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Boomerang: The False Claims Act Returns Post-COVID

By Alexander Major, Matthew Wright, Franklin Turner, and Andriani Buck[*]

"The Boomerang is Australia's chief export (and then import)."[1]

A good tool persists. Once discovered and properly employed, it evolves and becomes omnipresent in the society it helps build. Some even return when thrown 45 degrees to the right of the headwind—to the left, if left handed. The boomerang, as a tool, is fascinating. While the oldest Australian boomerangs found date back about 10,000 years, images of that same technology can be found in rock art paintings going back 20,000.[2] Australia's Indigenous peoples used boomerangs for many purposes—hunting, digging, even fighting.[3] Their use was not one note; they were intentionally versatile. Of course, "throwing sticks" are by no way limited to Australia, but the boomerang—especially the returning variety—is an inescapable symbol of that country/continent that keeps returning no matter how hard one tries to throw it away.

Approximately 19,841 years after those images were drawn on a rock wall, a new tool was created that, like so many of its predecessors, would stand the test of time, be employed in a variety of ways, symbolize the environment that bore it, and always seems to come back. The False Claims Act (FCA),[4] enacted during the Civil War, was crafted to fight rampant fraud in military procurement contracts. Created by legislators with care to include trebled damages, attorney's fees, and civil penalties, the FCA has always been a severe tool by design.

In 1986 Congress sharpened the FCA, ushering in more aggressive enforcement of the Act and leading to settlements and judgments exacting more than $70 billion in damages (to the benefit of the United States and the detriment of untold numbers of contractors) over the past 36 years.[5] In the prior fiscal year alone, the government obtained more than $5.6 billion in

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settlements and judgments from fraud and false claims cases—the second largest annual total in FCA history, and the largest total since 2014.[6]

Like the boomerang, the manner in which the government deploys the Act is versatile and evolving as the government continues its hunt to curb fraud by using this old tool in new and sometimes unique ways. Trillions of federal dollars were pumped into the economy during the pandemic. As the government begins to account for these vast (and sometimes poorly managed) expenditures, FCA enforcement is poised to accelerate faster than a kangaroo being chased by a dingo across the outback. COVID-related chaos has turned the government's attention from its more traditional focus on Medicare and Medicaid-related fraud. The Department of Justice (DOJ) has committed to prioritizing pandemic fraud investigations as President Biden recently signed legislation extending the pandemic fraud statute of limitations to 10 years, signaling the government's long-term commitment to aggressively pursue FCA violations.[7] Similarly, the Administration and the DOJ have both stated that "enough is enough" when addressing the cybersecurity of our nation's critical information systems. As these new areas of enforcement slowly migrate onto the plain, the government is finding a plethora of targets at which to aim with a tool more than capable of puncturing the profits of unsuspecting contractors.

This Briefing Paper begins by explaining what the FCA is and why you (should) care, and then discusses federal legislative initiatives to amend the FCA, circuit court splits on key FCA issues, recent cases of particular interest to contractors, the DOJ's "Cyber Fraud Initiative," and other DOJ/Office of Inspector General (OIG) areas of enhanced scrutiny before providing practical guidance on how to avoid or address FCA allegations.

What Is The FCA And Why You (Should) Care

What do you call a boomerang that doesn't come back? A stick.

The FCA is a highly effective weapon to combat fraud. The FCA's arsenal includes the imposition of significant penalties and consequences such as treble damages—three times the actual damages sustained by the government—and debarment.[8] In addition to treble damages, violators also face inflation-building civil penalties currently ranging from $12,537 to $25,076 *per claim* and liability for the government's cost of litigating the matter.[9] The harsh penalties coupled with strong whistleblower incentives—in which whistleblowers can receive up to 30% of the recovery[10]—create the perfect storm to trap unsuspecting contractors.

The government often, but not always, focuses on the egregious or high-dollar cases. This tendency can create a false sense of security for companies that have worked with the government in the past and have not had any brushes with the Act. But as the government's eye wanders from healthcare fraud to new hunting grounds, even relatively minor infractions could be pursued. Large numbers of minor infractions can result in massive damages (and legal costs). The government does not overlook small prey and FCA infractions can quickly become problematic for businesses of any size.

Avoiding the leading edge of the Act is imperative. If contractors do not have sufficient internal controls in place, they should consider closing this loophole immediately to avoid underestimating the threat lurking in an increasing number of well-funded contracts connected to federal and state programs. But these aren't the typical

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controls, the ones that (should) have been in place since 1863. It's a new field requiring contractors to examine the evolving threats from all sides. If a company has not proactively ensured FCA compliance, once the DOJ turns its sights to a new mark it may be too late to avoid injury.

Elements And Definitions

Contractors beware: FCA liability can attach under several different predicates, which are designed to allow the government significant flexibility to ferret out and prosecute various forms of fraud. To successfully prove an FCA violation, the party alleging the FCA violation must show that (1) a defendant presented a *claim* to the government, (2) the claim was *false*, (3) the defendant *knew* the claim was false,[11] and (4) the misrepresentation the defendant made was *material*.[12]

Element 1: The Claim. The FCA's effectiveness can be attributed, in part, to a broad definition of "claim." A company does not need to submit a claim directly to the government to be liable. A "claim" can include requests or demands for money or property that are presented to the government or made to a contractor, grantee, or other recipient if (1) the money or property will be used on the government's behalf or to advance a government interest, and (2) the government pays or reimburses the money or property that is requested or demanded.[13] If a company through its interactions with a contractor, grantee, or recipient causes a false claim to be presented to the government, indirect FCA liability can be found.[14] Additionally, an individual does not need to successfully defraud the government for liability to attach.[15] Liability can attach even when the individual "did not actually induce the government to pay out funds or to suffer any loss."[16] The Government "need not prove actual damages in order to recover."[17]

Element 2: Falsity. Whether a false claim is false can depend on the jurisdiction in which the issue arises. The FCA does not define falsity and instead leaves courts to interpret the term. The courts, in turn, have created two categories of falsity: (1) factual falsity and (2) legal falsity.

Factual falsity occurs when a contractor makes a claim or request for reimbursement with "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided."[18] Factual falsity is also known as literal falsity. A false FCA theory may lie where "the claim for payment is itself literally false or fraudulent."[19] Examples of factual falsity include billing when goods or services were not provided and overbilling.

Legal falsity occurs in cases where a "contractor falsely represents that it is in compliance with a particular federal statute or regulation."[20] Legal falsity is more difficult than factual falsity to assess.[21] Legal falsity includes express certification of compliance with legal requirements and submission of a claim with representations rendered misleading as to the goods or services provided.[22]

Element 3: Knowledge. "Knowing" includes not only actual knowledge, but also deliberate ignorance and reckless disregard of the truth or falsity of the information.[23] An individual will not be protected from liability by an " 'ostrich-like' refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know."[24] "Congress adopted the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek."[25] Intent to defraud is not required.[26] The FCA "covers not just those who set out to defraud the government, but also those who ignore obvious deficiencies in a claim."[27] There are, however, limitations to liability. Liability does not attach to innocent mistakes or simple negligence.[28]

Element 4: Materiality. This is the current battlefield that includes mixed questions of law and fact. The FCA definition of "material" seems deceptively straightforward—*i.e.,* "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[29] Application of the definition is anything but simple. The materiality standard becomes especially difficult to apply in the false certification context, when the government must demonstrate that the standard or fact to which a contractor falsely certified was actually material to the payment decision. In 2016, the U.S. Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* offered an explication of materiality that has led to more confusion than clarity.[30] In *Escobar,* the Court instructed that "materiality cannot rest on a single fact or occurrence as always determinative" and is not intended to be a "vehicle for punishing garden-variety breaches of contract or regulatory violations."[31] The Court elaborated that "materiality looks to the effect on the likely or actual behavior of the recipi-

ent of the alleged misrepresentation."[32] Proof of materiality may include evidence the Government "consistently refuses to pay claims . . . based on noncompliance with the particular statutory, regulatory, or contractual requirement," and that a defendant submitted these claims despite that knowledge.[33] "Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, . . . that is very strong evidence that those requirements are not material."[34]

The upshot of *Escobar* in recent years is that defendants have slightly improved odds of success in obtaining early dismissals or summary adjudications if they can demonstrate a "continued payment defense." The DOJ has feverishly tried to chip away at this defense to mixed results. While courts have largely been faithful to *Escobar's* admonition that the materiality standard is a demanding one, this standard may be refined through legislative action in the form of proposed FCA amendments that are discussed below in greater detail.[35]

Mechanics: *Qui Tam* Relator And Government Intervenors

Qui tam originates from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning that he who sues in this matter sues for the king as well as for himself. In 1863, Senator Jacob Howard of Michigan explained how the FCA *qui tam* provisions were intended to work:

> In short, sir, I have based the [*qui tam* provision] upon the old-fashioned idea of holding out a temptation and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.[36]

While the authors of this PAPER are unclear as to exactly what kind of capers Senator Howard may have been up to, his logic is sound. If treble damages and debarment weren't enough of a deterrent, the FCA encourages private individuals—colloquially known as whistleblowers and formally known as *qui tam* relators—to bring cases on behalf of the government.[37] *Qui tam* relators may recover as much as 30% of a favorable judgment or settlement, which is a strong incentive for individuals to blow the whistle on questionable behavior.[38] Any person or entity with knowledge (or even an errant belief) of fraudulent activity, whether personally harmed by the activity or not, may file a *qui tam* suit.

If a contractor receives a report of alleged FCA violations, the information should be treated as potential evidence in a subsequent FCA suit and the individual reporting the potential violation should be treated as a potential whistleblower and properly protected. Yes, protected. If retaliation stems from an employee raising an FCA concern, the employee may be entitled to double back pay and interest, reinstatement, and attorney's fees.[39] Whistleblowers filed 598 *qui tam* suits in fiscal year 2021, resulting in settlements and judgments exceeding $1.6 billion.[40]

Once a lawsuit is filed by a *qui tam* relator, the DOJ may (1) *intervene* in the case, (2) *decline* to intervene, or (3) move to *dismiss*. When the DOJ participates in a suit by intervening or filing its own complaint aggregate recoveries are much greater than when the DOJ declines to intervene or otherwise chooses not to seek recovery. In cases where the DOJ intervenes, the relator receives between 15% and 25% of the recovery.[41] In cases where the DOJ declines to intervene, the relator may continue to litigate the suit and if successful is entitled to 25% to 30% of the recovery.[42]

The government's ability to dismiss *qui tam* cases continues to be the subject of ongoing litigation and reform efforts that gained momentum after the DOJ's Director of the Civil Fraud Section, Michael Granston, issued a 2018 memorandum (the "Granston Memo"). The Granston Memo detailed seven non-exhaustive factors DOJ attorneys should consider when determining whether to dismiss *qui tam* cases.[43] The factors, implemented at DOJ Manual § 4-4.111, include (1) Curbing Meritless *Qui Tams*, (2) Preventing Parasitic or Opportunistic *Qui Tam* Actions, (3) Preventing Interference with Agency Policies and Programs, (4) Controlling Litigation Brought on Behalf of the United States, (5) Safeguarding Classified Information and National Security Interests, (6) Preserving Government Resources, and (7) Addressing Egregious Procedural Errors.[44] Since the issuance of the Granston Memo, the DOJ has dismissed at least 50 meritless *qui tam* actions pursuant to 31 U.S.C.A. § 3730(c)(2)(A). Prior to the memo, the DOJ exercised its dismissal authority just 45 times in approximately 30 years.

The Granston Memo and the raft of earlier dismissals it prompted have started a backlash reaction among legislators and new DOJ authorities. While Senator Grassley's False Claims Amendments Act of 2021 proposes to make dismissal of *qui tam* cases more difficult,[45] the dismissal

provisions of the proposed legislation may have less of a practical effect than when initially introduced since the Biden Administration's DOJ has already begun to instruct its attorneys to identify reasons supporting dismissal of *qui tam* actions. In addition to the possibility of new legislation, the Supreme Court has agreed to review a circuit split around when/how the DOJ may properly dismiss *qui tam* cases.[46]

Federal Initiatives To Amend The FCA

Genie: You have 3 wishes.

Contractor: I've seen this before. Whatever I wish for will come back and bite me in some way.

Genie: I promise that won't happen. I'm so sure it won't I'll give you infinite wishes if it does.

Contractor: Okay. I wish for a boomerang with teeth.

Genie: Son of a . . . .

With bipartisan support, Senator Chuck Grassley introduced the False Claims Amendments Act of 2021. The proposed legislation would amend the FCA in four important ways:

1. modify the *Escobar* materiality standard by lowering the burden of proof to a preponderance of evidence standard, and would clarify that the government's decision to forgo a refund or to pay a claim despite actual knowledge of fraud or falsity would not be considered dispositive if there were other reasons for the decision;

2. resolve a circuit split, impose a uniform standard for courts to employ in cases where the government moves to dismiss a *qui tam* case over a relator's objection, and require the government to provide its reasons for dismissing a *qui tam* case over a relator's objection;

3. in *qui tam* actions where the government does not intervene, shift the government's discovery request costs to the defendant; and

4. clarify that whistleblower protections apply to former employees.[47]

The Amendments would apply to "all pending and future litigation to ensure that it covers the trillions of dollars spent on COVID relief."[48] The Congressional Budget Office estimates that the Amendments would allow the DOJ to "succeed in about three FCA cases each year that would not otherwise have been won."[49] If the Amendments are enacted, the FCA will become a more effective and staunch weapon in the government's arsenal and a bigger pain in contractors' sides. The removal of flexibility the Amendments could occasion means significantly less opportunity to dissuade the government from pursuing a fruitless (and costly) claim by resolving FCA suits early in the process. The only absolute is that it will almost certainly increase defense costs for individuals and entities charged with violating the Act.

Circuit Splits On Key FCA Issues

Contractor: I would like to return a defective boomerang.

Shop owner: Sure. Where is it?

Contractor: I have no idea.

In the absence of new federal legislation or new Supreme Court decisions that resolve circuit splits on key FCA issues, contractors can expect continued uncertainty and variability among the different jurisdictions. In some instances, it appears additional clarity may be on the horizon. In other instances, contractors should anticipate that circuit splits will continue to create opportunities for forum shopping and inconsistent decisions depending on the circuit.

Is "Objective Falsity" Required, Or Not?

The anti-fraud language and principles of the FCA today still read much as they did in the 1860's, even though the statute itself never defined "false or fraudulent."[50] Over time, the courts have created two categories of falsity: (1) factual falsity and (2) legal falsity. Surprisingly, there is an important circuit split over whether statements of opinion can be "false" and subject to FCA liability, or whether the statute demands evidence of "objective falsity." The lack of uniform guidance regarding how opinions—which are subjective by nature—should be treated is the basis of this circuit split. This issue most often arises in healthcare cases where clinical opinions can differ and experts may disagree about whether treatments are medically necessary. But any business or contractor that receives funds under a federal program or procurement is potentially at risk if they perform work or certifications that implicate subjective judgment, opinion, or interpretation of ambiguous statutes, regulations, or contract provisions.

One example many federal contractors will recognize is the cost-reimbursement principle, and the relevant regula-

tions that provide an "allowable cost" (*i.e.,* a cost the government will reimburse) must be "reasonable."[51] What constitutes reasonableness is very much a matter of perspective and judgment based on a fact-intensive analysis determined by *post hoc* weighing of various factors that are often unknown before the contractor's performance in complete.[52] A contractor's good-faith certification that its costs are reasonable and supported by such an analysis cannot be objectively false, even if the government may disagree with that analysis in whole or in part. If "objective falsity" is not required and a difference of expert opinion may adequately allege a "false claim" to support FCA liability, it does not take much to imagine the explosion of "unreasonable cost" *qui tam* actions filed by relators challenging contractors' reasonableness certifications as false or fraudulent. What should be an ordinary contract dispute that could be resolved either by the parties or before a board of contract appeals or the U.S. Court of Federal Claims would be transformed into an FCA case where the contractor faces the threat of trebled damages, penalties, and potential debarment.

Fourth, Seventh, and Eleventh Circuits: Objective Falsity Is Required. Aligning with the objective falsity requirements in the Fourth and Seventh Circuits,[53] the Eleventh Circuit recently found that a reasonable difference of expert opinion, without more, is insufficient to establish falsity under the FCA. The objective falsity standard requires expert opinions to be contradicted by objectively verifiable facts. In 2019, the Eleventh Circuit held that "a properly formed and sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong."[54] FCA liability therefore requires more than "mere difference of reasonable opinion."[55] There must be "an objective falsehood."[56] In other words "the clinical judgment on which the claim is based contains a flaw that can be demonstrated through verifiable facts."[57]

Third and Ninth Circuits: Difference of Opinion May Suffice. In the Third and Ninth Circuits a difference of expert or clinical opinion may be sufficient to establish falsity under the FCA. In 2020, the Third Circuit determined that expert testimony challenging a physician's medical opinion can be adequate to establish falsity.[58] The Third Circuit found that the objective falsity standard conflates scienter and falsity.[59] The Ninth Circuit held that the FCA does not require "objective falsity" and medical opinions should be analyzed pursuant to the same standards as all other false claims assertions.[60] Accordingly, contractors should beware that in these circuits, relators and the government can use FCA penalties to punish routine, professional business judgments that are challenged by an outside expert.

The circuit split has potentially massive consequences for health care providers and contractors. Complicating those consequences is the uncertainty and lack of clear direction related to falsity presently provided by the First, Fifth, Sixth, and Tenth Circuits. Suffice it to say, along with materiality, falsity remains a significant and forum-specific uncertainty under FCA jurisprudence.

DOJ Standards For Dismissal

The Supreme Court has granted certiorari in an FCA case in the Third Circuit, *Polansky v. Executive Health Resources, Inc.*, that seeks to clarify whether the government can dismiss a *qui tam* case over a relator's objections after initially declining to intervene, and, if so, what standard applies.[61] The Supreme Court decision will resolve a circuit split regarding the DOJ standards of dismissal. The FCA establishes the government's authority to dismiss a *qui tam* action, but does not provide a standard of review for dismissal motions. This has led to at least four different standards.

Ninth and Tenth Circuits: The "Rational Relationship" Test. The Ninth Circuit requires that the government first identify a "valid government purpose" and "rational relation between dismissal and accomplishment of that purpose." The burden then shifts to the relator to show that the dismissal would be "fraudulent, arbitrary, and capricious."[62] The Tenth Circuit has adopted the same standard.[63]

D.C. Circuit: The "Unfettered Discretion" Approach. In contrast to the stringent rational relationship text, the D.C. Circuit applies a deferential "unfettered right" standard.[64] The D.C. Circuit has interpreted the FCA to vest the executive branch with sole dismissal authority.[65]

Seventh and Third Circuits: The Federal Rules of Civil Procedure Process-Oriented Approach. The government can only dismiss if it meets the Federal Rules of Civil Procedure dismissal standards.[66] Courts have broad discretion to dismiss on "terms the court considers proper."[67] The Third Circuit adopted the process-oriented approach and utilized the standard when deciding *Polansky*.[68]

First Circuit: The Benefit of the Doubt Approach. The First Circuit requires the government to provide its reasons for seeking dismissal to allow the relator a chance to persuade the government to withdraw its motion.[69] If the government declines to withdraw its motion for dismissal, the relator can prevent dismissal by showing that the government's decision to seek dismissal of the *qui tam* action transgresses constitutional limitations or perpetrates a fraud on the court.[70]

While clarity on dismissal standards will be welcome, it is less likely to have a large effect on FCA litigation due to the relatively small number of cases the government seeks to dismiss.

The Scienter Standard

Circuit courts are also deeply split over how to determine scienter, or knowledge of wrongdoing. Scienter is a required element of any FCA violation. But where one court may see an innocent mistake, another may see actionable conduct.

The leading Supreme Court case, *Safeco Insurance Co. of America v. Burr*, teaches that a defendant is not considered to have knowledge of alleged wrongdoing, or to have otherwise acted with "reckless disregard," if they made an "objectively reasonable" interpretation of an unclear law or regulation without any available "authoritative guidance" to the contrary.[71] In *Safeco*, the Supreme Court noted that to be liable under the Fair Credit Reporting Act, the defendants must have acted "willfully," which covered both knowing and reckless violations.[72] The Court also held that an objective standard applied to recklessness: it entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[73]

The objective scienter standard allows FCA defendants to contest scienter as a matter of law. The Seventh Circuit recently joined four other circuits in holding that the Fair Credit Reporting Act's objective scienter standard (explored in *Safeco*) also applies to the FCA, holding that a defendant's subjective intent is "irrelevant" because "[a] defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown."[74] The dissent (and four other circuits) have argued that this approach facilitates fraud against the government and that it creates "a safe harbor for deliberate or reckless fraudsters whose lawyers can concoct a *post hoc* legal rationale that can pass a laugh test."[75] They contend that evidence of a subjective intent to defraud should be sufficient to satisfy the scienter requirement.

9(b) Fraud Particularity Standard

Pleading standards are meant to shield against frivolous lawsuits, and FCA complaints that fail to meet pleading standards are frequently dismissed. Circuits are split on whether to apply rigid particularity standards or a more flexible approach that allows false claims to be inferred from the circumstances. The Supreme Court has shown interest in the particularity standard signaling that there may be interest in granting the cert petition filed in *Johnson v. Bethany Hospice & Palliative Care, LLC*.[76]

While there are clearly different particularity standards applied in different circuits, there is disagreement about the level of convergence. The Sixth and Eleventh Circuits require FCA complaints to include an example of a specific fraudulent claim made to the government.[77] The Seventh Circuit applies a precise and substantiated standard in which specific details can be included as litigation proceeds and an example of a specific fraudulent claim made to the government is not necessarily needed at the pleadings stage.[78] The relator in *Bethany Hospice* argues that the circuits apply three separate standards:

- Eleventh Circuit: "relators who have pled a fraudulent scheme with particularity also to plead specific details of false claims."[79]
- Third, Fifth, Seventh, Ninth, Tenth and D.C. Circuits: "allow[] the submission of claims to be inferred from circumstances (including from a fraudulent scheme)."[80]
- First, Second, Fourth, Sixth, Eighth: "have adopted rules that typically require relators to plead details of false claims, but recognize certain exceptions."[81]

The defendant in *Bethany Hospice* asserts that "[n]early all circuits apply similar standards in appropriate cases, and any disparity in outcomes is driven by differences in the pleaded facts, not by a difference in legal rules." The DOJ has also minimized the differences arguing that the courts have "largely converged on an approach that allows relators *either* to identify specific false claims *or* to plead other sufficiently reliable indicia supporting a strong infer-

ence that false claims were submitted to the government."[82]

While there is disagreement regarding how much the pleading standards have coalesced, there are clear differences in the standards applied by different circuits. Contractors forced to defend themselves in jurisdictions with more flexible standards may find themselves in protracted litigation, while defendants in jurisdictions with stringent pleading standards may be able to successfully dismiss the case at an early juncture. A uniform standard would allow defendants and relators alike to benefit from a more predictable system.

Recent Cases Of Particular Interest To Contractors

I threw a boomerang 5 years ago. Today, I live in constant fear.

United States ex rel. USN4U, LLC v. Wolf Creek Federal Services, Inc., 34 F.4th 507 (6th Cir. 2022)

In *Wolf Creek*, the Sixth Circuit overturned the lower court dismissal of a *qui tam* action finding that FCA liability could attach if a contractor's use of false cost estimates induced the government to enter into the contract. Liability could be found under the FCA's fraudulent inducement provision. Materiality and causation could be found if the government relied on Wolf Creek's estimates when it made its price reasonableness determination. The court determined that the complaint adequately alleged that Wolf Creek deliberately inflated work hours in its proposals that far exceeded industry standards. The case was remanded back to the lower court, and it is unclear whether the relator will ultimately prevail. *Wolf Creek* serves as a cautionary lesson for contractors to avoid deliberately overinflating estimates, especially in noncompetitive acquisitions. Even if the award is firm-fixed-price and the contractor seeks payments which align with the awarded contract amounts, based on the exaggerated estimates the contractor may be found liable under the FCA for fraudulently inducing the government to enter into the contract.

United States ex rel. Cimino v. IBM Corp., 3 F.4th 412 (D.C. Cir. 2021)

The D.C. Circuit Court of Appeals affirmed in part and reversed in part a district court's dismissal of a *qui tam* action alleging that IBM fraudulently induced the government to renew a contract. At the pleading stage, IBM's alleged misrepresentations were required to be taken as true and were determined to be capable of affecting the government's decision to renew the contract. The court expressed doubt that the relator would ultimately prevail, given that FCA liability for "fraudulent inducement must turn on whether the fraud caused the government to contract."[83] The liberal materiality standard adopted by the court allows it to consider additional discovery and conduct a more thorough factual analysis, but the hesitancy to dismiss cases at the pleading stage drastically increases defendants' litigation costs. In cases such as this one—where the court expresses reservations about the relator's case—decisions to prolong the inevitable can be difficult to accept and underscore the need for a uniform pleading standard that minimizes frivolous FCA suits.

United States ex rel. Vermont National Telephone Co. v. Northstar Wireless LLC, 34 F.4th 29 (D.C. Cir. 2022)

The D.C. Circuit Court reversed the dismissal of a *qui tam* action based on the government-action bar and materiality. The court disagreed that the *qui tam* case involved allegations similar to those raised in an administrative civil monetary penalty proceeding. Instead the court found that any imposed penalties were not part of the proceeding at issue and therefore did not apply.

The court's materiality finding "focuses on the potential effect of the false statement when it is made," not "the false statement's actual effect after it is discovered."[84] The court found that materiality was met because the false statement was *capable of influencing* the government's decision, even if the decision makers failed to appreciate the statement's significance and did not consider it when making the decision. The court's focus on the potential effect rather than the actual effect of false statements on government decisions will make it more difficult for defendants to disprove materiality.

Scollick ex rel. United States v. Narula, 2022 WL 3020936 (D.D.C. July 29, 2022)

Unique in this case were not the claims against the contractors, which were alleged to have falsely certified their status as a service-disabled veteran-owned small

business (SDVOSB). Rather, what set this case apart was that the plaintiff-relator, Scollick, also named as defendants the *insurance broker* who helped secure the bonding that the contractor defendants needed to bid and obtain the contracts, and the *surety* that issued bid and performance bonds to the contractor defendants. Scollick alleged that the bonding companies "knew or should have known" that the construction companies were shells acting as fronts for larger, non-veteran-owned entities violating the government's contracting requirements—and thus the bonding companies should be held equally liable with the contractors for "indirect presentment" and "reverse false claims" under the FCA. This suit appropriately seized the attention of the surety industry, which had never before faced similar claims or the threat of trebled damages liabilities under the FCA.

While the surety claims likely should not have been reinstated following the plaintiff's amended complaint in 2017, the district court reached the correct determination on a more developed record. Regardless of the facts (or lack of facts) adduced in discovery, there was always a duty problem here as a matter of law. Ultimately there was no evidence of scienter because the plaintiff's entire theory of liability was premised on a fabricated duty that does not actually exist. As Judge Lamberth stated, the plaintiff "failed to proffer evidence that the insurance defendants knew of the SDVOSB requirements nor any support for the notion that they had a duty to familiarize themselves with those requirements."[85] There is no duty for Miller Act sureties to investigate the possibility of set-aside fraud by a contractor and raise and suspicions to the government's attention, nor is there a duty to further confirm whether an already-verified contractor is compliant with all regulatory and legal requirement for set aside contracts or if a violation has occurred. Simply put, that is not their job. This recent decision (July 2022) should cause insurers and Miller Act sureties to breathe a sigh of relief.

Other DOJ/OIG Areas Of Enhanced Scrutiny

DOJ's "Cyber Fraud Initiative"

In October 2021, the DOJ announced a new Civil Cyber Fraud Initiative intended to "hold accountable entities or individuals that put U.S. information or systems at risk by knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches."[86] Acting Assistant Attorney General Brian M. Boynton explained that the Civil Cyber Fraud Initiative "will use the [FCA] to identify, pursue and deter cyber vulnerabilities and incidents that arise with government contracts and grants and that put sensitive information and critical government systems at risk."[87] Common cybersecurity failures which will be flagged include (1) knowingly failing to comply with cybersecurity standards, (2) knowingly misrepresenting security controls and practices, and (3) knowingly failing to timely report suspected breaches.[88]

Cybersecurity incidents are inevitable, so contractors should prioritize cybersecurity compliance. Cybersecurity compliance requires contractors to stay on top of changing standards. It is not a static endeavor. Contractors should:

- Confirm compliance with the basic data safeguarding requirements identified in NIST SP 800-171, as mandated by DFARS 252.204-7012.
- Clarify Controlled Unclassified Information (CUI) obligations with customers, prime contractors, and subcontractors.
- Understand CUI—What it is and whether you have it.
- Ensure that you do not certify what you do not know.

It's notable to recognize that less than a year after the Civil Cyber-Fraud Initiative's creation, the DOJ settled its first two False Claims Act cases under it.[89] The first settlement was for $930,000 and was based upon claims that the contractor had not sufficiently secured and stored medical records. The second settlement was for approximately $9 million and was based upon claims that the contractor misrepresented its compliance with the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.204-7012 and the clause at National Aeronautics and Space Administration Federal Acquisition Regulation Supplement (NFARS) 1852.204-76.[90] The action, brought by an information technology employee, led to a $9 million settlement to resolve the alleged false statements related to compliance with DFARS 252.204-7012. The difficulty in keeping up with cybersecurity requirements—both from the technology standpoint and the ever-shifting regulatory landscape—makes this an at-

tractive area for potential whistleblowers. Contractors should ensure they understand and remain capable of complying with the dynamic scope of shifting cybersecurity requirements.

GSA Schedule Pricing

Non-compliance with GSA's price reduction clauses can result in FCA liability. In 2016, Deloitte settled an FCA claim for $11 million for not complying with its GSA contract's price reduction clause.[91] GSA awarded Deloitte a contract for the provision of information technology services, which required Deloitte to reduce the prices it charged the government if it offered lower prices to specific commercial customers during the course of the contract. Deloitte failed to comply with the price reductions clause in its contract, resulting in government customers paying more for Deloitte's services than comparable commercial customers.

SAM Registration/Small Business Status

Federal government contracts and subcontracts may be set aside for various categories of small businesses so that only eligible small businesses in a particular socioeconomic category are eligible to bid on, receive, and perform the contracts. Large businesses that perform on large federal prime contracts must develop and implement small business subcontracting plans designed to subcontract portions of the work to small businesses. If an entity misrepresents its size status or does not meet its obligation to subcontract with small businesses, it can result in FCA liability. In 2022 Hensel Phelps settled an FCA claim for $2.8 million to resolve allegations of small business subcontracting fraud.[92] The relator received $630,925 of the settlement.[93] In a separate settlement TriMark USA agreed to pay $48.5 million to resolve claims related to fraudulent procurement of small business contracts intended for service-disabled veterans.[94] The settlement constituted the largest-ever FCA recovery based on allegations of small business contracting fraud.

Antitrust/Price-Fixing

The Anti-Kickback Statute prohibits companies from receiving or making payments in return for arranging the sale or purchase of items such as drugs for which payment may be made by a federal health care program. These provisions are designed to ensure that the supply and price of health care items are not compromised by improper financial incentives. In 2021, three pharmaceutical manufacturers, Taro Pharmaceuticals USA, Inc., Sandoz Inc., and Apotex Corporation, agreed to pay a total of $447.2 million to resolve alleged violations of the False Claims Act arising from conspiracies to fix the price of various generic drugs.[95] The settlement compensates the government when it is the victim of anticompetitive conduct.

Price And Cost Issues

In the past year, the DOJ pursued a variety of fraud matters involving the government's purchase of goods and services, including allegations that government contractors falsified pricing data. Navistar Defense LLC paid $50 million to resolve allegations that it fraudulently induced the U.S. Marine Corps to enter into a contract modification at inflated prices for a suspension system for armored vehicles known as Mine-Resistant Ambush Protected vehicles. In another case, Insitu Inc. paid $25 million to settle allegations that it knowingly submitted materially false cost and pricing data for contracts with the U.S. Special Operations Command and the Department of the Navy to supply and operate Unmanned Aerial Vehicles.[96]

Labor Billing And Executive Compensation Caps

Failing to have a system in place to properly account for time spent on activities that cannot be charged directly to government-funded projects and improperly charging time can result in FCA liability. The Scripps Research Institute agreed to pay the government $10 million to settle claims that it improperly charged National Institutes of Health-funded research grants for time spent by researchers on non-grant related activities such as developing, preparing, and writing new grant applications, teaching, and engaging in other administrative activities. The relator will receive $1.75 million.[97]

Performance And Delivery Requirements

Failing to ascertain and verify items were manufactured by compliant countries under either the Buy American Act or the Trade Agreements Act can be a violation of the FCA. In 2021, Brighton Cromwell settled an FCA claim for $850,000 to resolve allegations that it breached contracts with the United States and violated the False Claims Act by selling items that were manufactured in prohibited countries.[98]

COVID Relief/CARES Act/PPP

What do prison inmates,[99] foreign bots, people who list their name as N/A,[100] and individuals on the Treasury's do not pay list[101] have in common? They all received loans under the Paycheck Protection Program (PPP) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act loans! In January 2021, the DOJ announced its first, and far from its last, PPP settlement.[102] Given the unprecedented amount of fraud in pandemic related programs, the appointment of a Special Inspector General for Pandemic Recovery (SIGPR), and an increase of the SIGPR budget[103] there is clearly enhanced scrutiny of pandemic programs that will continue to be a priority for years to come.

Into The Wind And Back Again . . . And Again

The False Claims Act isn't going anywhere. Even a year of the actual plague didn't stop it. Instead, it has returned stronger than ever and with more avenues of attack. It's an enforcement tool that will always keep coming back, again and again, capable of hitting federal contractors from seemingly more angles every day. The challenge, of course, is for federal contractors to recognize that it is continuing to evolve beyond its original intent to ferret out fraud. The legislation and oversight recently proposed gives it an edge that its creators likely never imagined. The new initiatives and proposals serve to tie the hands of the DOJ and make entering—even if just wading—into the FCA fray more costly than ever for contractors. What furthers that cost may be an administrative reluctance (or a bureaucratic malaise) by the DOJ to take actions to eliminate FCA complaints that its attorneys know or recognize as bogus or simply intended to harass a recipient of federal dollars. The question DOJ attorneys may find themselves having to ask may very well be: "Is it worth my fighting to get rid of this?" That answer, even with an increasing workload, maybe that the "juice ain't worth the squeeze" and the action would continue.

For federal contractors this means that compliance (*argh!*) is more important than ever. This does not mean simply checking the boxes and moving on. It means practicing what you preach. Federal contractors need to (1) understand the regulatory environment in which they are operating; (2) understand the agency-specific contractual peculiarities they are facing; (3) ensure that they have clear policies, procedures, *and practices* that align with that reality; (4) ensure that every employee, subcontractor, partner, and vendor/supplier (a.k.a. potential whistleblower(s)) understands and will abide by the organizational commitment to compliance; and (5) understand and accept that DOJ may still come knocking. The FCA is a lucrative instrument. But a contractor with a good vantage over its contractual compliance obligations will have the ability to see, properly gauge, and react to whatever actions come its way.

Emphasizing the importance of a strong compliance stance is the effort to legislate the lowering of the *Escobar* materiality standard. To be clear, that change would allow what are now routinely recognized by many courts as run-of-the-mill breach of contract suits to effectively be elevated to claims of fraud and falsity—even in the gaze of government knowledge and complicity. Such an amendment may allow the government to "draw the foul," well aware that they will get a full payback and then some after the FCA complaint is filed. This would be a seismic shift in the power balance between contractors and federal contractors, where the threat of the FCA could be used to make even compliant contractors more complicit and servile. Furthermore, it could create an environment where the federal contractor is effectively responsible for the actions of its federal customer, and if not responsible, at least liable. This is not the purpose for which the FCA was intended, but that is where it appears to be heading. Hopefully, the right amount of headwind and the correct angle will allow it to return where it is supposed to be.

Guidelines

These *Guidelines* are intended to assist you in understanding the impact on government contractors of recent developments affecting FCA enforcement. They are not, however, a substitute for professional representation in any specific situation.

1. Carefully review potential contracts (*e.g.,* requests for proposals and quotations) to ensure that your company is able to comply with all requirements. Engage with the government during the question and answer process to resolve any questions before submitting a proposal/quotation. Make sure any questions are thoroughly documented and retained.

2. Inventory existing contractual provisions to ensure

that your company has documented policies and procedures on file that capture and address all affirmative compliance obligations. Take proactive steps to fill any gaps that are discovered in short order.

3. Draft and follow clear policies and procedures addressing the company's compliant and ethical environment. Ensure that the company has clear methods for employees to raise concerns without the specter of retaliation.

4. Conduct routine, interactive compliance trainings for personnel assigned to support federal contracts. In addition to covering core compliance obligations, the trainings should focus on the importance of candor in all communications with the federal government and the affirmative measures the company takes to be and remain compliant with its contractual obligations.

5. Examine existing and potential contractual relationships (*e.g.,* teaming and joint venture arrangements and prime-sub relationships) to ensure compliance with antitrust laws and cybersecurity regulations. This is particularly important in light of the DOJ's focus on addressing anticompetitive contractor conduct and increased data security threat and scrutiny.

6. Ensure you retain relevant documents and understand why/how those documents are being retained. Remember that while most government contract statute of limitations lie around the six-year mark, the FCA has a longer look back period (upwards of 10 years), so you'll want to be prepared to reach back if and as needed.

7. Monitor pending statutory and regulatory developments to ensure that your company stays ahead of the curve as much as possible. Remember, today's "new regulation" is tomorrow's "compliance headache."

8. Be mindful and not fearful of mandatory disclosure obligations. A properly drafted and disclosed error or miscalculation can save the company millions in penalties and legal fees. A mistake is just a mistake until it's covered up.

9. Proper prior planning prevents poor performance. Make sure you have a plan when/if there is an accusation/allegation of fraud. Be prepared to engage outside counsel to perform an investigation to better ensure the validity of any defenses or counsel on the need to settle.

10. Like any well-thrown boomerang, you need to be ready to catch it on the return. So too with compliance. Annual training on and review of policies and procedures can assist the company in better solidify its stance to prevent fraud, ensure healthy internal communication, and bolster any possible defenses.

ENDNOTES:

[1]Demetri Martin. Just kidding—it's actually iron ore and oil, respectively. But that's not nearly as funny . . . or as applicable.

[2]National Museum of Australia, Earliest Evidence of the Boomerang in Australia (Mar, 22, 2022), available at https://www.nma.gov.au/defining-moments/resources/earliest-evidence-of-the-boomerang-in-australia#:~:text=Boomerangs%20and%20throwing%20sticks&text=A%2023%2C000%2Dyear%2Dold%20mammoth,to%20about%2010%2C000%20years%20ago.

[3]Traci Watson, National Geographic, "Boomerangs Were Lethal Weapons of War, Skeleton Suggests" (Sept. 19, 2016), available at https://www.nationalgeographic.com/science/article/deadly-boomerang-australia-aboriginal-weapon#:~:text=Boomerangs%20Were%20Lethal%20Weapons%20of%20War%2C%20Skeleton%20Suggests&text=Aboriginal%20peoples%20relied%20on%20boomerangs,edge%20were%20deployed%20for%20fighting.

[4]31 U.S.C.A. §§ 3729–3733.

[5]DOJ Press Release, "Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021: Second Largest Amount Recorded, Largest Since 2014" (Feb. 1, 2022), available at https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

[6]Id.

[7]White House Speeches and Remarks, "Remarks by President Biden on the July Jobs Report and Signing of Anti-Fraud Bills" (Aug. 5, 2022), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/05/remarks-by-president-biden-on-the-july-jobs-report-and-signing-of-anti-fraud-bills/.

[8]31 U.S.C.A. § 3729(a); FAR 9.406-2 ("Causes for debarment").

[9]31 U.S.C.A. § 3729(a)(1); see also 28 C.F.R. § 85.5(d).

[10]31 U.S.C.A. § 3730(d)(2).

[11]United States ex rel. Purcell v. MWI Corp., 807 F.3d 281, 287 (D.C. Cir. 2015) (quoting United States ex rel. Davis v. District of Columbia, 793 F.3d 120, 124 (D.C. Cir. 2015).

[12]United States ex rel. Lemon v. Nurses To Go, Inc., 924 F.3d 155, 159 (5th Cir. 2019) (requiring materiality as an element of proof).

[13]31 U.S.C.A. § 3729(b)(2)(A)(ii).

[14]See 31 U.S.C.A. § 3729(a)(1)(A).

[15]Lamb Eng'g & Constr. Co. v. United States, 58 Fed. Cl. 106, 111 (2003).

[16]Id.

[17]Id.

[18]United States ex rel. Forcier v. Computer Scis. Corp., 2017 WL 3616665, at *7 (S.D.N.Y. Aug. 10, 2017).

[19]United States ex. rel. Dresser v. Qualium Corp., 2016 WL 3880763, at *5 (N.D. Cal. July 18, 2016).

[20]United States ex rel. Pervez v. Beth Israel Med. Center, 736 F. Supp. 2d 804, 812 (S.D.N.Y. 2010).

[21]Id.

[22]United States ex rel. Conner v. Salina Regional Health Center, Inc., 543 F.3d 1211, 1217 (10th Cir. 2008), abrogated in part on other grounds.

[23]United States ex re. Schmidt v. Zimmer, Inc., 386 F.3d 235, 242 (3d Cir. 2004).

[24]Horn & Assocs., Inc. v. United States, 123 Fed. Cl. 728, 763 (2015).

[25]Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1211 (9th Cir. 2019).

[26]31 U.S.C.A. § 3729(b)(1).

[27]Horn & Assocs., Inc. v. United States, 123 Fed. Cl. 728, 763 (2015).

[28]United States ex rel. Phalp v. Lincare Holdings, Inc., 857 F.3d 1148, 1155 (11th Cir. 2017).

[29]31 U.S.C.A. § 3729(b)(4).

[30]Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2003 (2016).

[31]Id. at 2002–2003.

[32]Id.

[33]Id. at 2003.

[34]Id. at 2003–2004.

[35]See False Claims Amendments Act of 2021, S. 2428, 117th Cong. (July 22, 2021), available at https://www.congress.gov/bill/117th-congress/senate-bill/2428/text/is?r=1.

[36]Statement of Senator Howard, Cong. Globe, 37th Cong. 955-56 (1863).

[37]31 U.S.C.A. § 3730(b).

[38]31 U.S.C.A. § 3730(d)(2).

[39]31 U.S.C.A. § 3730(h).

[40]DOJ Press Release, "Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021: Second Largest Amount Recorded, Largest Since 2014" (Feb. 1, 2022), available at https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

[41]31 U.S.C.A. § 3730(d)(1).

[42]31 U.S.C.A. § 3730(d)(2).

[43]31 U.S.C.A. § 3730(c)(2)(A).

[44]DOJ Justice Manual § 4-4.111.

[45]See False Claims Amendments Act of 2021, S. 2428, 117th Cong. (July 22, 2021), available at https://www.congress.gov/bill/117th-congress/senate-bill/2428/text/is?r=1.

[46]Polansky v. Exec. Health Res., Inc., 17 F.4th 376 (3d Cir. 2021), cert. granted, 142 S. Ct. 2834 (2022).

[47]False Claims Amendments Act of 2021, S. 2428, 117th Cong. (July 22, 2021), available at https://www.congress.gov/bill/117th-congress/senate-bill/2428/text/is?r=1.

[48]Press Release, Sen. Chuck Grassley, False Claims Act Amendments of 2021, available at https://www.grassley.senate.gov/imo/media/doc/false_claims_amendments_act_summary.pdf.

[49]Congressional Budget Office, Cost Estimate, S. 2428, False Claims Amendments Act of 2021, at 4 (July 15, 2022), available at https://www.cbo.gov/publication/58308.

[50]The FCA imposes liability for one who, among other things, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." See 31 U.S.C.A. § 3729(a)(1)(A)–(B), (G).

[51]See FAR 31.201-2(a)(1).

[52]See FAR 31.201-3.

[53]E.g,. U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d, 370, 376 (4th Cir. 2008) (finding FCA liability requires the underlying statement to represent an objective falsehood); U.S. ex rel. Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 836 (7th Cir. 2011) (identifying that "[a] statement may be deemed 'false' for purposes of the [FCA] only if the statement represents 'an objective falsehood' ") (citation omitted).

[54]United States v. AseraCare, Inc., 938 F.3d 1278, 1297 (11th Cir. 2019).

[55]Id.

[56]Id.

[57]Id.

[58]United States ex rel. Druding v. Care Alternatives, 952 F.3d 89 (3d Cir. 2020).

[59]Id.

[60]Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1112–13 (9th Cir. 2020).

[61]Polansky v. Exec. Health Res., Inc., 422 F.Supp.3d 916 (E.D. Pa. 2019), aff'd, 17 F.4th 376 (3d Cir. 2021), cert. granted, 142 S. Ct. 2834 (2022).

[62]United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998).

[63]Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005).

[64]Swift v. United States, 318 F.3d 250, 252–53 (D.C. Cir. 2003).

[65]Id.

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

[67]Polansky v. Exec. Health Res. Inc., 17 F.4th 376, 390 (3d Cir. 2021), cert. granted, 142 S. Ct. 2834 (2022) (citing Fed. R. Civ. P. 41(a)(2)).

[68]Id.

[69]United States ex rel. Borzilleri v. Bayer Healthcare Pharm., Inc., 24 F.4th 32, 44–45 (1st Cir. 2022).

[70]Id.

[71]Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 60–70 (2007). Safeco adopted a two-part analysis that asked the following: first, was the defendant's interpretation of the law objectively reasonable, and second, is there any authoritative guidance from the relevant agency and courts that may have warned the defendant about that interpretation? Alternatively, even if the defendant's interpretation is erroneous, as long as it was objectively reasonable and there is no authority to guide the interpretation, then the defendant could not have acted recklessly and therefore not willfully—the defendant's subjective intent is irrelevant.

[72]Id. at 58 (citing 15 U.S.C.A. § 1681n(a)).

[73]Id. at 68 (internal quotation marks and citation omitted).

[74]United States ex rel. Schutte v. SuperValu Inc., 9 F.4th 455, 468 (7th Cir. 2021).

[75]Id at 473.

[76]Estate of Helmly v. Bethany Hospice & Palliative Care LLC, 853 F. Appx. 496 (11th Cir. 2021) (affirming dismissal for failure to plead FCA claims in accordance with Fed. R. Civ. P. 9(b)), petition for writ of certiorari pending No. 21-462).

[77]U.S. ex rel. Owsley v. Fazzi Assocs., Inc., 16 F.4th 192, 197 (6th Cir. 2021).

[78]U.S. v. Molina Healthcare of Ill., Inc., 17 F.4th 732, 739, 741 (7th Cir. 2021).

[79]Petition for a Writ of Certiorari, Jolie Johnson, et al., v. Bethany Hospice & Palliative Care, LLC (No. 21-462).

[80]Id.

[81]Id.

[82]Brief for United States as Amicus Curiae, Johnson, et al., v. Bethany Hospice & Palliative Care, LLC (No. 21-462).

[83]United States ex rel. Cimino v. IBM Corp., 3 F.4th 412, 419 (D.C. Cir. 2021).

[84]United States ex rel. Vermont Nat'l Tel. Co. v. Northstar Wireless LLC, 34 F.4th 29, 37 (D.C. Cir. 2022).

[85]Scollick ex rel. United States v. Narula, 2022 WL 3020936, at *14 (D.D.C. July 29, 2022).

[86]DOJ Press Release, "Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative" (Oct. 6, 2021), available at https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative.

[87]DOJ Press Release, "Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Cybersecurity and Infrastructure Security Agency (CISA) Fourth Annual National Cybersecurity Summit" (Oct. 13, 2021).

[88]DOJ Press Release, "Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Cybersecurity and Infrastructure Security Agency (CISA) Fourth Annual National Cybersecurity Summit" (Oct. 13, 2021).

[89]United States ex rel. Watkins et al. v. CHS Middle East, LLC, No. 17-cv-4319 (E.D.N.Y. Feb. 28, 2022); United States ex rel. Lawler v. Comprehensive Health Servs., Inc. et al., No. 20-cv-698 (E.D.N.Y. Feb. 28, 2022).

[90]DOJ Press Release, "Aerojet Rocketdyne Agrees To Pay $9 Million To Resolve False Claims Act Allegations of Cybersecurity Violations in Federal Government Contracts" (July 8, 2022), available at https://www.justice.gov/opa/pr/aerojet-rocketdyne-agrees-pay-9-million-resolve-false-claims-act-allegations-cybersecurity.

[91]DOJ Press Release, "Deloitte Consulting LLP Agrees To Pay $11 Million for Alleged False Claims Related to General Services Administration Contract" (May 31, 2016), available at https://www.justice.gov/opa/pr/deloitte-consulting-llp-agrees-pay-11-million-alleged-false-claims-related-general-services.

[92]DOJ Press Release, "Construction Company Agrees To Pay $2.8 Million To Resolve Allegations of Small Business Subcontracting Fraud" (May 13, 2022), available at https://www.justice.gov/usao-edwa/pr/construction-company-agrees-pay-28-million-resolve-allegations-small-business.

[93]Id.

[94]DOJ Press Release, "Government Contractor Agrees To Pay Record $48.5 Million To Resolve Claims Related to Fraudulent Procurement of Small Business Contracts Intended for Service-Disabled Veterans" (Feb. 23, 2022), available at https://www.justice.gov/usao-ndny/pr/government-contractor-agrees-pay-record-485-million-resolve-claims-related-fraudulent.

[95]DOJ Press Release, "Pharmaceutical Companies Pay Over $400 Million To Resolve Alleged False Claims Act Liability for Price-Fixing of Generic Drugs" (Oct. 1, 2021), available at https://www.justice.gov/opa/pr/pharmaceutical-companies-pay-over-400-million-resolve-allege

d-false-claims-act-liability.

[96]DOJ Press Release, "Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021: Second Largest Amount Recorded, Largest Since 2014" (Feb. 1, 2022), available at https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

[97]DOJ Press Release, "The Scripps Research Institute To Pay $10 Million To Settle False Claims Act Allegations Related to Mischarging NIH-Sponsored Research Grants" (Sept. 11, 2020), available at https://www.justice.gov/opa/pr/scripps-research-institute-pay-10-million-settle-false-claims-act-allegations-related.

[98]DOJ Press Release, "Military Supplier To Pay $850,000 To Settle Breach of Contract and False Claims Act Allegations" (Oct. 19, 2021), available at https://www.justice.gov/usao-nj/pr/military-supplier-pay-850000-settle-breach-contract-and-false-claims-act-allegations.

[99]DOJ Press Release, "33 Inmates and Accomplices Charged With Illegally Obtaining Coronavirus Unemployment Benefits" (Aug. 25, 2020), available at https://www.justice.gov/usao-wdpa/pr/33-inmates-and-accomplices-charged-illegally-obtaining-coronavirus-unemployment.

[100]Small Business Administration Office of Inspector General, "Inspection of Small Business Administration's Initial Disaster Assistance Response to the Coronavirus Pandemic" (Oct. 28, 2020), available at https://www.sba.gov/sites/default/files/2020-10/SBA%20OIG%20Report%2021-02.pdf.

[101]Small Business Administration Office of Inspector General, "COVID-19 EIDL Program Recipients on the Department of Treasury's Do Not Pay List" (Nov. 30, 2021), available at https://www.sba.gov/document/report-22-06-covid-19-eidl-program-recipients-department-treasurys-do-not-pay-list.

[102]DOJ Press Release, "Eastern District of California Obtains Nation's First Civil Settlement for Fraud on Cares Act Paycheck Protection Program" (Jan. 12, 2021), available at https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act.

[103]See Office of The Special Inspector General for Pandemic Recovery, Quarterly Report to the United States Congress January to March 2022, available at https://www.sigpr.gov/sites/sigpr/files/2022-05/SIGPR_Quarterly_Report_March_2022.pdf.

BRIEFING PAPERS