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The Salcido Report: False Claims Act Public Disclosure Alert

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Key Points

- Under the FCA there are multiple circuit court splits related to how power should be allocated between the United States and the relator and whether the relator has contributed sufficient value to merit obtaining a significant portion of the government's recovery.
- These circuit splits include whether the government must consent to a dismissal, whether the government has essentially unfettered discretion to dismiss *qui tam* actions that do not advance the government's interest, whether relators have the same ability as the United States to toll the FCA statute of limitations beyond the FCA's six-year statute of limitations, and whether relators can intervene in an existing *qui tam* or the extent to which a *qui tam* can survive if it is filed while another *qui tam* action is pending based upon related facts.
- Courts should apply the FCA's plain language and effectuate its purpose by construing it to ensure the primacy of the United States over private individuals in determining what allegations advance the government's interest and to ensure that relators obtain only a portion of the government's funds when the relator actually contributes real value to the government.

False Claims Act Circuit Splits—FCA Issues That May Soon Reach The Supreme Court Or Lead To Congressional Amendment

The False Claims Act (FCA) is the government's primary weapon to police fraud committed against the government. The FCA's *qui tam* provisions authorize private citizens, known as "relators," to file lawsuits where they have suffered no personal injury and obtain a substantial statutory bounty from funds that otherwise would be remitted to the government.[1]

In crafting the FCA, Congress confronted many challenges. One was to provide private plaintiffs with sufficient incentives to file an action and yet not usurp the executive branch's constitutional power to enforce the law.[2] Another was to allow private persons to receive a statutory bounty from the government that is proportionate to the value that the private person contributed in filing the action so that excessive wealth (in the form of recoveries) is not redistributed from the government, the actual victim in any FCA action, to private persons and their counsel.[3]

In seeking to strike the right balance in the allocation of power and providing an appropriate reward when the relator actually contributes valuable information rather than repeating public information or information disclosed in a prior *qui tam* lawsuit (and, hence, no "whistleblower" is needed), Congress, at times, used ambiguous language that presents, as the Supreme Court has noted, "many interpretative challenges" for courts.[4] These "many interpretative challenges" have resulted in multiple circuit splits. Indeed, going into 2018, there are more than one half dozen circuit court splits regarding the FCA. Given the overall goals underlying the FCA, not surprisingly, some splits center on how power should be allocated between the United States and the relator and whether relators (private citizens) motivated by their private financial interest, should have equal authority and power as the United States. These splits include:

- Under Section 3730(b)(1), which requires that the Attorney General "give written consent to the dismissal" of an FCA action, does the relator, when the United States declines to participate in the action, have the power to settle FCA lawsuits when the United States does not believe that a settlement is in the United States' interest and therefore refuses to provide written consent to the dismissal of the underlying FCA action?
- Under Section 3730(c)(2)(A), which authorizes the "Government [to dismiss the action notwithstanding the objections of the person initiating the action if . . . the court has provided the person with an opportunity for a hearing on the motion," does the United States have essentially an unfettered right to dismiss the litigation that is brought in its name, or can the relator compel the FCA action to continue when the United States does not believe that the FCA action advances its interest?
- Under Section 3731(b)(2), which extends the statute of limitations beyond six years if an "official of the United States" did not know of a right of action within three years of the time in which the action is brought, can the relator be considered an "official of the United States" and have the statute of limitations extended if the relator did not know of a right to action within three years of the time in which the relator filed?

Other circuit splits center on whether the relator's action brings sufficient value such that a substantial portion of the government's recovery should be transferred to a private individual. More specifically, these splits include:

- Under Section 3730(b)(5), which bars relators from intervening or bringing an FCA action "based on the facts underlying" a pending FCA action, there have been multiple splits, including:
  - Does the bar prohibit relators from amending the complaint to join additional relators?
  - Does the bar prohibit relators from proceeding when they file a viable *qui tam* action, but some other relator previously filed a defective *qui tam* that is subject to dismissal?
  - Does the bar prohibit relators from proceeding when the prior-filed *qui tam* is no longer pending?
- Under Section 3730(e)(4), which, unless the relator qualifies as an original source, prohibits actions based upon the "public" disclosure of specified types of information, what disclosures qualify as

"public"? Is a disclosure to a single individual sufficient to be a public disclosure? Are employees and agents of the defendant members of the public? Are government employees members of the public such that disclosures to them are public disclosures?

- In applying Fed. R. Civ. P. 9(b) to FCA actions, must the relator, who presumably is an insider privy to fraud, be able to specify at least a single false claim with specificity to be permitted to proceed with an FCA action?

Resolving those circuit splits is important for multiple reasons. First, the FCA is a national statute that should be applied uniformly, but, instead, as a result of these multiple splits, it is applied differently depending upon in which circuit the lawsuit is pending. Second, such a divergence in application results in forum–shopping, since relators, who frequently file their lawsuits against companies operating across the country,[5] strategically file their actions in jurisdictions based upon which jurisdiction is deemed most favorable based upon its case law and which United States Attorney's Office may view their claims more sympathetically. Third, the splits indicate which issues are more likely to be reaching the Supreme Court in the near term in an era in which the Court has been taking FCA cases almost annually. Fourth, the splits also indicate issues that may soon result in additional congressional amendments to the FCA.

I. Circuit Splits Addressing The Proper Allocation Of Power Between The Government And Relators

Courts have split regarding whether the government should have the ultimate say regarding whether an FCA case is dismissed, either on the relator's motion or the government's, and whether Congress ever considered the relator to be an "official of the United States." Set forth below is a description of the splits and how they should be resolved.

A. Section 3730(b)(1) and the Government's Power to Oppose Dismissal of an FCA Action

Section 3730(b)(1) mandates that an FCA "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." This provision has its origin in the FCA's initial passage in 1863.[6] The purpose of the provision is to ensure that the executive branch can bar the relator from dismissing the lawsuit when the relator is not acting in the public's best interest.[7]

In construing Subsection (b)(1), the precise issue upon which circuits have split concerns whether the United States, in a case in which it does not intervene, can unilaterally veto a settlement reached between the relator and defendants when the United States is not a party to the litigation. For example, imagine a scenario where the United States declines to intervene; the relator and the defendant litigate over a period of years, incurring substantial cost; and they ultimately reach a settlement and thus move to dismiss the action. At that point, can the United States, after spending the litigation on the sidelines, refuse to consent to settlement or dismissal, under Subsection (b)(1), and thereby compel the relator and defendant to continue to litigate the matter through trial?

The majority of circuits—specifically, the 4th, 5th, and 6th—have ruled in the affirmative, noting that the FCA's plain language and purpose support the conclusion that the FCA grants the executive branch a unilateral veto over the relator's decision to dismiss a *qui tam* that is not in the United States' interest.[8] For example, as to the plain language, the 5th Circuit, in *Searcy,* noted that Subsection (b)(1) is "unambiguous" in providing that dismissal may be granted only if the Attorney General provides his or her "written consent to the dismissal"[9] and that, given that this statutory language has existed since the FCA's initial passage in 1863, the plain language should be given full force.[10] As to policy, the court noted that this interpretation fully effectuates the statutory purpose of prohibiting relators from undertaking actions contrary to the public interest because, if this provision were not enforced, there is a danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States, and, thus, Section 3730(b)(1) allows the government to resist these tactics and protect its ability to prosecute matters in the future.[11]

The 9th Circuit, in *United States ex rel. Killingsworth v. Northrop Corp.,*[12] reached a different conclusion, finding that the government's veto power extended to only the initial 60-day (or extended) pre-intervention review period and that the government could not unilaterally veto a settlement between relator and defendant when the government had not intervened in the action. Specifically, the court noted that, after the relator files the action, the government, under Subsections (b)(2)-(4), may elect to intervene and proceed with the action within 60 days, or seek an extension of the 60-day period, prior to determining whether to proceed with the action or note its declination. If the government declines to intervene during this time frame, the relator has a right to proceed with the action. If the relator proceeds, it has, under Subsection (b)(4), the "right to conduct the action." The court ruled that the "right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action," and, therefore, the government, under these circumstances, does not possess a unilateral veto and does not have the ultimate power to control litigation brought in its name where it is the alleged victim of the fraud.[13]

B. Section 3730(C)(2)(A) and the Government's Authority to Dismiss *Qui Tam* Lawsuits That Do Not Advance the Government's Interest

Section 3730(c)(2)(A) provides that "[t]he Government may dismiss [a *qui tam*] action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."[14] Congress created this provision in 1986 and did not amend it in its 2009 and 2010 FCA amendments. Although Subsection (c)(2)(A) provides that the government may dismiss the action notwithstanding the relator's objection, the provision does not indicate the standard that courts will use to review the government's exercise of prosecutorial discretion to dismiss an action filed in its name.

Courts have split regarding the appropriate standard to use in evaluating the government's dismissal motion. The D.C. Circuit, relying upon the separation-of-powers doctrine; the government's broad discretion in initiating or continuing a criminal prosecution; and the language of § 3730(c)(2)(A), which grants the "Government," not the court, unilateral authority to "dismiss the action notwithstanding the objections of the person initiating the action," ruled that the government has what amounts to "an unfettered right to dismiss" a *qui tam* action.[15] The court reasoned that nothing "in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States. The provision neither sets 'substantive priorities' nor circumscribes the government's 'power to discriminate among issues or cases it will pursue.'"[16] The court noted that, although "the government conceded at oral argument that there may be an exception for 'fraud on the court,'" there was "no evidence of that sort . . . presented," and, thus, the court had no occasion to determine whether this exception would apply under § 3730(c)(2)(A).[17]

By contrast, the 9th Circuit applies a "two-step analysis . . . to test the [government's] justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the United States satisfies the two-step test, the burden switches to the relator to demonstrate that the dismissal is fraudulent, arbitrary and capricious, or illegal."[18]

C. The FCA Statute of Limitations Tolling Provision

The FCA has a general statute of limitations of six years, but also a tolling provision, 31 U.S.C. § 3731(b)(2), under which the plaintiff may extend the statute of limitations for up to 10 years if the action is brought within three years of when an "official of the United States" knew, or should have known, of facts material to a right of action.[19] Congress created the tolling provision in 1986. Although it subsequently amended the FCA's statute of limitations in other respects, Congress did not revise this tolling provision in its 2009 and 2010 amendments.[20] The circuit split has focused on whether the relator can be characterized as an "official of the United States" and thereby potentially extend the six-year FCA statute-of-limitations period.

The 4th and 10th Circuits, based upon the provision's plain language and purpose, hold that the provision does not apply to the relator because the relator is not an "official of the United States," and, thus, the relator has a six–year statute of limitations.[21] Under this line of reasoning, courts have ruled that the tolling provision applies only if the government has intervened in the action because Section 3731(b)(2) applies to only government officials.

Conversely, the 9th Circuit has ruled, in *United States ex rel. Hyatt v. Northrop Corp.*,[22] that relators may invoke equitable tolling if the relator did not know, and reasonably should not have known, of a right to action more than three years before bringing the action. In *Hyatt*, the 9th Circuit ruled that the plain language of Section 3731(b)(2) dictated that it apply to relators because "there is nothing in the entire statute of limitations subsection which differentiates between private and government plaintiffs at all. If Congress had intended the tolling provisions of § 3731(b)(2) to apply solely to suits brought by the Attorney General, it could have easily expressed its specific intent."[23] The court concluded that, because the relator stands in the shoes of the government, the statute of limitations is tolled if the relator did not reasonably know of a right to action within three years of the time in which the action was filed.[24]

Several district courts have adopted a third line of precedent, which is that the relators may invoke equitable tolling if the official of the United States charged with responsibility to act does not know, and should not know, of facts material to the right of action more than three years prior to the relator bringing the action.[25] It is not addressed here, however, because no circuit court, to date, as adopted this precedent.

* * *

In resolving these circuit splits regarding the proper allocation of power between the relator and the United States, courts should apply the FCA's plain language to rule that:

- Under Section 3730(b)(1), the United States must indeed "consent to the dismissal" and that the relator does not have the power to overrule the government.
- Under Section 3730(c)(2)(A), the United States has essentially unfettered discretion to dismiss litigation that is brought in its name.
- Under the FCA statute-of-limitation tolling provision, consistent with its language, the tolling provision's express language is triggered from the lack of knowledge of a "responsible government official" and thus can apply to only the United States, not the relator, and that the relator has a six-year statute of limitations.

Not only are these conclusions consistent with the FCA's plain language, but they also effectuate the FCA's purpose, which, as multiple courts have recognized, is to advance the government's interest, and not merely to enrich relators or their counsel.[26] Moreover, as the Supreme Court has recognized, in FCA actions, the United States is the real party in interest.[27] The Supreme Court has also recognized that, as a class, relators are different in kind than the United States in that they pursue their own private financial gain and not the public interest.[28]

Given that the purpose of the statute is to advance the government's interest, that the government is the victim of the fraud and is the real party in interest, and that the government is charged with pursuing the public good and not the private interest of the relator, the statute should be construed in accordance with its plain language to mandate that the United States must expressly consent to the termination of any FCA litigation and have the unfettered right to dismiss any *qui tam* action that is not in the government's interest and that relators cannot be deemed to be responsible government officials for purposes of tolling the statute of limitations.

II. Circuit Splits Addressing Whether Relators Should Be Permitted To Advance Actions When They Fail To Report Nonpublic Information To The Government, When A Related Action Is Pending Or When They Cannot Identify A Single False Claim

Courts have split regarding whether the relator should be permitted to proceed with *qui tam* actions when the underlying facts are pending in another *qui tam* action and when the underlying allegations are in the public domain. Courts have also split regarding the extent to which the relator must have the ability to state a single false claim with specificity before proceeding with an FCA action. Set forth below is a description of the splits and how they should be resolved.

A. The First-to-File Bar

Section 3730(b)(5), known as the "first-to-file" rule, provides that, "[w]hen a person brings an action under the [FCA], no person other than the Government may intervene or bring a related action based on facts underlying the pending action."[29] This provision has its origin in Congress' 1986 FCA amendments. Congress did not amend the provision in its 2009 and 2010 FCA amendments.

The purpose of the first-to-file rule is to avoid needlessly duplicative *qui tam* actions based upon the same essential facts when the government has already obtained information regarding the alleged fraud based upon a previously filed *qui tam* action.[30] Indeed, once a *qui tam* action has been filed, the government necessarily has the information it needs to enforce the law effectively or to be held accountable in the event that it fails to discharge its obligation to enforce the law. The addition of multiple relators or claims only serves to decrease the government's ultimate recovery (inasmuch as it needs to split a portion of the recovery with relators), and it imposes additional costs on defendants (inasmuch as they will need to defend additional cases that cover the same matter).

Although the Supreme Court, in *Kellogg Brown & Root Servs., Inc., v. United States ex rel. Carter*,[31] addressed the split in courts regarding the meaning of the word "pending," in the first-to-file rule, there are currently four other issues underlying the proper construction of the rule upon which circuit courts have split.

1. Does the prohibition of intervention in the first-to-file rule bar relators from amending the complaint to join additional relators?

Courts have split regarding what it means to "intervene" in a *qui tam* lawsuit as the word is used in the first-to-file rule. For example, if the relator creates a corporate entity to serve as relator, and the corporate entity is barred from qualifying as *qui tam* relator, can an individual relator intervene, or be substituted, as the relator without running afoul of the first-to-file rule?

The 10th and 5th Circuits have split on this issue. In *United States ex rel. Precision Co. v. Koch Indus., Inc.*,[32] after the relator's initial action was dismissed under the FCA's public disclosure bar because the relator was not an "original source," the relator then filed an amended complaint to name as relators individuals who could qualify as original sources. The district court dismissed the action under the first-to-file rule.

On appeal, the 10th Circuit determined that the "focal point" for proper analysis was the statutory term "intervene" in the first-to-file rule—that is, did it apply to any type of joinder or substitution of relator, or did it apply more specifically to Fed. R. Civ. P. 24 intervention?[33] The court believed that the meaning of the term should be limited to its meaning in Fed. R. Civ. P. 24 and not extended to bar, as defendants contended, any form of substitution or joinder of any party.[34]

Conversely, in *Fed. Recovery Servs., Inc. v. United States*,[35] the 5th Circuit refused to permit the relator to amend the complaint to name a different relator when the initial relator was barred under the FCA's public disclosure bar because the initial relator could not qualify as an original source.[36]

2. If the first-filed pending *qui tam* action is defective (e.g., it does not satisfy Fed. R. Civ. P. 9(b) or is barred under the FCA's public disclosure bar), can that action nonetheless bar later-filed nondeficient *qui tam* actions based upon the same "related" facts?

Courts have split regarding whether a fatally defective pending *qui tam* lawsuit can serve to bar a later-filed more substantive *qui tam* action under the first-to-file rule. For example, if a *qui tam* action is pending that does not state the alleged fraud with specificity under Fed. R. Civ. P. 9(b), can the second-filed action be a "related action" under the first-to-file rule?

The D.C. Circuit and the 1st Circuit have held that the first-filed complaint need not necessarily comply with Fed. R. Civ. P. 9(b) as a prerequisite to the application of Subsection 3730(b)(5) based upon the first-to-file rule's plain language and purpose.[37] For example, as to the plain language, the D.C. Circuit, in *Batiste*, noted that nothing in the first-to-file rule indicated that it "incorporates the particularity requirement of Rule 9(b), which militates against reading such a requirement into the statute."[38] Second, the court found that engrafting such a requirement onto the plain language of the first-to-file rule would not advance the rule's purpose to provide the government notice. Specifically, the court reasoned, "Rule 9(b) is designed to protect defendants in fraud cases from frivolous accusations and allow them to prepare an appropriate response. Section 3730(b) is designed to allow recovery when a *qui tam* relator puts the government on notice of potential fraud being worked against the government, but to bar copycat actions that provide no additional material information. As the district court found, a complaint may provide the government sufficient information to launch an investigation of the fraudulent scheme even if the complaint does not meet the particularity standards of Rule 9(b)."[39]

Conversely, the 6th Circuit, in *United States ex rel. Walburn v. Lockheed Martin Corp.,* has ruled that, if the first-filed action breaches Fed. R. Civ. P. 9(b) such that it could not have provided effective notice of the fraud to the government, the first-filed action will not operate to bar a second-filed action under the first-to-file rule.[40] Additionally, the 9th Circuit has similarly ruled that, if the first-filed action is barred under the public disclosure bar, then it does not serve to eliminate the second-filed action under the first-to-file rule.[41]

3. If the first-filed action is no longer pending when the defendant's motion to dismiss is heard in the second-filed action, must the court in the second-filed action nonetheless dismiss the second-filed action under the first-to-file rule?

Circuits have split regarding what sanction, if any, is appropriate if the first-to-file rule is breached at the time the subsequent related action is filed but the first-filed action is no longer "pending" when the motion to dismiss is considered in the subsequent action. Does the court look to the facts at the time when the second-filed action is filed and thus dismiss the second-filed action because another action was pending at the time the second-action was filed? Or does the court look to the facts at the time it rules on the motion to dismiss and, given that there is no longer any pending related action, allow the second action to proceed or simply permit the relator to amend or supplement the complaint noting that the first-filed action is no longer pending? If this latter approach is adopted, defendants may lose important defenses. For example, if the second-filed action is dismissed and the relator must refile, the relator's subsequent action may have claims barred under the FCA's statute of limitations. Additionally, if additional public disclosures occurred, the relator's subsequent action may be barred under the FCA's public disclosure bar.

Courts have split on this issue. The 4th Circuit and the D.C. Circuit have ruled that the second-filed *qui tam* must be dismissed because, under their view, the provision's plain language and purpose operate to bar the action at the time it is filed.[42] For example, as to the plain language, the 4th Circuit, in *Carter*, noted that the relevant statutory text imposes a restriction on the "bring[ing]" of an "action."[43] The court ruled that, in ordinary parlance, one "bring s] an action" by "institut[ing] legal proceedings."[44] The court noted that, inasmuch as "[o]ne 'brings' an action by commencing suit," the appropriate reference point for a first-to-file analysis is the set of facts in existence at the time the FCA action under review is commenced.[45] The court concluded that, based upon this statutory language, the facts that may arise after the commencement of a relator's action, such as the dismissals of earlier-filed, related actions pending at the time the relator brought her action, do not factor into this analysis.[46] Additionally, as to policy, the 4th Circuit concluded that its ruling advances the purposes underlying the first-to-file rule. The court noted that, although its holding may reduce the number of duplicative actions that can survive the FCA's statute of limitations, this reduction would have no material effect on the FCA's objective of ensuring that the government is put on notice of fraud because such notice is already provided by the first-filed action.[47]

Other courts have permitted the relator to supplement her existing complaint and have not required dismissal. For example, the 1st Circuit has ruled that a first-to-file defect at the time of filing can be cured if the earlier-filed action is dismissed by filing an amended or supplemental complaint in the later-filed action.[48] The court ruled that dismissal and refiling would be a "pointless formality."[49]

4. Is the first-to-file rule jurisdictional?

Courts have split regarding whether the first-to-file rule is jurisdictional. For example, the 4th, 5th, 6th, and 9th Circuits have stated or assumed that the first-to-file rule is jurisdictional.[50] However, the 2nd Circuit and the D.C. Circuit have reached the opposite conclusion.[51]

B. The Meaning of the Word "Public[]" in the FCA's Public-Disclosure Bar

Section 3730(e)(4)(A) bars actions where the relator does not qualify as an original source that are based upon the public disclosure of specified information. Congress created the public-disclosure bar in 1986, including the provision that it is a "public disclosure" that triggers the bar. The purpose of the public-disclosure bar is to prohibit those actions in which the allegations or transactions underlying the lawsuit have been publicly disclosed—because no "whistleblower" who will obtain a substantial portion of the government's recovery is needed if the information is already public—unless the relator contributes material, independent information that advances the government's knowledge of the case and hence qualifies as an original source.[52] Although Congress substantively amended the public-disclosure bar in 2010, it did not expressly address the circuit splits regarding the meaning of the word "public" upon which circuit courts had split prior to the 2010 amendments.

There are at least three discernible splits regarding the meaning of the word "public"—Does it apply to any disclosure to a person not involved in the fraudulent conduct? Does it instead require a disclosure beyond not just those who participated in the fraud, but the agents of those persons? Does a member of the "public" include disclosures to government employees such that, if the defendant, or someone else, discloses the allegations to the government before the *qui tam* complaint is filed, does that become a "public" disclosure under the FCA?

The 2nd and 3rd Circuits have defined the word "public" broadly to encompass any information that is disclosed to one or more persons who is a "stranger to the fraud."[53] Moreover, the 2nd Circuit took this rule a step further in *United States ex rel. Kreindler v. United Techs.*[54] by holding that, not only is information "public" if it reaches a single individual ("a stranger to the fraud"), but it is also "public" if it is simply accessible to the public. Accordingly, in that case, the court found that, although the relator was prohibited under a confidentiality agreement from disclosing information that it had obtained in discovery, the information nonetheless was "public" because it was on file with the court, and, thus, "it was available to anyone who wished to consult the court file."[55]

The 9th Circuit, however, has construed the term "public disclosure" more narrowly. For example, the 9th Circuit, in *United States ex rel. Schumer v. Hughes Aircraft*,[56] specifically rejected the 2nd and 3rd Circuits' broad interpretation of the word "public." In *Schumer*, the government had issued an audit report critical of the defendant's accounting practices and released the audit report to the defendant's and the prime contractor's employees.[57] The court rejected the defendant's contention that the disclosure of the audit report to "innocent" employees and other "strangers to the fraud" constituted a "public" disclosure and that the audit report was a "public" document because it could be obtained under the Freedom of Information Act.[58] The court reasoned that any disclosures to the company and its prime contractor were merely disclosures within a "private sphere" because those companies had no economic incentive to further publicize the results of the audit report.[59] Additionally, the court, criticizing the 3rd Circuit's holding in *Stinson*, ruled that the public disclosure bar applied to only actual disclosures, not theoretical disclosures; thus, the fact that the audit report was theoretically obtainable under the Freedom of Information Act was inconsequential under the statute.[60]

Finally, in *United States v. Bank of Farmington*,[61] the 7th Circuit has construed the word "public" broadly to reach disclosures that the defendant made to a responsible government official. Additionally, in *Glaser v. Wound Care Consultants, Inc.*, the 7th Circuit ruled that notices from the government regarding potential overpayments similarly constitute a public disclosure.[62]

C. The FCA and Rule 9(b)

Rule 9(b) provides that in "alleging fraud … , a party must state with particularity the circumstances constituting fraud . . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

In FCA Rule 9(b) cases, where courts have split concerns whether the plaintiff must plead some representative examples of actual false claims or can proceed without pleading some representative examples of actual false claims but instead simply plead a fraudulent scheme with specificity together with strong indicia of reliability that actual false claims were submitted to the government.

Indeed, courts have even split regarding the extent to which the split exists, and, frequently, panels within the same circuit will disagree regarding whether there is even a split. For example, one panel in the 2nd Circuit, in *United States ex rel. Polansky v. Pfizer, Inc*., in 2016, summarized the split as follows:

> … we need not wade into the circuit split regarding whether, to satisfy Rule 9(b), an FCA relator alleging a fraudulent scheme must provide the details of specific examples of actual false claims presented to the government (which Polansky does not do). (That split is detailed in the margin.)[10]
>
> n. 10 *Compare, e.g., United States ex rel. Bledsoe v. Cmty. Health Sys., Inc*., 501 F.3d 493, 504 (6th Cir. 2007) ("We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)."), and *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc*., 707 F.3d 451, 457-58 (4th Cir. 2013) ("[W]hen a defendant's actions, as alleged and as reasonably inferred from the allegations, could have led, but need not necessarily have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment. To the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach."), *with United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) ("[A] relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."), and *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-57 (3d Cir. 2014) (adopting same approach and discussing circuit split).[63]

One year later, in 2017, another panel in the 2nd Circuit, *United States ex rel. Chorches v. Am. Med. Response, Inc*., reviewed the same body of case law and denied that a split even exists, noting that its holding that the relator's complaint need only allege the scheme with specificity together with a strong inference that false claims were submitted to the government was "consistent with the law as generally stated by a majority of our sister circuits, and that the reports of a circuit split are, like those prematurely reporting Mark Twain's death, 'greatly exaggerated'."[64]

In addressing Rule 9(b) FCA cases, it is more useful not to address circuit splits at the circuit level (which is frequently impossible because the cases within the circuit are hopelessly irreconcilable), but merely describe how panels within the same circuit have diverged.

When panels hold that the relator should be able to identify a single false claim with specificity, the principle upon which they rely is the "fairly obvious notion that a False Claims Act suit ought to require a false claim."[65] This is because the "[FCA] attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"[66] "Therefore, a central question in

False Claims Act cases is whether the defendant ever presented a 'false or fraudulent claim' to the government."[67] Thus, multiple courts have pointed out that an "actual false claim is 'the *sine qua non* of a[n FCA] violation.'"[68]

Those panels that hold that specific false claims need not be alleged, but only a specific scheme, together with reliable indicia that lead to a strong inference that false claims were submitted have found reliable indicia when the relator sets forth (1) statistical proof,[69] (2) direct personal knowledge of the fraud[70] or (3) direct personal knowledge about the billing process.[71]

* * *

In resolving these circuit splits regarding whether the relator provided the government with sufficient, valuable and nonpublic information to merit a substantial portion of the government's recovery for the fraud committed against the government, courts should apply the FCA's plain language to rule that:

- Under Section 3730(b)(5), relators are not permitted to intervene in an existing *qui tam* action, and, if "related" facts are part of a pending FCA *qui tam* action (even if the pending action is otherwise defective under Fed. R. Civ. P. 9(b) or the public-disclosure bar) or the action is no longer pending at the time the court considers the motion to dismiss, the first-to-file rule should operate to bar the subsequent action because it is based upon "related" facts of a pending lawsuit at the time in which the subsequent action was filed.
- Under Section 3730(e)(4), the court should find an action to be "public[ly]" disclosed whenever it reaches a nonparticipant in the alleged fraud because, at that point, the information has reached a member of the public, and no "whistleblower" action is needed, unless the relator discloses the information before it is public (and hence is a true whistleblower) or the relator contributes new information that "materially adds" to the information in the public domain.
- In FCA cases, to satisfy Rule 9(b), the relator must directly allege a single false claim with specificity because that is what the relator must prove to establish an FCA violation.

Not only are these conclusions consistent with the FCA's plain language, but they also effectuate the FCA's purpose, which, as noted, is to advance the government's interest, and not simply to enrich relators or their counsel.[72]

As to the public-disclosure bar and the first-to-file rule, Congress found that *qui tam* "whistleblower" actions do not generally advance the public interest, but actually undermine that interest, once a related *qui tam* action is filed or the allegations have been publicly disclosed, unless the relator is able to establish that it provided the government with materially useful information, because at that point no whistleblower action is needed, and the government should not needlessly have to share a recovery with a relator who did not break the conspiracy of silence.

For example, under the public-disclosure bar, 31 U.S.C. § 3730(e)(4), Congress forced would-be "whistleblowers" to report the fraud before the information was publicized in various formats. In enacting this bar, Congress viewed that actions where the relator merely repeated public information was not valuable enough to compel the government to share a substantial portion of its recovery with the relator, unless the relator was an informant or was materially added to the allegations in the public domain. Congress wisely found, in establishing the public-disclosure bar, that, if information is in the public domain, the Attorney General will pursue the matter when warranted and that under these circumstances, should obtain 100% of the recovery and not share any portion to pay a whistleblower for republishing public information. Given this purpose, and consistent with its plain language, the circuit split should be resolved by courts' ruling that the word "public" applies to any disclosure of allegations to strangers to the fraud and disclosures to responsible governmental officials, who also are members of the public. Qualified relators can always still bring actions if they qualify as "original sources" under the FCA.[73]

Similarly, under the first-to-file rule, 31 U.S.C. § 3730(b)(5), Congress prohibited all actions that are based upon the facts underlying a pending action. Unlike the public-disclosure bar, the first-to-file rule applies even if the relators in the subsequent action would otherwise qualify as "original sources" and if the first-filed action is still under seal (and hence is not public). In enacting such a broad bar, Congress concluded that, once a *qui tam* lawsuit has been filed, no additional *qui tam* action is necessary in order for the government to effectively enforce its rights.[74] If courts were to permit would-be relators to intervene in an existing action or file related actions, Congress' chief purposes in amending the statute would be undermined because those relators who lost the race to the courthouse—and thus who did not promptly provide the government with information that it would need to prosecute the action—would be permitted to proceed, and the government's ultimate recovery would be reduced. Accordingly, in light of these purposes, and consistent with its language, courts should resolve the circuit split by ruling that, once a *qui tam* is filed, a relator cannot intervene in a *qui tam* action and that no other relator can bring a related action even if the first-filed action is potentially defective or no longer pending because the government will have already received notice of the underlying facts and can bring its own action and retain one hundred percent of the recovery and should not be required to share any recovery with a relator who does nothing more than, by definition, file a duplicative action.[75]

As to Rule 9(b), strict adherence to the Rule will also effectuate the purposes underlying the FCA. For example, as courts have noted, a literal application of Rule 9(b) in FCA actions is needed to effectuate the FCA's purposes because such an interpretation protects the government from broadly worded complaints, and broadly worded, nonspecific complaints have the effect of depriving the United States of its full recovery due to the fact that the United States must share a portion of its recovery with the relator filing a cause of action who does not provide specific information regarding a fraud.[76] Indeed, in *qui tam* actions when the purported insider supposedly has direct access to the alleged wrongdoing, Congress expected the *qui tam* plaintiff to be a "close observer" to the misconduct, and, hence, any deviation (or relaxation) from the literal language of Rule 9(b) is not needed and will only needlessly result in a transfer of wealth from the government to private individuals who do not provide specific facts to the government. Finally, by not dismissing generally alleged, nonspecific *qui tam* actions, relators, seeking a larger recovery, will have an incentive to include additional defendants and schemes, which will ultimately harm the government because, by virtue of the first-to-file rule, the nonspecific pending *qui tam* action will likely deter other relators, who may have greater access to specific facts, from filing their actions in the first instance.[77]

Conclusion

In its language, Congress carefully crafted the *qui tam* provisions to ensure the primacy of the United States over private individuals in determining what allegations advance the government's interest, and it tailored the provisions to ensure that relators obtained only a portion of the government's funds when the relator actually contributed real value to the government. Otherwise, the *qui tam* provisions would operate as only a mechanism to transfer wealth from the government to private individuals.

Courts should apply these principles in resolving the current circuit splits so that the FCA can be applied uniformly.

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About the Author

Robert Salcido is a leading FCA practitioner.

Mr. Salcido has been lead counsel in several actions in which he successfully defended clients in some of the largest FCA actions in the country that the government and relator have filed at trial, summary judgment and appeal. Those cases include:

- Mr. Salcido was lead counsel for Golden Living in an FCA action where the federal government had sued Golden Living's predecessor company, Beverly Enterprises ("Beverly"), for $895 million, alleging that Beverly had engaged in an unlawful kickback scheme with McKesson Corp. in violation of the Anti-Kickback Act and the FCA. After 14 days of trial, the court ruled that Beverly and McKesson did not violate the FCA or the Anti-Kickback Act because their business negotiations were fair, reasonable and conducted in good faith. *See United States of America ex rel. Jamison v. McKesson Corp.*, 900 F. Supp. 2d 683 (N.D. Miss. 2012).
- *Mr. Salcido was lead counsel for the* operator of a chain of skilled nursing companies and a rehabilitation company in Florida during a five-week FCA jury trial. Based upon the trial record, the district court reversed the jury verdict and entered judgment for the defendants, ruling that the relator did not establish FCA materiality at trial as a matter of law. *See United States ex rel. Ruckh v. CMC II, LLC,* 2018 U.S. Dist. LEXIS 5148 (M.D. Fla. Jan. 11, 2018).
- Mr. Salcido was counsel for Trinity Industries in its appeal from a $663 million FCA judgment. The 5th Circuit reversed the trial court's verdict, finding that the relator failed to satisfy the FCA's materiality element. *See United States ex rel. Harman v. Trinity Indus., Inc.,* 872 F.3d 645 (5th Cir. 2017).
- Mr. Salcido was lead counsel for Aegis Therapies and a Golden Living skilled nursing facility where the federal government had alleged that the defendants provided medically unnecessary rehabilitation therapy. The district court granted defendants' summary judgment motion, ruling that the government had used the wrong standard to assess whether the services were medically necessary and failed to prove that defendants' certification regarding medical necessity was objectively false. *See United States ex rel. Lawson v. Aegis Therapies, Inc.*, 2014 U.S. Dist. LEXIS 45221 (S.D. Ga. Mar. 31, 2015).
- Mr. Salcido was lead counsel for a defendant physician and multispecialty group practice that the government accused of FCA violations. The district court dismissed all the government's claims on summary judgment. Ultimately, because the United States' action lacked "substantial justification," the United States was ordered to pay the defendants more than $500,000 in legal fees. In making the ruling, the court ruled that Medicare fraud law is an area of expertise and ruled that it was undisputed that Mr. Salcido possessed such expertise. *See United States v. Prabhu*, 442 F. Supp. 2d 1008 (D. Nev. 2006).
- Mr. Salcido was lead counsel for Golden Living in an action where the relator and the government sued multiple defendants, alleging that they violated the FCA because they knowingly created and operated a supply company in violation of Medicare Supplier Standards. The district court granted the defendants' FCA summary judgment motion regarding the Supplier Standards allegations, finding that the government's prior administrative proceedings demonstrated that the defendant supply company was entitled to payment. *See United States ex rel. Jamison v. McKesson Corp*., 784 F. Supp. 2d 664 (N.D. Miss. 2011).

Mr. Salcido has authored a number of books and chapters in leading publications (including the American Health Lawyers Association, BNA Books and Bloomberg BNA) regarding the application of the FCA, including:

- *False Claims Act & the Health Care Industry: Counseling & Litigation* (2d ed. American Health Lawyers Ass'n 2008) (3d edition forthcoming in 2018)
- *2014 Supplement to False Claims Act and the Health Care Industry: Counseling and Litigation* (American Health Lawyers Ass'n 2014)
- "The False Claims Act in Health Care Prosecutions: Application of the Substantive, Qui Tam and Voluntary Disclosure Provisions," in *Health Care Fraud and Abuse: Practical Perspectives*, Ch. 3 (3d ed. BNA Books 2013) (with annual supplements)
- "False Claims Act: Health Care Applications and Defenses" in *Bloomberg BNA Health Law and Bus. Series No. 2650* (2012) (with annual supplements).

Because of his work successfully defending a number of FCA lawsuits, Mr. Salcido has been recognized in:

- *The National Law Journal* in its 2014 Litigation Trailblazers & Pioneers as one of 50 "people who have made a difference in the fight for justice" for his outstanding work in defending FCA lawsuits
- *Chambers USA: America's Leading Lawyers for Business* (2006-2017), in the 2011-2017 editions of *Chambers USA*, listed under Health Care: Regulatory and Litigation, Leading Individuals (Nationwide) (Band 1) and as Health Care Leading Individuals (District of Columbia) (Band 1)
- *Law360*, which selected Mr. Salcido as one of the four Health Care MVPs for 2012 based upon a successful trial verdict obtained in the Golden Living FCA/Anti-Kickback Act lawsuit.

Before entering private practice, Mr. Salcido served as trial counsel for the U.S. Department of Justice Civil Fraud Section, which has nationwide jurisdiction over the FCA, where he led several successful prosecutions of the FCA on the United States' behalf.

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[1] Under the *qui tam* provisions, a private person files the lawsuit under seal, and the government determines whether to intervene or decline to intervene in the action. 31 U.S.C. § 3730(b). If the government intervenes, it assumes primary responsibility to litigate the action. *Id.* § 3730(c)(1). Alternatively, if the government declines, the relator may litigate as the government's assignee. *Id.* § 3730(b)(4)(B); *Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 773-74 (2000).

[2] *See, e.g., United States ex rel. Ridenour v. Kaiser-Hill Comp., L.L.C.*, 397 F.3d 925, 934-35 (10th Cir. 2005) (noting that courts should construe FCA provisions consistently with the Constitution's Take Care clause, which requires that the executive branch maintains sufficient control over *qui tam* actions so that there is no violation of its duty to enforce the laws of the land).

[3] For example, Congress created various bars to the relator's action to preclude lawsuits that do not sufficiently benefit the government to merit a reward. For example, under the public disclosure bar, 31 U.S.C. § 3730 (e)(4), Congress barred actions that are substantially similar to specified information in the public domain, unless the relator is the original source of the information in the public domain or materially adds to the information in the public domain. Similarly, under the first-to-file rule, 31 U.S.C. § 3730(b)(5), Congress prohibited all actions that are based upon the facts underlying a pending *qui tam* action.

[4] *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015) (noting in construing 31 U.S.C. § 3730(b)(5) that the "*qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine").

[5] In cases against defendants operating in several jurisdictions, relators have flexibility regarding where to file the action. Under the FCA, an action "may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transactions business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a).

[6] *See* Act of March 2, ch 67, 12 Stat. 696 (1863) ("Such suit may be brought and carried on by any person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without

the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.").

[7] *Searcy v. Philips Electronics North America Corp.,* 117 F.3d 154, 159 (5th Cir. 1997) (noting that, although Congress substantially revised the FCA in 1986, it did not revise this provision, which had its roots in the original FCA and thus reasoned that, as "far as we can tell, Congress decided that it should combine its effort to reinvigorate the *qui tam* provisions of the Act with a continuation of its policy of encouraging the government to monitor relators' actions and step in when relator is not acting in the best interest of the public").

[8] *See United States ex rel. Michaels v. Agape Senior Community, Inc*., 848 F.3d 330, 339-40 (4th Cir. 2017) (noting that, instead of "freeing relators to maximize their own rewards at the public's expense, Congress granted the Attorney General the broad and unqualified right to veto proposed settlements of qui tam actions" and agreeing "with the district court, and with the Fifth and Sixth Circuits, that the Attorney General possesses an absolute veto power over voluntary settlements in FCA qui tam actions"); *United States ex rel. Smith v. Lampers*, 69 Fed. Appx. 719, 721 (6th Cir. 2003) (the language of Subsection (b)(1) "means that a relator may not seek a voluntary dismissal of any qui tam action under the FCA without the government's consent") (citation omitted); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000) ("We now join the Fifth Circuit in rejecting the Ninth Circuit's analysis, and hold that a relator may not seek voluntary dismissal of any *qui tam* action without the Attorney General's consent."); *Searcy v. Philips Electronics North America Corp*., 117 F.3d 154 (5th Cir. 1997).

[9] 117 F.3d at 159.

[10] *Id*.

[11] *Id.* at 160. The rule does not apply to involuntary dismissals. *See, e.g., United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 91 (2d Cir. 2008) ("While the False Claims Act appears to bar dismissal of *qui tam* actions absent the Attorney General's consent, . . . we have previously construed this provision to apply only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal.") (citations and internal quotation omitted).

[12] 25 F.3d 715 (9th Cir. 1994).

[13] *Id*. at 722.

[14] 31 U.S.C. § 3730(c)(2)(A).

[15] *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). In *Swift*, the relator, a Department of Justice lawyer, contended that three Department of Justice (DOJ) Office of Legal Counsel employees had conspired to defraud the government of $6,169.20 using falsified time sheets and leave sheets.

[16] *Id.* at 253 (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 (1985)). Although, in *Swift*, the court created this rule in the context of a case where the defendants had not been served the complaint, the D.C. Circuit subsequently applied *Swift's* interpretation of § 3730(c)(2)(A) in a case where the defendant had been served. *See Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). In *Hoyte*, the relator had contended that the defendant, the American National Red Cross, had failed to report that it had mishandled blood supplies. The government moved to dismiss under § 3730(c)(2)(A). The court, finding that, as in *Swift*, "there is no evidence . . . of fraud on the court or any similar exceptional circumstance to warrant departure from the usual deference we owe the Government's determination whether an action should proceed in the Government's name," affirmed the district court's dismissal. *Id.* at 189.

[17] *Id.* A fraud on the court is generally described as a "a scheme to interfere with the judicial machinery performing the task of impartial adjudication," which "is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury" and includes as examples "the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony." *United States ex rel. Berg v. Obama*, 656 F. Supp. 2d 107, 109, n. 1 (D.D.C. 2009) (citations omitted), *aff'd,* 2010 U.S. App. LEXIS 13599 (D.C. Cir., June 30, 2010). DOJ, in its recent internal memorandum regarding Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (dated Jan. 10, 2018), has stated that it believes that the D.C. Circuit's unfettered discretion standard is the appropriate standard. *Id.* at 7.

[18] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir. 1998), *aff'g sub nom. United States ex rel. Sequoia Orange Co. v. Sunland Packing*, 912 F. Supp. 1325 (E.D. Cal. 1995). *Accord United States ex rel. Ridenour v. Kaiser-Hill Comp., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005) (adopting the 9th Circuit standard in *Sequoia Orange* and stating that that standard is correct because it "recognizes the constitutional prerogative of the Government under the *Take Care Clause*, comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss"). *See also United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. Appx. 849 (10th Cir. 2012). In *Wickliffe*, the government moved to dismiss the relator's action because it had settled a related action and believed that the relator's action was barred under the first-to-file rule. *Id.* at 850. Because the defendant had not been served, the court considered it an open question whether its prior precedent in *Ridenour* controlled, and considered whether to apply the *Sequoia Orange* standard or the *Swift* unfettered right rule. *Id.* at 853. Because *Sequoia Orange* presented a broader standard, and the court determined that, even under that broader standard, the relator's action could not survive, the court applied the *Sequoia Orange* rule. *Id.* (finding that dismissal was appropriate because it is "rationally related to the government's interest in ending a duplicative action that would result in no recovery for the government"). Other courts have similarly ruled, in light of the circuit split, to apply *Sequoia Orange*

because they found that, even under that broader standard, the case was subject to dismissal. *See, e.g., United States ex rel. Nicholson v. Spigelman*, No. 10 C 3361, 2011 U.S. Dist. LEXIS 74258, at *4-5 (N.D. Ill. July 8, 2011) (finding that dismissal rationally related to the government's interest when the government contended that the actual damages alleged were $320 and that, even if statutory penalties and treble damages are added to that amount, the burdens on the government of monitoring the case, filing briefs to clarify its position on questions of law, responding to discovery requests and preparing government officials for depositions would cost the government more in expenses than it could recover). In *Swift*, the D.C. Circuit rejected the *Sequoia Orange* rational basis test because it did not believe that the FCA provided the judiciary with general oversight of the Executive's Judgment. *See id.*, 318 F.3d at 253.

[19] 31 U.S.C. § 3731(b).

[20] In 2009, Congress clarified when the government's complaint would relate back to the relator's complaint for statute-of-limitations purposes.

[21] *United States ex rel. Sanders v. N. Am. Bus. Indus*., 546 F.3d 288, 293 (4th Cir. 2008) ("We hold that Section 3731(b)(2) extends the FCA's statute of limitations beyond six years only in cases in which the United States is a party. It would be problematic to read the text of the statute any other way. Section 3731(b)(2) refers only to the United States—and not to relators. Thus, Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action."); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725-26 (10th Cir. 2006) (finding that § 3731(b)(2) "was not intended to apply to private *qui tam* relators at all. We recognize that this interpretation creates the possibility that a relator who learns of fraudulent activity seven years after it occurs would be barred from bringing suit. However, this result is more in accord with the FCA's stated purpose of encouraging prompt action on the part of relators and would discourage those relators who chose to delay on bringing an FCA claim, or refrain from informing the government of the fraud, to allow increasing damages to accrue. Congress cannot have intended such a result.").

[22] 91 F.3d 1211 (9th Cir. 1996), *vacated on other grounds*, 117 S. Ct. 2476 (1997). *United States ex rel. Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9th Cir. 1997) (ruling that the tolling provision applies for the benefit of the relator, as well as the government, and that the three-year extension begins to run upon the relator's knowledge of false claims). In ruling that the relator may avail itself of the three-year tolling provision, the 9th Circuit concluded that the relator did not need to demonstrate fraudulent concealment in order to invoke the tolling provision. *See Lehman Brothers*, 123 F.3d at 1308 ("Although fraudulent concealment forms part of the historical rationale for the doctrine of equitable tolling, neither § 3731(b)(2) nor [Ninth Circuit precedent] imposes a requirement that a *qui tam* plaintiff must allege fraudulent concealment to actuate tolling under the FCA.").

[23] *Id.* at 1214.

[24] Of course, although not addressed by the court, the designation of a relator as an "official of the United States" would be contrary to the Constitution's Appointments Clause. *See, e.g.*, *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co*., 41 F.3d 1032, 1041-42 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co*., 9 F.3d 743, 757-59 (9th Cir. 1993); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172, 179 (E.D. Pa. 1991); *see also United States ex rel. Colunga v. Hercules Inc*., No. 89-cv-954B, 1998 U.S. Dist. LEXIS 21811, at *12 (D. Utah Mar. 6, 1998) (stating that "the plain meaning of 'official of the United States' means a person holding office of the United States . . . . That is not the relator in an FCA case. The relator is not an official of the United States. If a relator was an official of the United States the Appointments Clause . . . might be violated by the statute.").

Courts have recognized that relators operate with different motives than United States officials. As the 5th Circuit noted in *United States ex rel. Foulds v. Tex. Tech Univ*., 171 F.3d 279 (5th Cir. 1999), relators can never be deemed to be "responsible federal officers," and, thus, Congress could not have delegated to relators the United States' exemption from 11th Amendment restrictions on suing states, because relators pursue private profit rather than the public good:

Qui tam plaintiffs cannot qualify as surrogates of "responsible federal officers" who have the right to represent the sovereign to sue the respective states. Indeed, the Supreme Court has recognized this fact. In a recent case, it stated that, "[a]s a class of plaintiffs, *qui tam* relators are different *in kind* than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939… (1997) (unanimous opinion) (emphasis added). Importantly, the Supreme Court specifically noted "[t]hat [just because] a *qui tam* suit is brought by a private party 'on behalf of the United States,' does not alter the fact that a relator's interests and the Government's do not necessarily coincide." *Id.* at 1877 n.5.

Foulds, 171 F.3d at 293. This view of *qui tam* plaintiffs is not new, and the court drew upon history to emphasize its point:

Furthermore, Sir Edward Coke's class description of *qui tam* plaintiffs hardly suggests a historical understanding of relators as responsible representatives of the sovereign. He described the common informers who institute penal actions for the government as "viperous vermin" that prevent "[t]he King [from] commit[ting] the sword of his justice or the oil of his mercy." Gerald Hurst, *The Common Informer*, 147 Contemp. Rev. 189-90 (1935). In short, these descriptions of the historical *qui tam* plaintiff undermine the concept that she is deputized to stand in for the "responsible federal officers" to whom the states have surrendered their sovereign rights.

Id.

[25] *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs* , 474 F. Supp. 2d 75 (D.D.C. 2007). *Accord United States ex rel. Wood v. Allergan, Inc*., No 10-CV-5845, 2017 U.S. Dist. LEXIS 50103, at *45-46 (S.D.N.Y. Mar. 31, 2017) (following *Pogue*¸ noting that, although "there are strong arguments on both sides of this divide, the Court finds the thorough and well-reasoned textual analysis of Judge Lamberth in *Pogue* most convincing") (citation omitted); *United States ex rel. Williams v. City of Brockton*, No. 12-cv-12193, 2016 U.S. Dist. LEXIS 178032, at *27 (D. Mass. Dec. 23, 2016); *United States ex rel. Colunga v. Hercules Inc*., No. 89-cv-954B, 1998 U.S. Dist. LEXIS 21811 (D. Utah Mar. 6, 1998). The 10th Circuit disavowed *Colunga* in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006). *See* 472 F.3d at 726 (finding that the court's construction of the FCA's statute of limitations would run afoul of the "absurdity doctrine" in that the FCA's statute of limitations could not rationally turn on the knowledge of a nonparty). Aside from the "absurdity doctrine," another court referred to this type of analysis as "bizarre," *United States ex rel. Sanders v. N. Am. Bus. Indus*., 546 F.3d 288, 293 (4th Cir. 2008), and another referred to it as "tortured." *See United States ex rel. Hunt v. Cochise Consultancy, Inc*., No. 5:13-cv-02168, 2016 U.S. Dist. LEXIS 56518, at *7 (N.D. Ala. Apr. 28, 2016).

[26] *See, e.g., United States v. Health Possibilities*, P.S.C., 207 F.3d 335, 340 (6th Cir. 2000) ("The FCA is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud against public monies") (citation omitted); *United States v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995) ("The private right of recovery created by the provisions of the FCA exists not to compensate the *qui tam* relator, but the United States. The relator's right to recovery exists solely as a mechanism for deterring fraud and returning funds to the federal treasury.").

[27] *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009) (United States is "a real party in interest" in a case brought under the FCA.).

[28] *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.").

[29] 31 U.S.C. § 3730(b)(5).

[30] *United States ex rel. Batiste v. SLM Corp*., 659 F.3d 1204, 1210 (D.C. Cir. 2011) (finding that Section "3730(b) is designed to allow recovery when a *qui tam* relator puts the government on notice of potential fraud being worked against the government, but to bar copycat actions that provide no additional material information"); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (a narrow identical-facts bar would encourage piggyback claims, which would have no additional benefit for the government, since, once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds") (citation and internal quotation omitted).

[31] 135 S. Ct. 1970 (2015).

[32] 31 F.3d 1015 (10th Cir. 1994).

[33] *Id.* at 1017.

[34] *Id.* Subsequently, the 10th Circuit ruled, in dicta, in *United States ex rel. Little v. Triumph Gear Sys.*, No. 16-4152, 2017 U.S. App. LEXIS 17997, at *7, n. 6 (10th Cir. Sept. 18, 2017), that, in light of the Supreme Court's decision in *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009), *Precision* may no longer be good law. The court noted in *Eisenstein* that the Supreme Court defined "intervention" broadly as the "method for a nonparty to become a party to a lawsuit." *Id.* Under this definition, a Rule 15 motion would encompass intervention and hence be barred. That is, "intervention takes place when a nonparty becomes a party—regardless of the mechanism by which it occurs." *Id.* at *6.

[35] 72 F.3d 447 (5th Cir. 1995).

[36] *Id.* at 452-53.

[37] *United States ex rel. Heineman-Guta v. Guidant Corp.,* 718 F.3d 28, 34–35 (1st Cir. 2013) ("The question in this case is narrow. It is whether a first-filed complaint under the FCA's first-to-file rule, § 3730(b)(5), must comply with Rule 9(b) particularity requirements in order to give sufficient notice to the government of an alleged fraudulent scheme. To that narrow question, . . . "we hold it does not" and noting that, although the FCA references the Federal Rules of Civil Procedure in various provisions, § 3730(b)(5) makes no reference to Rule 9(b) and thus "Congress's reference to the Federal Rules of Civil Procedure in some of the FCA's provisions, particularly the subsections under § 3730(b), and the omission of any Rule 9(b) requirement from § 3730(b)(5), tells us that Congress did not intend the first-to-file rule to incorporate Rule 9(b)'s heightened pleading standard."); *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011).

[38] *Id*. at 1210.

[39] *Id*. (citation omitted). Additionally, the court ruled that engrafting such an extratextual requirement would be nonsensical: "Imposing the heightened pleading standard, moreover, would create a strange judicial dynamic, potentially requiring one district court to determine the sufficiency of a complaint filed in another district court, and possibly creating a situation in which the two district courts disagree on a complaint's sufficiency." *Id.* at 1210.

[40] *See United States ex rel. Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005) (relator's "action cannot be 'based on the facts underlying' the [first-filed] action when the facts necessary to put the government on notice of the fraud alleged are conspicuously absent from the [first-filed] complaint.

Because the [first-filed] action is legally infirm under Rule 9(b), it fails to preempt [the relator's] later-filed action despite the fact that the overly broad allegations of the [first-filed] complaint 'encompass' the specific allegations of fraud made by [the relator].").

[41] *See United States ex rel. Campbell v. Redding Med. Ctr*., 421 F.3d 817, 825 (9th Cir. 2005) ("we hold that in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4)"). *See generally United States ex rel. Poteet v. Medtronic, Inc*., 552 F.3d 503, 516 (6th Cir. 2009) ("if the first complaint is either jurisdictionally precluded, see 31 U.S.C. § 3730(e), or legally incapable of serving as a complaint, see Fed. R. Civ. P. 9(b) . . . , then it does not properly qualify as a 'pending action' brought under the FCA") (citations omitted) (dicta).

[42] *United States ex rel. Carter v. Halliburton, Co.*, 866 F.3d 199 (4th Cir. 2017); *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 929-30 (D.C. Cir. 2017) (noting that "the 'general rule' is that, 'if an action is barred by the terms of a statute, it must be dismissed' rather than left on ice" and the "first-to-file bar, in specifying that 'no person . . . may . . . bring a related action' while a first-filed suit is 'pending' . . . manifests just such a statutory command" and rejecting contention that the relator may simply amend the complaint once the other parties' prior complaints are dismissed because an amended complaint "does **not operate to end the action and begin a new one" and concluding that the relator's action was "incurably** flawed from the moment he filed it") (citations omitted).

[43] *See* 866 F.3d at 206 (citing 31 U.S.C. § 3730(b)(5)).

[44] *Id. (*citing *Bring and Action*, Black's Law Dictionary 231 (10th ed. 2014)).

[45] *Id.* at 206-07 (citations omitted).

[46] *Id.* The 4th Circuit also noted that its plain-language interpretation was supported by the Supreme Court's decision in *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016). In *Rigsby*, the Supreme Court considered whether a violation of the FCA provision mandating that relators file their complaints under seal could be sanctioned only with dismissal. *Id.* at 439-40. The Court held that the appropriate response to a seal violation was left to the district court's discretion in light of congressional silence on the issue of how to sanction a seal violation. *Id.* at 442-44. In reaching this ruling, however, the Court contrasted the seal requirement with the first-to-file rule, which the Court described as one of a number of FCA provisions that do require, in express terms, the dismissal of a relator's action. *Id.* at 442-43 (citing 31 U.S.C. § 3730(b)(5)). The 4th Circuit found that the Supreme Court's reasoning confirms that the only appropriate response for a first-to-file rule violation is dismissal. *See* 866 F.3d at 209.

[47] *Id.* (citations omitted).

[48] *See United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015).

[49] *Id.* at 6.

[50] *See, e.g*., *United States ex rel. Hartpence v. Kinetic Concepts, Inc*., 792 F.3d 1121, 1130 (9th Cir. 2015); *United States. ex rel. Carter v. Halliburton Co.,* 710 F.3d 171, 181 (4th Cir. 2013), *aff'd in part on other grounds sub nom Kellogg Brown & Root,* 135 S. Ct. 1970, 1979 (2015); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376-77 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

[51] *See United States ex rel. Hayes v. Allstate Ins., Co.*, 853 F.3d 80, 86 (2d Cir. 2017) ("we join the D.C. Circuit in holding that the first-to-file rule of the FCA is not jurisdictional"); *United States ex rel. Heath v. AT&T, Inc*., 791 F.3d 112, 120-21, (D.C. Cir. 2015).

[52] *United States ex rel. Doe v. Staples, Inc.,* 773 F.3d 83, 88-89 (D.C. Cir. 2014) (noting that the relator's action did not fulfill purposes of the public-disclosure bar because "anyone armed with the information in the [administrative reports] could troll the aisles of any office-supply store for pencils with loose ferrules or off-center leads. The would-be plaintiff could then determine whether the retailer had paid the required anti-dumping duties by reference to other public information, and if it had not, then voila, the plaintiff would be entitled to millions of dollars in *qui tam* compensation. But these sorts of lawsuits, brought by 'opportunistic plaintiffs who have no significant information to contribute of their own,' are precisely the kind the public disclosure bar seeks to prevent.") (citation omitted); *United States ex rel. Poteet v. Bahler Med. Inc*., 619 F.3d 104, 111 (1st Cir. 2010) ("*Qui tam* actions are intended to help the federal government expose fraud on the United States that has escaped the government's detection. If the materials necessary to ground an inference of fraud are generally available to the public, however, there is nothing to prevent the government from detecting it. Concomitantly, the likelihood of parasitic *qui tam* action in such circumstances is high, providing a reason for the public disclosure bar."); *United States ex rel. Gilligan v. Medtronic*, 403 F.3d 386, 389 (6th Cir. 2005) ("Where information has been publicly disclosed, the government has access to enough information to bring a civil action and the citizen-suit provision becomes unnecessary."); *United States ex rel. Feingold v. Adminastar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) ("[T]he function of a public disclosure is to bring to the attention of the relevant authority that there has been a false claim against the government . . . . Where a public disclosure has occurred, that authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose . . . . Where, on the other hand, a transaction or an allegation of fraud has not been publicly disclosed, society benefits by creating a monetary incentive for a knowledgeable person, called a relator, to identify the problem, present his information to the government, and, where the government declines to prosecute, proceed with a *qui tam* action under the FCA.") (citations omitted).

[53] *See, e.g., United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Stinson v. Prudential Ins. Co*., 944 F.2d 1149, 1155 (3d Cir. 1991); *cf. United States ex rel.*

Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 652-53 (D.C. Cir. 1994) (no public disclosure results from "the discovery process conducted between two private litigants" when that information is not filed with the court) (dictum) (citations omitted); *United States ex rel. Hagood v. Sonoma Cty. Water Agency,* 929 F.2d 1416, 1419 (9th Cir. 1991) (no public disclosure occurs merely as a result of internal government debate regarding the defendant's acts); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (same).

[54] 985 F.2d 1148, 1195 (2d Cir. 1993).

[55] *Id. See United States ex rel. Branhan v. Mercy Health Sys. of Sw. Ohio,* No. 98-3127, 1999 U.S. App. LEXIS 18509 at *5 (6th Cir. Aug. 5, 1999) (HCFA report was publicly disclosed because it would be "available to anyone who requested it") (citations omitted); *United States ex rel. Woods v. Empire Blue Cross & Blue Shield*, No. 99-Civ. 4968, 2002 U.S. Dist. LEXIS 15251 at *15 (S.D.N.Y. Aug. 19, 2002); *United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) ("If information is equally available to the relator as it is to strangers to the fraud transaction had they chosen to look for it, then there is public disclosure.") (citations omitted); *cf*. *United States ex rel. Holmes v. Consumer Ins. Grp*., 318 F.3d 1199, 1205 (10th Cir. 2003) (where the government interviewed current and former employees of the defendant, there was no public disclosure because all persons were "previously informed" of the fraudulent scheme prior to their respective interviews with government investigators) (en banc).

[56] 63 F.3d 1512 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 939 (1997).

[57] 63 F.3d at 1518-19.

[58] *Id*. at 1518-20.

[59] *Id*. at 1518. The court believed that its ruling was consistent with the statutory purpose because Congress specifically intended for relators to be able to bring lawsuits when the government possessed identical information. *Id*. at 1519. The Court relied, in part, upon statements in the Senate Judiciary Committee Report. *Id*. However, the court's reliance on the Senate Report undermines the reliability of its holding because the draft jurisdictional bar that the Senate Judiciary Committee referenced in its Report was substantially narrower than the one that Congress ultimately passed. *Compare* S. Rep. 345 at 43 (setting forth draft § 3730(e)(4)) *with* 31 U.S.C. § 3730(e)(4). Indeed, to the extent that the audit report was released to the prime contractor—which was a stranger to the fraud—under the plain language of the statute—which requires only that the information be "public"—the 9th Circuit should have found that there had been a public disclosure of the audit report. The statute, unlike the court's ruling, contains no exception for "public" disclosures within "private spheres."

[60] *Id*. at 1520. *See also United States ex rel. Berg v. Honeywell Int'l, Inc.*, No. 11-35001, 2012 U.S. App. LEXIS 25897 at *4–*5 (9th Cir. Dec. 19, 2012) (finding no public disclosure when governmental report was produced to private company the government hired to audit contract); *United States ex rel. Putnam v. E. Idaho Reg'l Med. Ctr*., 2009 U.S. Dist. LEXIS 81416 at *26–*27 (D. Idaho Sept. 8, 2009) (ruling that public disclosures made to defendants' employees and independent contractors did not trigger the public-disclosure bar because their financial interest is that the accusations not be further publicized). More recently, a district court within the 3rd Circuit distinguished *Stinson* and found that documents produced during discovery but not filed with the court did not constitute a public disclosure because, unlike the situation in *Stinson*, it was produced under a Confidentiality Agreement and the presumption that the *Stinson* court noted in the Federal Rules of Civil Procedure of "public access" to civil discovery had been altered such that public access was generally limited to discovery filed with the court. *See United States ex rel. Spay v. CVS Caremark Corp.*, 09-4672, 2012 U.S. Dist. LEXIS 180602, at *152–57 (E.D. Pa. Dec. 20, 2012).

[61] 166 F.3d 853 (7th Cir. 1999). Other circuits have expressly ruled that disclosures to the government do not constitute public disclosures for purposes of the public-disclosure bar. *See, e.g., United States ex rel. Whipple v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 782 F.3d 260, 267-70 (6th Cir. 2015); *United States ex rel. Rost v. Pfizer Inc*., 507 F.3d 720, 730 (1st Cir. 2007), *abrogated on other grounds by Allison Engine v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

[62] 570 F.3d 907 (7th Cir. 2009).

[63] 822 F.3d 613, 619 & n. 10 (2d Cir. 2016).

[64] 865 F.3d 71, 89 (2d Cir. 2017). *See also United States ex rel. Nargol v. DePuy Orthopaedics, Inc*., 865 F.3d 29, 38 (1st Cir. 2017) ("The circuits have varied . . . in their statements of exactly what Rule 9(b) requires in a *qui tam* action. Of most relevance here, a consensus has yet to develop on whether, when, and to what extent a relator must state the particulars of specific examples of the type of false claims alleged.") (citation omitted).

[65] *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys*., 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting *United States ex rel. Aflatooni v. Kitsap Physicians Serv*., 314 F.3d 995, 997 (9th Cir. 2002)); *see also United States ex rel. Hendow v. Univ. of Phx*., 461 F.3d 1166, 1173 (9th Cir. 2006) ("[F]or a false statement or cause of action to be actionable . . . , it is necessary that it involve an actual claim . . ."); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996) ("The FCA . . . requires a false claim").

[66] *Cafasso*, 637 F.3d at 1055 (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995); *see also In re: Baycol Prods. Litig*., 732 F.3d 869, 875 (8th Cir. 2013).

[67] *Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 785 (4th Cir. 1999).

[68] *Aflatooni*, 314 F.3d at 1002 (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)); *see also Cafasso*, 637 F.3d at 1055; *United States ex rel. SNAPP, Inc. v. Ford Motor Co*., 618 F.3d 505, 513 (6th Cir. 2010); *United States ex rel. Rost v. Pfizer, Inc*., 507 F.3d 720, 727 (1st Cir. 2007), *abrogated on other grounds by Allison Engine v. United States ex rel. Sanders*, 553 U.S. 662 (2008). *See generally United States ex rel. Hockett v. Columbia/HCA Healthcare Corp*., 498 F. Supp. 2d 25, 71 (D.D.C. 2007) (holding that, when a relator cannot “point to a single, specific false claim” or sufficiently describe one, he has “failed to create a triable issue of fact”).

[69] *See, e.g., United States ex rel. Nargol v. DePuy Orthopaedics, Inc*., 865 F.3d 29, 41 (1st Cir. 2017) (finding that the relators had fit into the “more flexible” approach used when evaluating the sufficiency of fraud pleadings in connection with indirect false claims for government payment and demonstrated “reliable indicia that lead to a strong inference that claims were actually submitted” when the “Relators allege that, over a five-year period, several thousand Medicare and Medicaid recipients received what their doctors understood to be Pinnacle MoM device implants; that more than half of those implants fell outside the specifications approved by the FDA; and that the latency of the defect was such that doctors would have had no reason not to submit claims for reimbursement for noncompliant devices” and where the complaint essentially alleges facts showing that it is statistically certain that [defendant] caused third parties to submit many false claim to the government).

[70] *See, e.g., United States ex rel. Chorches v. Am. Med. Response, Inc*., 865 F.3d 71, 84-85, 93 (2d Cir. 2017) (where complaint set forth specific instances in which defendant’s supervisors required that records be falsified so that reimbursable claims could be submitted to Medicare, the court found that, “in alleging that supervisors specifically referenced Medicare as the provider to whose requirements the allegedly falsified revisions were intended to conform, the [complaint] supports a strong inference that false claims were submitted *to the government*” and noting that the relator does not need to provide details of actual bills or invoices submitted to the government as long as the relator makes plausible allegations that lead to a strong inference that specific claims were indeed submitted and that information about the details of the claims submitted are peculiarly within the opposing party’s knowledge).

[71] *See, e.g., United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 917-20 (8th Cir. 2014) (finding that “relators whose allegations lack sufficient indicia of reliability should be required to plead representative examples of the false claims because their allegations are more likely to be unfounded” but that “a relator who provides sufficient indicia of reliability to support her allegations that false claims were submitted, such as by pleading details about defendant’s billing practices and pleading details about the defendant’s billing practices and pleading personal knowledge of the defendant’s billing practices fulfills Rule 9(b)’s objective”); *United States ex rel. Walker v. R&F Properties of Lake Cty., Inc*., 433 F.3d 1349, 1360 (11th Cir. 2005) (finding that relator’s conversations with billing employees regarding

the allegedly fraudulent practices can provide well-founded belief that the defendant submitted actual false or fraudulent claims).

[72] *See Health Possibilities*, P.S.C., 207 F.3d at 340; *Northrop Corp.*, 59 F.3d at 968.

[73] *See generally Graham Cty. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1410 (2010) (broadly construing the public-disclosure bar and noting that its ruling "is buttressed by the fact that Congress carefully preserved the rights of the most deserving *qui tam* plaintiffs: those whistleblowers who qualify as original sources").

[74] *See, e.g., United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc*., 149 F.3d 227, 234 (3d Cir. 1998) ("interpreting section 3730(b)(5) as imposing a broader bar furthers the Act's purpose by encouraging *qui tam* plaintiffs to report fraud promptly . . . . In addition, . . . duplicative claims do not help reduce fraud or return funds to the federal fisc, since (once the government knows the essential facts of the fraudulent scheme, it has enough information to discover related frauds.") (citation omitted).

[75] Once any *qui tam* action is filed, the government must investigate the facts underlying a *qui tam* action. *See* 31 U.S.C. § 3729(a). Thus, even a defective first-filed action will provide the government with sufficient facts (name of defendant and general allegations) so that government can discharge its duty to investigate further without the need of any additional *qui tam* action.

[76] *See, e.g., United States ex rel. Walburn v. Lockheed Martin Corp*., 431 F.3d 966, 973 (6th Cir. 2005) (heightened pleading requirement of Rule 9(b) in FCA cases "deters would-be relators from making overly broad allegations that fail to adequately alert the government to possible fraud in an effort to preclude future relators from sharing in any bounty eventually recovered"); *United States ex rel. Bledsoe v. Cmty. Health Servs., Inc*., 342 F.3d 634, 642 (6th Cir. 2003) ("Application of Rule 9(b) is appropriate in that it would deter those alleging FCA violations from making overly broad allegations.") (citation and internal quotation omitted); *United States ex rel. Lacorte v. SmithKline Beecham*, 149 F.3d 227, 234 (3d Cir. 1998) (stating that Rule 9(b) provides "sufficient deterrence" to relators to prevent them from alleging broad claims or otherwise engaging in "artful pleading" to maximize their recoveries).

[77] *See, e.g., United States ex rel. Joshi v. St. Luke's Hosp., Inc*., 441 F.3d 552, 561 (8th Cir. 2006) ("As this court stated in Kinney, 'The [FCA] is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing.'") (citation omitted); *Bly-Magee v. Cal*., 236 F.3d 1014, 1019 (9th Cir. 2001) (noting that the court had "observed that qui tam suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime . . . . Because insiders privy to a fraud on the government should have adequate knowledge of the wrongdoing at issue, such insiders should be able to comply with Rule 9(b)") (citation and internal quotation omitted).