (10th Cir. 2020), cert. denied, No. 20-286, 2020 WL 5883407 (Oct. 5, 2020)**

The Tenth Circuit affirmed the district court's decision to grant the defendant's motion for summary judgment on the basis of materiality.

#### *About the Case*

The relator alleged that a hospital engaged in two schemes to fraudulently receive Medicare reimbursement. 949 F.3d at 535. First, the relator alleged that the hospital falsified patient arrival

times to improve its performance and therefore its reimbursement under Medicare requirements. *Id.* Second, the relator alleged that the hospital falsely certified compliance with the Deficit Reduction Act (DRA), which requires that employee handbooks include information about the FCA. 949 F.3d at 538.

The Tenth Circuit agreed with the district court that neither activity satisfied the materiality requirement, 949 F.3d at 535, as set forth in *Escobar*, 136 S. Ct. at 1996, 949 F.3d at 541.

With respect to patient arrival times, the Tenth Circuit assessed each of the non-exhaustive *Escobar* factors and determined that each factor weighed in favor of immateriality. The Court explained that the focus of materiality is whether there is “some quotient of potential influence on the [government] decisionmaker.” 949 F.3d at 540. First, the Court examined the government’s prior conduct. 949 F.3d at 541. The agency had been made aware of the allegations, investigated them, and continued to reimburse the hospital. 949 F.3d at 542. The Court concluded that “its inaction in the face of detailed allegations from a former employee suggests immateriality.” *Id.* Second, the Court determined that, although there had been “some inaccuracies in [the hospital’s] reporting,” there were not “sufficiently widespread deficiencies that they would likely affect the Government’s payment decision.” 949 F.3d at 543. Third, the Court concluded that, although accurate reporting in general was a requirement of participation in Medicare, accurate reporting was not an express condition of payment for the particular programs at issue. 949 F.3d at 544-45.

As for compliance with the DRA, the Court concluded that the “potential DRA compliance failures are precisely the type of garden-variety compliance issues that the demanding materiality standards of the FCA are meant to forestall.” 949 F.3d at 545. Although the new employee handbook did not itself include information about FCA compliance, the handbook included cross-references to other resources containing such information. 949 F.3d at 545-46.

#### *Implications for Future FCA Cases*

The case demonstrates the high bar that some courts have set for materiality following *Escobar*.

### **Eleventh Circuit: Retaliation; Causation; Litigation Funding**

#### ***Nesbitt v. Candler Cty.*, 945 F.3d 1355 (11th Cir. 2020)**

The Eleventh Circuit affirmed the district court’s grant of summary judgment for the defendant, holding that a “but-for” standard of causation applies to FCA retaliation claims.

#### *About the Case*

The relator was an EMT, whose responsibilities included preparing trip reports relied upon by Medicare to determine whether to reimburse the costs of ambulance services. 945 F. 3d at 1356. He alleged that his employer pressured EMTs to falsify these reports and that he was terminated in

retaliation for reporting the issue. 945 F. 3d at 1357. DOJ intervened and reached a settlement whereby the fraud claims were voluntarily dismissed, but the relator's FCA retaliation claim proceeded. *Id.* The district court granted summary judgment on the retaliation claim on the ground that the relator had not created a genuine issue of material fact that he had been fired "because of" his engagement in protected conduct. *Id.*

The Eleventh Circuit affirmed. 945 F. 3d at 1357, 1362. The Court recognized a circuit split on the applicable standard of causation under the antiretaliation provision of 31 U.S.C. § 3730(h)(1), but followed the Third and Fifth Circuits in adopting a "but-for" standard rather than the "motivating factor standard" adopted by the D.C. and Sixth Circuits. 945 F. 3d at 1358, 1360-61. The Court relied on the language in the statute requiring that the employee be discharged "*because of* lawful acts done by the employee." 945 F. 3d at 1358 (emphasis added). The Court found that similar language had already been interpreted to require a but-for standard in a pair of Supreme Court decisions. 945 F. 3d at 1358-59. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (holding that based on the text of the antiretaliation provision of Title VII, claims under that statute require proof that the desire to retaliate was the but-for cause of the challenged employment action); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 182 (2009) (deciding that "because of such individual's age" meant age must be the but-for cause of an employer's decision for a claim under the Age Discrimination in Employment Act of 1967). The Eleventh Circuit reasoned that the "because" language was identical or materially identical in all three statutes and concluded that a but-for standard likewise applied to a retaliation claim under the FCA. 945 F. 3d at 1359-60. Although other circuits held otherwise based on the legislative history of the FCA, the Eleventh Circuit determined that it could not rely on legislative history to overcome the plain meaning of the statute's text. 945 F. 3d at 1360-61.

#### *Implications for Future FCA Cases*

This ruling announced that a "but-for" standard of causation applies to the antiretaliation provision of 31 U.S.C. § 3730(h)(1) in the Eleventh Circuit—though there remains a circuit split on the issue.

#### ***Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089 (11th Cir. 2020)**

The Eleventh Circuit (1) held that a partial assignment of the relator's recovery did not affect her standing to pursue an appeal; (2) conducted a post-*Escobar* materiality analysis, distinguishing between claims that clearly affected the defendants' Medicare reimbursement and claims of non-compliance with Medicaid requirements that did not, and (3) decided that the proximate cause standard applies to "cause to be presented" actions under the FCA.

#### *About the Case*

The relator, a registered nurse, claimed that the owners and operators of specialized nursing facilities (SNFs) were misrepresenting the services they provided to Medicare beneficiaries in order

to obtain greater reimbursements and failed to comply with certain Medicaid requirements. 963 F.3d at 1097. The United States declined to intervene and the case proceeded to trial. 963 F.3d at 1097-98. After the jury returned a verdict finding the defendants liable for Medicare and Medicaid fraud, 963 F.3d at 1098, the district court granted defendants' motion for judgment as a matter of law, concluding that the relator failed to introduce evidence of materiality and scienter. *Id.* Relator appealed. 963 F.3d at 1099.

The Eleventh Circuit first denied a motion to dismiss the appeal for lack of standing. The defendants argued that the relator lacked standing to appeal because she had entered into a litigation funding agreement whereby she assigned a small portion of any recovery to another entity. 963 F.3d at 1102. The Court held that relator retained sufficient interest to meet the "irreducible constitutional minimum" of standing under Article III, noting that she retained sole authority over the litigation, that the United States had suffered injury, and that the relator was the assignee of the United States to pursue its claim. 963 F.3d at 1101-02.

On the merits, the Eleventh Circuit concluded that there was sufficient evidence of materiality for the Medicare claims, but not for the Medicaid claims. 963 F.3d at 1104-09. The Court found that evidence that the SNFs engaged in upcoding on Medicare claims was material and presented "a simple and direct theory of fraud." 963 F.3d at 1105. The Court also addressed, for the first time, the applicable causation standard under section 3729(a)(1)(A)(2), or a "cause to be presented" theory of liability. 963 F.3d at 1106. Specifically, relator had alleged that the defendant knowingly caused false and fraudulent claims to be presented to Medicare. *Id.* The Eleventh Circuit adopted a "proximate causation" standard, explaining that "proximate causation is a useful and appropriate standard by which to determine whether there is a sufficient nexus between the defendant's conduct and the submission of a false claim." 963 F.3d at 1107. Applying this standard, the Court determined that the relator had introduced sufficient evidence to permit a jury to reasonably conclude the defendant had caused the submission of false claims. *Id.* Among the evidence proffered, a former investigator testified as to a conversation revealing that the nurses were routinely pressured to elevate coding levels irrespective of the services provided, so that reimbursement would be high. 963 F.3d at 1107-08.

As to the Medicaid fraud claims, however, the Eleventh Circuit found that the alleged failure to prepare and maintain comprehensive care plans did not meet *Escobar's* materiality standard. 963 F.3d at 1108-09. The Court reasoned that the relator's "scant evidence" on this front supported only the conclusion that the care plans were labeled as conditions of payment under Medicaid regulations, 963 F.3d at 1109, but that the relator failed to connect the absence of care plans to specific representations regarding the services provided, or to prove any deficiencies in Medicaid services. *Id.*

## *Implications for Future FCA Cases*

The Eleventh Circuit considered that partial reassignment pursuant to a litigation funding agreement did not eliminate the relator's standing. In addition, the case creates a comparison of the evidence necessary to establish materiality under the *Escobar* standards. Finally, the case sets the standard for causation in a "cause to be presented" action in the Eleventh Circuit.

## *About WilmerHale's False Claims Act Practice*

With a team of veteran litigators and former lawyers from DOJ and other key federal departments, including DoD and HHS, WilmerHale brings unparalleled experience to representing clients in FCA investigations and litigation, including in both state and federal courts. We regularly represent clients in sectors of the economy facing the greatest FCA activity, including healthcare and pharmaceuticals, defense, government procurement, financial services, energy, and information technology. Our team includes lawyers who, during prior government service, oversaw the management, litigation and settlement of major FCA investigations and suits. We thus approach each matter with a deep understanding of the government's objectives, and we have obtained favorable resolutions of numerous matters without a formal action being filed. We also have an extensive track record of obtaining early dismissal or resolution of suits by focusing on precedent-setting legal defenses, including innovative uses of the public-disclosure and first-to-file bars. By conducting credible internal investigations and negotiating with DOJ or state attorneys general, we have also helped clients avoid criminal prosecution and accomplish appropriate civil resolutions of parallel criminal, civil, and administrative proceedings. If a case goes to trial, we have experienced courtroom advocates prepared to take the case to a jury.

Our FCA Group includes:

- A former Deputy Attorney General of the United States, who supervised all of DOJ's litigating and law enforcement components (including DOJ's Civil Frauds Unit and the US Attorneys' Offices) and co-led (with the Deputy Secretary of HHS) the Obama Administration's "HEAT" initiative against health care fraud. He also served in an earlier administration as Assistant Attorney General for the Civil Division, where he directly supervised FCA enforcement; and as Deputy General Counsel for DoD, where he supervised all litigation at DoD, including FCA and government-contracts litigation.
- A former Deputy Attorney General of the United States, who in that capacity had ultimate oversight over DOJ's Civil Frauds Unit and considered major interventions and settlements. She also had served as General Counsel of DoD, responsible for overseeing all litigation, including FCA litigation.
- Three former US Attorneys—for the District of Columbia and the District of Colorado.
- A former General Counsel of DoD, responsible for overseeing all litigation, including FCA and other procurement-related legal work.

- A former Chief of Staff and Assistant Secretary for the Department of the Interior, who, in response to the Deepwater Horizon incident, acted as lead negotiator of the Natural Resource Damage Assessment team.
- Numerous former Assistant US Attorneys and other lawyers with jury trial experience, as well as litigators who specialize in handling government contracts litigation.

## CONTACT INFORMATION FOR MORE ON FALSE CLAIMS ACT MATTERS

### Washington DC

<b>Christopher E. Babbitt</b>	+1 202 663 6681	<a href="mailto:christopher.babbitt@wilmerhale.com">christopher.babbitt@wilmerhale.com</a>
<b>Jamie Gorelick</b>	+1 202 663 6500	<a href="mailto:jamie.gorelick@wilmerhale.com">jamie.gorelick@wilmerhale.com</a>
<b>Ronald C. Machen</b>	+1 202 663 6881	<a href="mailto:ronald.machen@wilmerhale.com">ronald.machen@wilmerhale.com</a>
<b>David W. Ogden</b>	+1 202 663 6440	<a href="mailto:david.ogden@wilmerhale.com">david.ogden@wilmerhale.com</a>
<b>Jonathan E. Paikin</b>	+1 202 663 6703	<a href="mailto:jonathan.paikin@wilmerhale.com">jonathan.paikin@wilmerhale.com</a>
<b>Stephen W. Preston</b>	+1 202 663 6900	<a href="mailto:stephen.preston@wilmerhale.com">stephen.preston@wilmerhale.com</a>
<b>Howard M. Shapiro</b>	+1 202 663 6606	<a href="mailto:howard.shapiro@wilmerhale.com">howard.shapiro@wilmerhale.com</a>
<b>Andrew E. Shipley</b>	+1 202 663 6283	<a href="mailto:andrew.shipley@wilmerhale.com">andrew.shipley@wilmerhale.com</a>
<b>Charles C. Speth</b>	+1 202 663 6133	<a href="mailto:charles.speth@wilmerhale.com">charles.speth@wilmerhale.com</a>

### New York

<b>Debo P. Adegbile</b>	+1 212 295 6717	<a href="mailto:debo.adegbile@wilmerhale.com">debo.adegbile@wilmerhale.com</a>
<b>Hallie B. Levin</b>	+1 212 295 6710	<a href="mailto:hallie.levin@wilmerhale.com">hallie.levin@wilmerhale.com</a>

### Boston

<b>Stephen A. Jonas</b>	+1 617 526 6144	<a href="mailto:stephen.jonas@wilmerhale.com">stephen.jonas@wilmerhale.com</a>
<b>Emily R. Schulman</b>	+1 617 526 6077	<a href="mailto:emily.schulman@wilmerhale.com">emily.schulman@wilmerhale.com</a>

### Los Angeles

<b>Matthew Benedetto</b>	+1 213 443 5323	<a href="mailto:matthew.benedetto@wilmerhale.com">matthew.benedetto@wilmerhale.com</a>
<b>David C. Marcus</b>	+1 213 443 5312	<a href="mailto:david.marcus@wilmerhale.com">david.marcus@wilmerhale.com</a>

### Denver

<b>Regina M. Rodriguez</b>	+1 720 598 3468	<a href="mailto:regina.rodriguez@wilmerhale.com">regina.rodriguez@wilmerhale.com</a>
<b>Thomas L. Strickland</b>	+1 720 274 3148	<a href="mailto:thomas.strickland@wilmerhale.com">thomas.strickland@wilmerhale.com</a>
<b>John F. Walsh</b>	+1 720 274 3154	<a href="mailto:john.walsh@wilmerhale.com">john.walsh@wilmerhale.com</a>

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. Our United Kingdom office is operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at [www.sra.org.uk/solicitors/code-of-conduct.page](http://www.sra.org.uk/solicitors/code-of-conduct.page). A list of partners and their professional qualifications is available for inspection at our UK office. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2004-2019 Wilmer Cutler Pickering Hale and Dorr LLP



