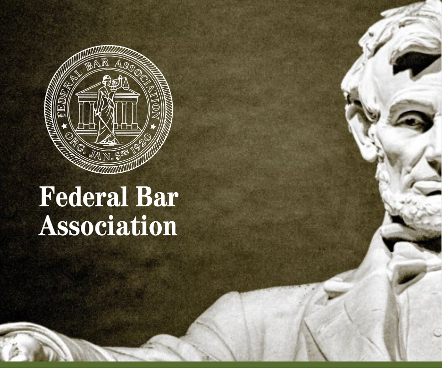

Turning Square Corners

The Newsletter of the Federal Bar Association Qui Tam Section

Summer 2026

Leadership Lane

By Rachel V. Rose, JD, MBA

Welcome to this edition of *Turning Square Corners!* We hope you enjoy the interviews, including The Honorable Eli Richardson, and articles highlighting various aspects of False Claims Act (**FCA**) trials. As always, case highlights are included and seasoned FCA attorneys from both sides of the aisle lend their perspectives and experiences.

Success. This single word pretty much sums up the result from the February 2026 *Qui Tam* Section's Annual Conference – *The FCA in an Era of Uncertainty*, which was championed by Co-Chairs Dee Dee Colson, a Criminal Assistant United States Attorney in the Southern District of Mississippi and Denise Barnes, a former U.S. Department of Justice (**DOJ**) Civil Frauds Trial Attorney and current partner at Bass, Berry & Sims, PLC.

Amid tumult surrounding *Zafirov* and the constitutionality of the FCA's *qui tam* provision, a change in the administration and record FCA recoveries and cases filed in FY 2025, the Conference Co-Chairs, their committee, Scott Oswald, Section Programming Chair, and other leaders pulled off a conference that set attendance records. The DOJ, Government agency attorneys, defense counsel and relators counsel showed up and delivered engaging panels on timely topics. Check out *Conference Column* in this edition of the Newsletter for the Co-Chairs insights!

Finally, looking forward to the 2027 Annual Conference. The FBA Qui Tam Section 2027 Annual Conference will

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Leaders in front of the conference sign – Kate Seikaly, Section Chair; Dee Dee Colson, Conference Co-Chair; Denise Barnes, Conference Co-Chair; and Scott Oswald, Programming Chair

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Also in This Issue

Conference Column

By Co-Chairs Denise Barnes and Dee Dee Colson

As Co-Chairs of the 2026 Federal Bar Association Qui Tam Conference, we were honored to welcome more than 400 practitioners from across the False Claims Act community—including relators' counsel, defense attorneys, government lawyers, compliance professionals, and appellate specialists—for two days of substantive discussion, spirited debate, and thoughtful engagement on the most pressing issues shaping FCA enforcement.

Day One opened with remarks from Kate Seikaly, Chair of the FBA Qui Tam Section, followed by six substantive panels. John Thomas led the Year in Review, covering the most significant case law developments and policy shifts of the past twelve months. Nick Peterson moderated a panel on whether "Illegal DEI" can function as an FCA trigger in light of the DOJ's Civil Rights Fraud Initiative and recent executive orders—an issue that generated significant debate and remains unsettled. Zach Williams then addressed customs and tariffs liability under the FCA, a subject of growing relevance as trade fraud cases multiply.

The keynote luncheon featured Deputy Assistant Attorney General Brenna Jenny, who described the FCA as a "flexible tool" and defended the Trump administration's novel applications of the statute in non-traditional enforcement areas—including the use of the FCA to combat discrimination. Her central point: new applications of the FCA are not invalid simply because they are new.

Jenny highlighted record FCA enforcement results in 2025, noting that DOJ issued over 1,000 Civil Investigative Demands annually in each of the last four years and that qui tam complaints increased by 33 percent last year. With 480 qui tam cases already filed in 2026, she characterized this heightened enforcement level as the "new normal," attributing it to data mining by both DOJ and relators and the expansion into novel enforcement areas.

On declinations, Jenny reiterated that merit is always the most persuasive factor, along with lack of harm to taxpayers or agencies. She dismissed arguments based on industry practice or "stale" conduct, noting that the statute of limitations serves as the backstop. On Section 3730(c)(2)(A) dismissals, Jenny reported that DOJ sought dismissal of 25 qui tam cases in 2025—a notable uptick—and described DOJ's posture as exercising its dismissal authority "sparingly, but not reluctantly." She announced a significant process change: DOJ will now evaluate (c)(2)(A) dismissals as a matter of course when deciding whether to intervene or decline, rather than on an ad hoc basis.

Jenny reaffirmed that Civil Frauds will not use noncompliance with regulatory guidance as a standalone basis for FCA liability—DOJ's analysis is rooted in violations of statutes and regulations. Questions remain about how this commitment applies where a defendant's conduct was inconsistent with particular guidance, and defendants may still argue relevance to scienter even where guidance lacks the force of law.

The afternoon resumed with Jake M. Shields on cybersecurity enforcement under the FCA, addressing how the government is using the statute to hold contractors accountable for failing to meet cyber standards. Sarah M. Hall followed with a panel on emergency-based healthcare fraud and the enforcement fallout from pandemic-era spending. Cormac Connor closed Day One with a session on federal contracting and the FCA, connecting procurement rules to fraud liability.

Day Two focused on procedural and practice-oriented issues. Former DAAG and Covington partner, Michael Granston, opened with a panel on the constitutionality of the FCA. With the Eleventh Circuit's decision in *United States ex rel. Zafirov v. Florida Medical Associates* still forthcoming, Justice Thomas' observation that the FCA exists in a "constitutional twilight zone"—where enforcement of federal law has been outsourced to private individuals—continues to fuel renewed scrutiny. Panelists agreed there is a strong likelihood the Supreme Court will take up the issue, and attention is focused on whether *Zafirov*provides a clean vehicle, particularly if the Eleventh Circuit addresses both the Appointments Clause and the Take Care and Vesting Clauses on appeal. On the practical side, defendants are increasingly raising Article II challenges, and the whistleblower bar reported that constitutional viability has become part of their early case evaluations.

Sara Vann addressed the rising importance of state False Claims Acts, arguing that practitioners focused exclusively on the federal statute are missing a growing share of enforcement activity. Diana Cieslak led a session on FCA liability for Anti-Kickback Statute violations. In the wake of the First Circuit's 2025 decision in *United States v. Regeneron Pharmaceuticals, Inc.*—which adopted a "but-for" causation standard for AKS-based FCA claims—panelists observed that relators have increasingly "dual pleaded" causation, alleging but-for causation to satisfy *Regeneron* while also pleading false certification as an alternative theory. This trend surfaced throughout the conference and appears to be reshaping how plaintiffs frame AKS-related cases.

The midday networking luncheon featured a roundtable moderated by Denise Barnes, with Erica Hitchings, Adam Tarosky, and Michael Granston. The afternoon continued with Brandie Weddle on the practical challenges of establishing damages in a false certification case—a topic with added relevance given that a decade after *Universal Health Services, Inc. v. United States ex rel. Escobar*, materiality questions remain unresolved. The Supreme Court's recent decision in *Kousisis v. United States* (a wire fraud case where the government characterized *Escobar* as an "essence of the bargain"

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From Federal Prosecutor to Federal Judge. A Conversation with The Honorable Eli J. Richardson

By Rachel V. Rose, JD, MBA & Megan Mocho, JD

Introduction

With even a quick glance at Judge Richardson's CV, it is immediately apparent that he brings a unique perspective to the bench. A 1992 graduate of Vanderbilt Law School, Judge Richardson was confirmed in 2018 to a seat on the United States District Court for the Middle District of Tennessee, Nashville Division.

Between law school graduation and taking the bench, there are a lot of impressive stops. His distinguished career includes serving as a FBI agent, federal prosecutor, U.S. embassy legal adviser, and private attorney, including Bass Berry & Simms. As a partner at Bass Berry & Simms, for nearly eight years, Judge Richardson assisted clients with government investigations involving both civil and white-collar criminal allegations.

In July 2025, Judge Richardson participated as a panelist during the Federal Bar Association Qui Tam Section's *Civil Enforcement Through the False Claims Act: A Practitioner's Perspective*, which was moderated by Deirde Lamppin Colson, AUSA-SDMS and also included Ellen Bowden McIntyre, Deputy Chief, Affirmative Civil Enforcement – MDTN, Wynn Shuford, AUSA-MDTN, Megan Mocho, Partner, Holland & Knight (Defense Perspective) and Rachel Rose, Principal, Rachel V. Rose – Attorney at Law, PLLC (Relator's Perspective).

Considering that this edition of *Turning Square Corners* is dedicated to False Claims Act ("FCA") trials, Judge Richardson is ideal to provide a judicial perspective.

Q&A with Judge Richardson

RVR/MM: What are three of your most memorable moments from your career that relate to either a Government investigation or a FCA case?

EJR: I will focus my answer on my time in the private sector, rather than in government service. One memory was from a very long and major trial that was part of a huge fraud investigation by the federal government; it resulted in the (extremely warranted) acquittal of my client on six of seven counts, with the last count later being dismissed. Another sticks out in my mind because it was factually and legally novel and especially interesting for me; it involved responding to an FCA investigation (probably not a qui tam) of my client, a pharmaceutical company; the investigation ultimately died on the metaphorical vine, which was a very satisfying result because evidence seemed clear that the client had not actually done anything to incur liability under the FCA. Finally, I fondly recall justice being done on many occasions (and in several different federal judicial districts) when I turned over to federal agents and prosecutors the results of an investigation I had done on behalf of a corporate client that had been victimized by white-collar federal criminal offenses; in these cases, the offenders were convicted by federal prosecutors at trial or by guilty plea.

RVR/MM: When was your first FCA case, whether as a federal prosecutor or defense counsel, and what type of fraud was at issue?

EJR: Not counting liaison I had, as a criminal AUSA, with civil AUSAs in connection with so-called parallel proceedings, the first FCA case that I handled (as lead counsel at my firm) began nearly 15 years ago and involved an ultimately abortive government investigation into potential (not to say actual) off-label marketing.

RVR/MM: When you made the transition from the bar to the bench, how did you approach your first trial?

EJR: I took pains to remind myself of the good techniques, vibes, rulings, etc., I had experienced from judges before whom I had tried cases, and to commit myself to doing likewise. I also took pains to brush up on the Federal Rules of Evidence, even though I was already very familiar and comfortable with them. Also, I was very intentional about setting in my mind procedures and discretionary rules that I would use in connection with voir dire.

RVR/MM: What are the most common motions and arguments that you observe in FCA cases and have these changed during your approximately eight years on the bench?

EJR: I suspect that the items on the list of motions won't come as a surprise: motions to extend the seal period (i.e., period for the Government to determine whether to intervene), motions for late intervention, and motions for voluntary dismissal (made during the seal period). What is surprising is the extent to which, although I certainly have my share of FCA cases (virtually all of them qui tam actions), the cases have not made it past the seal period; very few have, and so this has really minimized the amount of motion practice.

RVR/MM: How has generative artificial intelligence ("GenAI") shifted how you approach electronically stored information ("ESI") requests and expert witness voir dire and expert reports?

EJR: Fortunately for me, I have not had to deal much with ESI requests during my time on the bench. As for my assessment of expert voir dire and expert reports, perhaps surprisingly my approach thus far has not changed (and dare I say has not yet needed to change). That well may change soon, as I may start seeing experts relying increasingly on GenAI, which will raise a variety of Daubert-type issues.

RVR/MM: What do you expect from all sides of the aisle (Government, Relator and Defense Counsel) when appearing before the court?

EJR: Here are just some of the things I expect. From all sides, candor. From the Government, a substantive discussion about why the seal period actually does needs to be extended as requested. From relators, an understanding that their requests for dismissal of a qui tam cannot be granted absent government approval. From defense counsel, accuracy in their factual representations to the court made in connection with, for example, their opposition to a Government motion for late intervention.

RVR/MM: What is your favorite type of cornbread – muffin or skillet?

EJR: Skillet, definitely. An American classic with features that no muffin cannot match.

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be held on February 18- 19, 2027 at the Capitol Hil Hilton (Washington, DC), with a kickoff reception on February 17.

Co-chairs Kristen M. Echemendia and Colin M. Huntley will present the theme, "*The Expanding FCA: Emerging Issues in an Era of Robust Enforcement*". As in past years, the conference will include a variety of viewpoints— defense, relator, government, and more. Conference registration opens in October, and early registration is encouraged as in-person space is limited. So, mark your calendars!

Conference Lead Sponsor – Attorneys from Pietragallo Gordon Alfano Bosick & Raspanti

Rachel V. Rose, JD, MBA (Houston, Texas), successfully advises clients on compliance, transactions, government enforcement actions, and litigation involving healthcare, cybersecurity, corporate and securities law, as well as False Claims Act and Dodd-Frank whistleblower cases. She also teaches bioethics at Baylor College of Medicine in Houston. Rachel holds a variety of leadership positions within the FBA, including serving on the *Qui Tam* Section Advisory Board as the Education Committee Chair and Newsletter Editor, as well as a Director for the Foundation of the Federal Bar Association. Rachel can be reached through her website, www.rvrose.com.

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standard) may give defendants new arguments that an allegedly false statement does not satisfy materiality where it did not induce the government to pay a claim.

Jason Mehta explored the elements of a viable data mining case, and Giselle Joffre closed the conference with a panel on ethics and navigating conflicts of interest under the FCA.

Several overarching themes emerged from the conference. The current FCA enforcement landscape falls into three categories: traditional areas (healthcare and procurement fraud, with managed care, drug pricing, and substandard care as DOJ's main healthcare targets), emerging priorities (trade and customs, cybersecurity), and novel theories (discrimination and gender-affirming care, though Jenny did not directly address the latter—likely reflecting recent government setbacks in that area). Open questions remain about whether initiatives like the Civil Rights Fraud Initiative bear a sufficient connection to the FCA's purpose of protecting the public fisc, and whether the newly announced National Fraud Enforcement Division will pursue FCA violations.

On discrimination-based enforcement specifically, Jenny provided perhaps the most detailed explanation to date of the administration's theory. DOJ is giving "expedited priority treatment" to qui tam cases involving alleged discrimination by federal contractors, consistent with the May 2025 Bondi Memo. However, she recognized that "promoting diversity is not necessarily unlawful." Pending investigations reportedly involve companies that created or tracked demographic hiring goals, tied compensation to workforce demographic targets, or required employees to develop demographic objectives affecting their compensation. These investigations remain at the investigatory stage, and whether liability will be established is unclear—though the deterrent effect of DOJ's pronouncements is already apparent.

Kate Seikaly delivered closing remarks reflecting on the conference's accomplishments and the Qui Tam Section's direction going forward. With twelve panels spanning constitutional challenges, data mining, DEI enforcement theories, and much more, the 2026 conference reinforced its position as the preeminent national event for FCA professionals.

We are deeply grateful to our outstanding faculty, moderators, sponsors, planning committee members, and attendees whose contributions made this year's conference a success. The thoughtful exchange of ideas, professionalism, and collegiality demonstrated throughout the event exemplify what makes the FCA bar unique, and we look forward to continuing these conversations in the years ahead.

Qui Tam Section Member Highlight — Josh Russ (Reese Marketos)

By Andrew Miller

Tell us a little bit about your background and how you became acquainted with the False Claims Act.

I grew up in Franklin, Texas, a small town where everyone knows each other. My father and grandfather were trial attorneys. As a kid, my dad (who is now a judge) often made my siblings and me "present" our cases to him when we had arguments. I suppose nurture and nature conspired to make me an advocate. After college at the University of Miami and law school at Berkeley Law, I moved back to Texas and worked at a large Dallas-based firm. I was fortunate to quickly find myself working closely with the head of the firm's healthcare section. He was representing major hospital systems across the country. The False Claims Act, the Anti-Kickback Statute, and the Stark Law became the sheet music I followed in my day-to-day legal work as a young attorney. In fact, even though I represent relators now, my first involvement in an FCA case was as defense counsel in a declined healthcare fraud *qui tam* action. After a few years, I moved to Reese Marketos to learn from elite trial attorneys and to start trying cases.

What led you to the U.S. Attorney's Office, and what did you most enjoy about handling FCA cases as a DOJ attorney?

Have you ever been presented with a decision where you first *feel* the answer with absolute conviction and then your brain catches up later to provide the analytical justification? That happened to me when in 2015 I saw the United States Attorney's Office for the Eastern District of Texas was hiring an AUSA for its Affirmative Civil Enforcement (ACE) section. My wife and I knew, despite requiring a pay cut for our very young family, that the call to public service needed to be answered. I loved that job, I loved the mission, and I loved my colleagues. Handling FCA cases as an ACE AUSA is a unique experience because each case comes to you as a partially formed puzzle that you must evaluate and complete. You learn to quickly determine credibility and motivations. I particularly enjoyed cutting to the heart of a case in witness interviews (which sometimes turned into interrogations).

How have the dynamics of declined FCA cases changed during your career?

For many years, a government declination meant the end of a case. Firms representing relators did not take many declined cases forward, but that has been changing. Defense firms and corporate trade organizations still press the notion that declined cases inherently lack merit, but whoever has ears, let them hear: that is simply not accurate. In practice, if the government determines that a *qui tam* lacks merit or is legally flawed, that case is not proceeding. The government has the power to dismiss FCA cases as the real party in interest. The cases the government does not have dismissed are almost always declined for reasons unrelated to the merits. When I left DOJ in 2019 and rejoined Reese Marketos, I knew that many declined *qui tam* actions needed trial attorneys to push them forward—in precisely the way the public-private partnership is designed to work under the FCA. Now we are seeing more declined cases being successfully litigated and tried, resulting in the recovery of hundreds of millions of dollars for taxpayers and critical government programs.

Give us a sense of the typical relator.

There are entire books written about whistleblowers, their motivations, and their shared experiences and characteristics. "Crisis of Conscience: Whistleblowing in an Age of Fraud" by Tom Mueller is one of the best. In my experience interviewing and representing whistleblowers, the "average" relator has a deep belief in right and wrong, is honest, is skilled and knowledgeable in their field, and is courageous. Most relators report their concerns internally or try to fix a fraud before circumstances force them to move outside of their organization. You would be surprised how many whistleblowers had no idea there was a potential monetary reward before they reported fraud or contacted an attorney. My clients are some of the best people you could ever hope to meet. You might read that cynically, but you shouldn't. It's true.

Walk us through how you prepare for a False Claims Act trial.

I am not authorized to disclose those trade secrets. But I will say what most people already know: there is no substitute for hard work. Our trial team's preparation is *intense*.

What are you looking for in a potential juror for one of these trials?

The interesting thing about this area of practice is that nobody likes fraud (except fraudsters, of course). It might be one of the few remaining areas of widespread agreement in our society. In my experience, once potential jurors with obvious biases are struck, we usually have open-minded, diligent, and honest people rendering a verdict. That is really all we need because, above all else, jurors look for sincerity. This favors us because we only take cases we absolutely believe in.

Tell us about a memorable trial.

Every trial is memorable. One of the most dramatic trial moments I've experienced happened when I was at DOJ. The defendant in a criminal conspiracy case took the stand. It was a very rainy day. During his testimony, he got visibly upset with my fellow AUSA and started yelling, "YOU ARE THE CONSPIRATOR!" At that exact moment, one of the loudest thunderclaps I have ever heard shook the entire courtroom. It was surreal.

If I had to describe a single, memorable trial, it would probably be my first trial representing relators after I returned to private practice. The case was *United States ex rel. Marsteller v. MD Helicopters, Inc.* in the Northern District of Alabama. I had been out of DOJ for about a year when I took the case. The relators hired me to complete discovery and take it to trial—all during COVID. My caseload was lighter then, so I took or defended every single deposition in a very short period. Andrew Wirmani and Allison Cook joined the firm a few months before trial, and we all became fast friends and trial partners. We had a great relationship with opposing counsel. Huntsville, Alabama was lovely. The judge was wonderful. There were several jaw-dropping moments of testimony, and the reactions in the courtroom were visible even with everyone wearing COVID masks. The jury was extremely professional—in fact, we did not exercise a single peremptory strike during jury selection. After a two-week trial, the jury returned a verdict for the United States and our clients in just over one hour. There is just no better feeling in the practice of law.

As a fellow Texan, is there any scenario where sauce should be applied *before* serving brisket?

First of all, brisket and Tex-Mex are reminders that God loves us and wants us to be happy. Second, no, there is no such scenario. To be clear, I am not against the use of barbeque sauce. It is a personal choice, and it should be decided on a plate-by-plate basis. Think of it as a form of gastronomical liberty. If someone serves you Texas brisket with sauce already applied, there are three conclusions you can fairly draw: (1) your host is making a huge faux pas, (2) the brisket is bone dry, and/or (3) your server might very well hate freedom. Sorry if this ruins any relationships out there, but you deserve to know the truth.

Andrew Miller is a partner at Baron & Budd (Washington, DC) where he represents whistleblowers in False Claims Act cases, as well as through the Securities and Exchange Commission and Internal Revenue Service's whistleblower programs. Mr. Miller serves on the Federal Bar Association's Qui Tam Section's Education Committee and can be reached through the firm's website - https://baronandbudd.com/our-attorneys/andrew-miller/.

Perspectives from a DOJ Veteran on Trying False Claims Act Cases

By Sara McLean

2025 was the biggest year for False Claims Act (FCA) trials that I can remember in my twenty-six years in the Department of Justice's Civil Fraud Section. And, in many ways, the trials that went to judgment that year only illustrate why there are so few. With mandatory penalties and trebling of damages, two cases saw judgments in the billion dollar or higher range, and two saw complete defense verdicts. Seeing outcomes like those, it's no surprise that most FCA cases end with the certainty of a settlement, negotiated by counsel, based on their evaluation and advocacy around the facts and the law, grounded in the decision of all concerned not to leave the result to chance. I was responsible for billions of dollars in False Claims Act settlements at DOJ.

While FCA trials are rare, I also saw more than my fair share. Until I joined Akin in November 2025, I was an Assistant Director in DOJ's Civil Fraud Section for sixteen years and before that a trial attorney for ten, fresh from a federal district court clerkship. I successfully tried to a jury allegations that a university misused foreign aid funds. I supervised a bid-rigging re-trial in EDVA and a major General Services Administration defective pricing trial in DDC. I worked on other significant FCA litigations that settled deep into trial preparation, among them cases alleging mineral royalty fraud in Texarkana, mortgage fraud in Detroit, and defective body armor in DC. I followed the Section's other FCA trials closely as part of the Civil Fraud Section leadership team.

From that vantage point, I have a few observations on some issues that arise in trying FCA cases.

Jury v. bench trial. One important threshold consideration that FCA teams face is whether to choose a jury trial or bench trial if the choice is up to them. Of course, that decision depends in part on the judge. How likely is the particular judge vs. a jury to grasp the intricacies of the complex fact scenarios that can arise in FCA cases? How likely is the judge vs. a jury to be predisposed to one side? But, in my experience, it's also important to consider the long view. Would it be better for the trial to end with a detailed written decision that could be challenged in post-trial motions or go up on appeal with a black box jury verdict that might be easier to defend? As discussed below, FCA trials will generally require a special verdict, but especially if a case has strong jury appeal, even the smartest, most sympathetic judge writing a detailed decision, trying to address all the minutiae of the evidentiary record and the caselaw, may be a worse draw than a jury choosing a side and delivering its verdict.

Knowing the jury pool. Every trial lawyer knows that in trying a case to a jury it's important to know the jury pool, but in my experience, that's true in spades in FCA cases. The DOJ Civil Fraud Section has a nationwide practice but teams up with U.S. Attorneys' Offices around the country so has the benefit of experienced local trial counsel in almost every case.

Even then, I have seen jury consultants play an invaluable role in FCA cases, even in my own hometown, the DC metro area, where you would think I would know the jury pool. Their value of course is not in helping to "pick" a jury. I am not aware of a federal court that actually allows the lawyers to choose jurors. They allow lawyers to exclude a few people (like my opposing counsel's law partner in one case). Jury consultants let teams present their arguments and hear real-time feedback from people drawn from a group that approximates the pool. I have heard mock jurors share critical impressions about who seems like the bad guy (the government, the defendant, or some other character lurking in the background). They've shared what confuses them or that they're wrapped around the axle on a side issue. All of this is tremendous intelligence for figuring out, not who to pick for the jury, but how best to present a case.

Not all cases have the budget for a jury consultant, of course, and there may be times when the best that can be done is to lean on local counsel, moot with non-lawyers as much as possible, and research the local concerns of the jury pool. Who does the pool hate more, the U.S. Government or a particular industry? I have sometimes been surprised by the answer to that but found it worth trying to know for the most effective presentation.

Managing the complexity. The facts in FCA cases are often unimaginably complex, and it is the job of the trial lawyers to manage the complexity to their side's benefit. A strong opening and closing still may leave weeks of trial in between, with no feedback from the jurors as to who they like and who they don't and whether they have any idea what's happening.

Whittling trial presentation down to its essentials to shorten trials can help significantly. It is important, especially for the plaintiff, to think about fewer witnesses, fewer exhibits, and fewer rabbit holes. I have seen the decision made at the time of the pretrial order to drop entire claims, rather than take them to trial and risk losing the jury on the complexity of the case.

In some cases, motions, for summary judgment or to bifurcate liability and damages, can streamline a case and reduce juror confusion. If the factfinder is only looking at part of the case, though, each side should consider what story that tells. A lengthy presentation on falsity may be perceived differently divorced from scienter evidence than it would be in the context of a fuller picture created through witness testimony or key documents in the case. On a trial as to a special liability question, seasoned defense counsel managed to suggest to the jury that the government was trying to avoid paying the defendant, with the jury unaware it was hearing a fraud case.

Another way to manage the complexity of FCA trials *is through very strong expert witnesses.* In one case involving complex accounting issues, talented opposing trial counsel had multiple "expert" witnesses lined up, including effectively one on the law and one on the facts, ready to summarize the evidence for the jury in his client's favor whenever he chose to call them during the course of a painfully confusing trial presentation. We moved to exclude them and settled before a ruling, but they would have been a powerful weapon for the other side if their testimony had been admitted.

Government employee experts are an interesting challenge. If they are not typically retained to provide expert testimony, they will not need to do an expert report under the Federal Rules of Civil Procedure. There may be less to raise with them on cross-examination as they certainly have less financial motivation than ordinary testifying experts. On the other hand, they may never have testified before so can be prone to rookie mistakes and may not be as willing to move mountains to help at trial as a highly compensated expert that any side has retained. I have seen government witnesses, trial and lay, be some of the very best and very worst witnesses at trial.

Daubert motions are, of course, important to blunt the impact of another side's expert and keep the jury from hearing testimony that is not of assistance to the jury or not methodologically sound. I have seen winning *Daubert* motions shake loose a pre-trial settlement in a very hard-fought case.

Motions in limine. FCA cases frequently feature standard motions in limine that should be filed and opposed. The plaintiffs will try to exclude discussion of treble damages and penalties arguing those are for the court to decide not a jury. They will generally try to exclude evidence of the financial interest of the relator. Plaintiffs may try to exclude evidence of advice of counsel if the defendant hasn't waived privilege. The opposing party should of course consider with each of these whether there is any admissible purpose that can be cited to get the court to treat the issue as a matter of weighing the evidence, rather than a cause for exclusion. If a relator testifies, for example, his entitlement to a share is fair ground to challenge the relator's credibility.

Jury instructions and special verdict forms. Jury instructions are bizarrely left to the last minute by law clerks and litigants. Of course, it is very important to get these right and, in my experience, to be careful of overreaching for your side and inviting a winning argument on appeal. There are some issues where Circuit form instructions help, but the FCA is replete with complex legal issues that require careful research or they become traps for the unwary. FCA jury instructions can be extremely difficult to follow. Condolences to the jury that has to hear about "implied false certification."

Most FCA jury trials will require a special verdict form so that the jury can identify the single damages and count the false claims, even if it is ultimately for the judge to award penalties and treble the single damages found by the jury. It is worth spending time on these forms to ensure clarity and consider the best presentation for each side. If there are separate counts, it is important that the form clearly indicate if damages and penalties are being awarded separately for each count and added up cumulatively or if there is one damage amount and number of claims that applies to all counts together. As in other types of trials, counsel should walk the jury through the special verdict form at closing and tell them what it should say.

Settlement. It's critical to keep settlement in mind leading up to trial. In intervened False Claims Act matters, the government will need weeks for approvals, especially in larger cases. Before, and even after, trial, the government will follow DOJ policy and be willing to negotiate settlements based on the defendant's ability to pay. But the analysis needed to arrive at an "ability-to-pay" settlement takes even more time than the ordinary settlement approval process. It is important not to wait until very last minute to put settlement cards on the table.

Sara McLean is a partner at Akin Gump Strauss Hauer & Feld (Washington, DC). Ms. McLean is a former Assistant Director in the U.S. Department of Justice's Commercial Litigation Branch (Fraud Section), where she served from 1999 to 2025. Many thanks to Laura Hill, Senior Counsel, Akin Gump Strauss Hauer & Feld, former Civil Fraud Section Senior Trial Counsel, for drafting assistance. Sara can be reached through the firm's website - https://www.akingump.com/en/lawyers-advisors/sara-mclean.

Recent Developments in the False Claims Act's Public Disclosure Bar

By Tamra Harris

Overview

Under the False Claims Act ("FCA"), an action will be barred if it is based on certain publicly available information. Specifically, 31 U.S.C. § 3730(e)(4)(A)-(B) requires dismissal—unless opposed by the Government—if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a part; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." An "original source" is someone who (1) voluntarily disclosed the information to the Government prior to the public disclosure or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations.

Courts across the country continue grappling with public disclosure determinations under this standard.

2026 Developments

U.S. ex rel. Relator LLC v. Nations Direct Mortgage, LLC, No. 2:22-cv-04784-SPG-MAA, 2026 WL 453464 (C.D. Cal. Jan. 5, 2026)

This case arose from the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which authorized the Small Business Administration to administer Paycheck Protection Program (PPP) loans to businesses struggling with expenses during the coronavirus pandemic. Under PPP rules, certain businesses were ineligible for loans, including "financial businesses primarily engaged in the business of lending."

Plaintiff brought an FCA action against lender Nations Direct Mortgage, alleging that it inappropriately applied for and received PPP funds. Nations Direct Mortgage filed a motion to dismiss, which the court granted, finding that the FCA's public disclosure bar precluded Plaintiff's claim because the material elements of the alleged fraud—that Defendant applied for a PPP loan despite being a mortgage lender—were publicly disclosed on PandemicOversight.gov (which revealed Defendant's NAICS code) and ProPublica.org (which disclosed the loan application and forgiveness).

U.S. ex rel. Anderson v. Saint Elizabeth Medical Center, Inc., No. 25-5858, 2026 WL 1047118 (6th Cir. Apr. 17, 2026)

This case arose against the backdrop of an earlier lawsuit alleging a similar fraudulent scheme. Specifically, the earlier lawsuit alleged that St. Elizabeth, the Kidney and Hypertension Center (KHC) and Davita Healthcare Partners conspired to pay physicians kickbacks for referring patients to dialysis centers for medically unnecessary treatments. That lawsuit was voluntarily dismissed, and the government never intervened.

Anderson's 2024 complaint alleged largely the same dialysis fraud scheme but added details including identifying Dr. Shaughnessy as head of KHC, alleging use of Epic medical referral software to facilitate automatic referrals, and claiming the scheme also involved billing commercial insurers. Anderson also alleged new conduct involving a "Vascular Center" partially owned by KHC, where dialysis patients were automatically referred for vascular procedures. Despite these new facts, the district court dismissed all claims as barred by the FCA's public-disclosure rule because they were substantially the same allegations as the earlier lawsuit.

U.S. et al. v. Ilink Emps. Co. et al., No. 5:22-CV-01004-RGK-DTB, 2026 WL 822522 (C.D. Cal. Mar. 20, 2026)

Defendants applied for PPP loans from the SBA, which were received and later forgiven. Plaintiff alleges that Defendants made five categories of false certifications: (1) falsely certifying loan proceeds would maintain payroll despite third parties being contractually obligated to reimburse 100% of temporary workers' wages; (2) using proceeds for non-business purposes and violating the $100,000 per-employee salary cap; (3) falsely certifying iLink Employers was in operation in February 2020 even though it didn't register to do business in California until July 22, 2020, one week before loan approval; (4) falsely certifying economic necessity despite having sufficient liquidity through client reimbursements; and (5) falsely certifying in forgiveness applications that funds were used for payroll and business purposes.

Defendants, in part, argued for the public disclosure bar. The court rejected this defense, finding that publicly available PPP loan data did not disclose the fraudulent transactions alleged.

U.S. ex rel. St. Paul's Found. v. Wipperman, No. 3-24-CV-00750, 2026 WL 622771 (M.D. Tenn. Mar. 5, 2026)

Defendant fraudulently submitted an Economic Injury Disaster Loan application to the SBA on September 25, 2020, purportedly on behalf of Plaintiff. Plaintiff alleged that the application was fabricated and that Defendant was not authorized to submit the application. The SBA denied the application on September 28, 2020, citing concerns about the validity of certain submitted information. Two years after the loan denial, Plaintiff's General Counsel were arrested on fraud charges related to CARES Act funds, but those charges were ultimately dismissed.

Plaintiff brought an FCA action for the fraudulent September 25, 2020 loan application, and Defendant moved to dismiss arguing, in part, that the public disclosure bar precluded the lawsuit. The court found, however, that public disclosures regarding fraud allegedly committed by other individuals did not bar the action because the allegations were not substantially the same and involved different perpetrators and fraudulent schemes.

U.S. ex rel. Relator LLC v. Cardinalli, No. 5:23-cv-00113-HDV-DTB, 2026 WL 391430 (C.D. Cal. Feb. 9, 2026)

Relator alleges that the defendants violated the FCA by knowingly making false certifications to obtain an SBA PPP loan. The SBA established rules excluding certain businesses from eligibility, including private clubs and businesses that limit memberships for reasons other than capacity. Defendant is an exclusive, members-only country club where membership is not open to the public and requires approval by committee based on certain criteria. Relator alleges that Defendant was ineligible for PPP funds because it is a private club that limits membership for reasons other than capacity, yet defendants falsely certified its eligibility when applying for the loan.

Defendant moved to dismiss, which the court granted without leave to amend, effectively terminating the action. The dismissal was based on the FCA's public disclosure bar, finding that the allegations against Defendant regarding its allegedly fraudulent receipt of a PPP loan were substantially the same as information already publicly disclosed through government websites, the Federal Register, and news media sources. The court further concluded that the relator did not qualify as an "original source" and therefore could not avoid the bar.

U.S. ex rel. Nevadans Against Fraud on the Gov't, LLC v. Terrible Herbst, Case No. 2:24-cv-2277-JCM-BNW, 2026 WL 608897 (D. Nev. Mar. 4, 2026)

Relator filed suit on behalf of the United States alleging that Defendants knowingly submitted false claims and certifications for SBA PPP loans. Specifically, Relator alleges that defendants were ineligible for these loans because they exceeded the 500-employee maximum for "small business concerns" eligible for PPP loans.

Defendants moved to dismiss the complaint on grounds that the public disclosure bar precluded the action and that Relator failed to state a claim under Federal Rule of Civil Procedure 9(b). The court found that the public disclosure bar did not apply and allowed Relator leave to amend the complaint to provide additional factual support regarding Defendants' failure to meet alternative PPP eligibility standards.

U.S. v. Health Mgmt. Sys., Inc., No. 25-20146, 2026 WL 637725 (5th Cir. Mar. 6, 2026)

After his termination, a former employee initiated a series of lawsuits against Defendant. This FCA lawsuit was based on contingency fee theories pulled from public announcements, SEC filings, and publicly available letters obtained through FOIA. The government reviewed the former employee's claims, interviewed him, and declined to intervene.

Defendant moved to dismiss, which the court granted, finding that the hospital settlement claims were barred by the FCA's public disclosure bar because the former employee was not an original source of information, and his unearned fees claims failed to satisfy Rule 9(b)'s heightened pleading requirements. The district court subsequently awarded attorneys' fees to Defendant, concluding that the former employee's claims were clearly frivolous.

State of Texas v. Alvarez, No. 15-25-00034-CV, 2026 WL 942691 (Tex. App. Apr. 7, 2026)

This case involves a dispute between the State of Texas and three qui tam Relators over the Relators' entitlement to a share of settlement proceeds from a Medicaid fraud case.

The underlying lawsuit alleges that Xerox fraudulently operated the review process by "rubber stamping" orthodontic prior-authorization requests without substantive review, causing Texas to pay millions of dollars for unauthorized services. A settlement was reached, after which Relators filed a joint motion seeking their share of the proceeds. The trial court awarded them $37,160,865 plus prejudgment interest. Texas appealed, arguing among other grounds, that the Relators' claims were barred by the TMFPA's public disclosure provision because allegations of Xerox's fraud had been publicly disclosed through WFAA news reports and other sources prior to the filing of the qui tam suits, and the Relators were not "original sources" of the information.

Texas prevailed, and the Court of Appeals reversed the trial court's judgment that awarded Relators' share of the settlement.

What to Watch

Many of these 2026 decisions arose from the CARES Act, which authorized the SBA to administer PPP loans to struggling businesses beginning in 2020. Some actions were quickly barred because the information was readily available through public resources. Others had enough detail or an "original source" relator, allowing the matter to proceed.

While not yet a focus of the 2026 public disclosure decisions, awareness and use of data mining has intensified in recent years. Whistleblowers have access to enormous amounts of public data that can now be used to find outliers, trends, and alleged fraud. Just last month, DOJ announced what it calls the "FOCUS" initiative – Fraud Oversight through Careful Use of Statistics. This initiative acknowledges a "surge" in analysis of publicly available government data for "potential signals of fraud (data miners), rather than the insiders who have traditionally served as relators under the FCA." The FCA's public disclosure bar should be a focus for both Relators and Defendants as they navigate the inevitable use of data in FCA actions.

Naturally, the public disclosure bar will continue to be hotly litigated, with both parties referring back to 31 U.S.C. § 3730(e)(4)(A)-(B), arguing whether allegations or transactions are substantially the same as the information that was publicly disclosed and whether the relator qualifies as an "original source." As data mining of publicly available information becomes more sophisticated—and as DOJ relies on it more heavily—the FCA's public disclosure bar will only grow as a battleground in forthcoming FCA matters.

Harris continued on 20

The Intersection of Artificial Intelligence and the Federal Rules of Evidence

By Rachel V. Rose, JD, MBA[A]

Overview

By now lawyers, judges and pro se litigants alike are familiar with artificial intelligence (**AI**). Generative AI (**GenAI**), the type of AI that has been the subject of sanctions,[1] dismissed cases[2] and disqualified experts alike,[3] has been explained by the International Standards Organization (**ISO**) as [G]enerative AI, which differs from traditional AI in its capabilities and application. While traditional AI systems are primarily used to analyse data and make predictions, generative AI goes a step further by creating new data similar to its training data.[4]

Simply stated, it is a tool that collects data, runs it through an algorithm and creates a result. In the case of court submissions, the "result" includes pleadings, motions, evidence, expert reports, etc. Sophisticated lawyers and pro se litigants alike are using GenAI. As the American Bar Association (**ABA**) iterated in its Advisory Opinion 512, lawyers have a duty of candor to a tribunal.[5] Additionally, many U.S. District Courts, including the Northern District of Texas, have implemented local rules addressing the use of GenAI.

Joy Wilson v. Kipp Texas, Inc., 2025 WL 3030444 (N.D. Tex., Oct. 29, 2025), is illustrative of a violation Local Rule 7.2, which resulted in Fed. R. Civ. P. 11 sanctions. Local Rule 7.2 requires, among other items, an express disclosure of the use of GenAI. Right out of the gate, the Court states

> To start, Plaintiff's counsel failed to include in the Summary Judgment Response a disclosure of his use of generative artificial intelligence in preparing the Summary Judgment Response and Response Appendix as required by this Court's Local Civil Rules. *See* L. Civ. R. 7.2(f) ("[a] brief prepared using generative artificial intelligence must disclose this fact on the first page under the heading 'Generative Artificial Intelligence.'"). Further, "[a] party who files a brief that does not contain the disclosure required by subsection (f)(1) of this rule *certifies that no part of the brief was prepared using generative artificial intelligence. Id.* at 7.2(f)(3) (emphasis added). *Id*. at *2.

By failing to include this disclosure in the Summary Judgment Response, Plaintiff's counsel certified to the Court that he did not use generative artificial intelligence in preparing the briefing. However, that was not accurate. Instead, Plaintiff's counsel used ChatGPT to prepare portions of the Response Appendix.

This brings us to what is on the table with the proposed Federal Rules of Evidence (**FRE**) and GenAI. On June 10, 2025, the Judicial Conference Committee on Rules of Practice and Procedure approved publication of proposed amendments, including new FRE 707.[6] The comment period opened on August 15, 2025, and closed on February 16, 2026. While FRE 707 has not been formally adopted, it is worth visiting, along with its intersection with the familiar FRE 702.

Analysis

First, let's begin with a rule that we all know and love – FRE 702 – Testimony by Expert Witness.[7] Also known as the *Daubert* factors,[8] FRE 702 last received an update that became effective in December 2023. The express language follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

As stated at the outset of this article, AI-generated evidence presents concerns of analytical errors, bias, and hallucinations, lack of interpretability. It has also led to the disqualification of expert witnesses.[9] In turn these occurrences raise significant reliability questions. "When such evidence accompanies expert testimony, Federal Rule of Evidence 702 and the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standard apply, requiring trial courts to act as gatekeepers to ensure that expert testimony rests on reliable methodology under a preponderance of the evidence standard. The application of such evidentiary rules to AI has had mixed results."[10]

Given the current landscape of Courts being tasked of assessing authenticity and reliability in the context of AI-based evidence and reports, the advent of the proposed FRE 707 is not surprising. What does FRE 707 – Machine-Generated Evidence state?

> When machine-generated evidence **is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d).** This rule does not apply to the output of simple scientific instruments. (emphasis added).

Immediately, the intersection between FRE 702 and FRE 707 is apparent; however, what does it mean? The Federal Courts Committee of the New York City Bar Association ("**NYC Bar**"), while supporting the adoption of FRE 707, explains its application and suggests some refinements. Specifically,

> The Federal Courts Committee agrees that the time is ripe to consider a rule addressing the admissibility of machine-generated evidence, and particularly evidence derived from machine learning. Given both the increasing complexity of such evidence and the danger

that will be uncritically accepted by a finder of fact, there is a need to establish guidelines for its admissibility. As currently drafted, it appears that Rule 707 will effectively require machine-generated evidence to be admitted through expert testimony except when it reliability is unchallenged or is susceptible to judicial notice. It is unclear whether any lay witness will be able to provide the testimony necessary to establish reliability under Rule 707. Under these circumstances, the note should explicitly indicate the preference for expert testimony.

> …
>
> Although it is unclear how often the rule will be used, any rule permitting lay testimony regarding such evidence should more specifically identify the type of evidence targeted and require discovery disclosures regarding such evidence.[11]

In the meantime, utilizing FRE 901 – Authenticating or Identifying Evidence, may be used to satisfy the authenticity and reliability of evidence, as well as potentially overcoming a hearsay objection. It is equally important to consider the Federal Rules of Civil Procedure 26 and 34 when implementing a legal hold, requesting and reviewing discovery. While courts, attorneys and litigants alike await the potential implementation of FRE 707, evidence and procedural rules that already exist can be effectively utilized. During voir dire of an expert witness, it would be imprudent not to ask if GenAI or any form of AI was utilized in the creation of reports, exhibits, sworn statements or other relevant information.

Conclusion

In the often high-stakes world of False Claims Act litigation, GenAI information cannot be overlooked, whether by Relator's counsel during intake and submission to the Government, by defense counsel during the Government's investigation and by any party during trial. Thinking ahead of what may be required by FRE 707 or requesting that a special master be appointed to authenticate evidence are items that should be considered by lawyers and judges alike. These are, indeed, interesting times, but the intersection between FRE 702 and proposed FRE 707 is on the precipice – in one way or another.

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[1] *Seth Cameron Virgil v. Experian Information Solutions, Inc., et al*., Case No. 1:25-cv-01641 (S.D. Ind.) (issuing a $10,000,000 sanction for the use of unchecked AI).

[2] *U.S. ex rel. Khoury v. Intermountain Healthcare, Inc.*, Case No. 2:20-cv-00372 (D. Utah) (intervening for the purpose of dismissing a False Claims Act case, the Government stated that the inaccuracies in the expert's report included false testimony, misquoted documents and inaccurate titles, which were not in the Government's interest in having the declined case move forward.).

[3] *Kohls v. Ellison*, 2025 WL 66514, at *4 (D. Minn. Jan. 10, 2025) (disqualifying an expert for submitting an expert report riddled with hallucinations and noting that an individual's "citation to fake, AI-generated sources … shatters his credibility.").

[4] www.iso.org (last visited Apr. 23, 2026).

[5] American Bar Association, *Advisory Opinion 512* (Jul. 29, 2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/.

[6] https://www.uscourts.gov/forms-rules/proposed-amendments-published-public-comment (last visited Apr. 23, 2026).

[7] https://www.law.cornell.edu/rules/fre/rule_702 (last visited Apr. 23, 2026).

[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1319 (9th Cir. 1995); *see also* Fed. R. Evid. Advisory committee's note, at (2000), citing *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").

[9] *Supra* n. 3.

[10] R. Anello, *AI Takes the Stand: The New Frontier In White Collar Evidence*, *Forbes* (Apr. 23, 2026), https://www.forbes.com/sites/maglaw/2026/04/23/ai-takes-the-stand-the-new-frontier-in-white-collar-evidence/.

[11] *See* https://www.nycbar.org/reports/comments-on-proposed-federal-rule-of-evidence-707-and-amendments-to-rule-609/#:~:text=SUMMARY,unless%20accompanied%20by%20expert%20testimony (Feb. 13, 2026).

Parallel Criminal Proceedings in False Claims Act Cases

By Andrew Wirmani and Allison Cook

The False Claims Act is one of the most powerful tools in the fight against fraud on the government. Since 1986, the FCA has empowered private citizens—known as relators—to file *qui tam* lawsuits on behalf of the United States against those who defraud government programs, and to share in a portion of any recovery. The Department of Justice has recovered tens of billions of dollars under the FCA, with several of those recoveries originating from tips provided by relators. But for all the attention paid to the FCA's civil enforcement mechanisms, there is an issue that receives far less discussion that can profoundly affect the trajectory of any FCA case: parallel criminal proceedings.

Parallel proceedings occur when the government pursues a criminal investigation or prosecution based on the same or substantially similar conduct involved in an FCA investigation or complaint. Because the FCA is a fraud statute, the conduct that gives rise to civil FCA liability often implicates criminal statutes as well—most notably, the criminal false claims statute (18 U.S.C. § 287), the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343), and the healthcare fraud statute (18 U.S.C. § 1347). The DOJ stresses the value of pursuing criminal, civil, and administrative remedies in tandem. Indeed, under Chapter 1-12.000 of the Justice Manual,[1] "if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation."

The DOJ's emphasis that "[p]arallel actions are important to the Department's efforts to hold accountable individuals who commit corporate malfeasance"[2] means parallel proceedings are not an anomaly. Rather, they are a feature of the modern enforcement landscape. Thus, it is essential that both defendants and relators understand the implications of a parallel criminal proceeding and act accordingly.

What Defendants Need to Know

For defendants, the following considerations are paramount.

First, defendants in FCA investigations must do what they can to ascertain whether there is a parallel criminal matter. Sometimes, the existence of a separate criminal investigation is known. But often, especially early in FCA investigations, defendants are flying in the dark. Defendants should pay careful attention to what agents are involved in the case and the division and section of attorneys at meetings and depositions. Because FCA investigations often involve multiple parties, comparing notes with other defense counsel is a good way to ensure that you are up to date on the latest case developments. There is also no harm in asking the civil AUSA assigned to the matter whether there is a parallel criminal investigation. AUSAs will sometimes be candid with this information. At worst, the AUSA will tell you that they aren't authorized to reveal that information, which is sometimes an answer in itself.

Second, defendants must carefully evaluate when to invoke Fifth Amendment rights in the FCA case—and understand the consequences of doing so. The Fifth Amendment protects against compelled self-incrimination, and a defendant facing parallel criminal proceedings has every right to invoke that protection in the civil case. But invoking the Fifth Amendment in a civil proceeding is not without cost. Unlike in a criminal case, where the jury may not draw an adverse inference from a defendant's silence, courts in civil cases often permit an adverse inference to be drawn against a party who invokes the Fifth Amendment. This means that a defendant who refuses to answer deposition questions or provide testimony in the civil case may find that the factfinder is instructed to infer that the answers would have been unfavorable. The decision of when and how to invoke the Fifth Amendment requires a careful balancing of the risk of self-incrimination against the risk of adverse inferences in the civil case. This calculus often depends on the stage of the criminal investigation, whether charges have been filed, and the extent to which the civil and criminal cases overlap.

Third, defendants should seriously consider whether to move to stay the civil litigation. A stay of the civil case pending the resolution of the criminal matter can relieve the defendant of the impossible choice between self-incrimination and adverse inferences. A stay may also temporarily limit the breadth of discovery, as civil cases generally afford a broader scope for discovery than criminal cases. But stays are not guaranteed. Courts generally weigh several factors in deciding whether to grant a stay, including the extent of overlap between the criminal and civil cases, whether the defendant has been indicted, the interests of the plaintiff and the public in a timely resolution of the civil case, and the burden on the defendant of litigating both cases simultaneously. Thus, if a defendant opts for this route, the motion to stay must include a fact-specific showing of prejudice—not merely a recitation of the difficulties inherent in parallel proceedings.

Fourth, defendants should develop a global resolution strategy. Any resolution of one component of a parallel proceeding can have cascading effects on the other. A guilty plea in the criminal case, for example, may establish facts that give rise to collateral estoppel in the civil FCA action, exposing the defendant to treble damages and per-claim penalties. Conversely, statements made or positions taken in the civil case may be used against the defendant in the criminal proceeding. For this reason, defendants facing parallel proceedings should pursue, wherever possible, a global settlement that resolves all criminal, civil, and administrative exposure simultaneously. Negotiating a global resolution requires coordination with the criminal, civil, and administrative components of the DOJ, and defendants should retain counsel experienced in navigating these parallel tracks.

What Relators Need to Know

For relators, the existence of a parallel criminal proceeding creates both opportunities and complications. The following considerations are critical.

First, the FCA case may slow down—or stop altogether. When the government initiates a criminal investigation or obtains an indictment, the Court may exercise its discretion to stay the civil FCA case while the criminal investigation is pending. Relators should be prepared for this possibility. This is not a reason to avoid filing a qui tam case, but it is a reality that relators and their counsel must account for in setting expectations and developing litigation strategy.

Second, relators must understand how to protect their right to share in criminal recoveries. This is one of the most complex and unsettled areas of FCA law. The FCA's alternate remedy provision, 31 U.S.C. § 3730(c)(5), provides that the government may elect to pursue its claim through "any alternate remedy available to the Government." If the government does so, the relator is entitled to "the same rights in such proceeding" as the relator would have had if the case continued under the FCA. But whether a criminal fraud prosecution is an "alternate remedy" under the statute is unresolved. Courts have held that the alternate remedy provision in the FCA does not entitle relators to intervene in criminal proceedings to claim a share of the proceeds.[3] However, those same courts have distinguished between the right to intervene and the right to recover, explaining that "a relator is entitled to a share of the forfeited property to the extent the *qui tam* defendant can deduct any forfeiture from [a] *qui tam* award."[4]

To lay the groundwork for this recovery, relators should ensure that their *qui tam* complaints are filed before the criminal prosecution commences, their complaints are valid and meet the applicable pleading standards, the factual allegations in their complaints overlap with the criminal charges, and they actively cooperate with both the civil and criminal divisions of the DOJ.

Finally, turning the civil AUSA into an advocate for your client with the criminal division can go a long way to ensuring that they share in any financial recovery.

Third, relators should monitor the criminal case closely. Even if a relator cannot intervene in the criminal proceeding, the outcome of that proceeding can have significant implications for the civil case. A guilty plea or conviction can give rise to collateral estoppel, effectively establishing certain facts that the relator can use in the FCA action. Conversely, if the criminal case results in an acquittal, the relator must be prepared to distinguish the higher burden of proof in criminal cases from the preponderance standard that applies in civil FCA actions.

Conclusion

Parallel criminal proceedings in FCA cases are not going away. If anything, the DOJ's continued emphasis on coordination between its criminal and civil divisions ensures that parallel proceedings will become even more common. For defendants, the key is strategic decision-making: evaluating the risks and benefits of invoking the Fifth Amendment, determining whether a stay of the civil case is both warranted and obtainable, and pursuing a global resolution that accounts for all dimensions of the government's enforcement efforts.

For relators, the key is preparation: understanding that the civil case may be delayed, protecting the right to share in criminal recoveries by filing early and cooperating with the government, and monitoring the criminal case for developments that may affect the civil action.

The stakes in parallel proceedings are high. Both sides ignore them at their peril.

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[1] *Available at* https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings (last visited June 21, 2026).
[2] *Id.*
[3] *See, e.g.*, *United States ex rel. Carver v. John Patrick Couch, M.D. et al.*, 906 F.3d 1223, 1228 (11th Cir. 2018); *United States v. Wegeler et al.*, 941 F.3d 665, 676 (3d Cir. 2019); *United States v. Van Dyck*, 866 F.3d 1130, 1133 (9th Cir. 2017).
[4] *Carver*, 906 F.3d at 1229.

The Export Control Laws and the False Claims Act: A Cautionary Tale

By Kenneth G. Coffin, Fabricio M. Archanjo, and Miranda A. Cassidy

When a government contractor exports controlled materials, technology, or technical data without a license, that is an export control problem. But what if that same contractor is billing the federal government for the work? Can it also result in liability under the False Claims Act? At least for one company, the answer was yes. In a 2023 False Claims Act settlement, the Department of Justice (DOJ) alleged that 3D Systems Corporation exported certain controlled items and/or intellectual property without authorization while performing work for the Department of Defense and NASA.[1] In parallel with the DOJ FCA settlement, the Department of Commerce's Bureau of Industry and Security (BIS) and the Department of State's Directorate of Defense Trade Controls (DDTC) resolved related export control investigations involving unauthorized exports of controlled design documents and technical data with 3D.[2] These resolutions underscore how the government can use civil fraud tools to advance national security and trade priorities when regulated or allegedly problematic conduct is tied to government contracts.

The Export Control Framework

The United States' export control system is primarily governed by (1) the Export Administration Regulations and (2) the International Traffic in Arms Regulations. And in some cases, exports can also implicate (3) sanctions imposed by the Office of Foreign Asset Control. The Export Administration Regulations (EAR), administered by the BIS, regulate items including commodities, software, and technology. The International Traffic in Arms Regulations (ITAR), administered by the DDTC, regulate defense articles, defense services, and technical data (including, in particular, items on the U.S. Munitions List). The Treasury Department's Office of Foreign Assets Control (OFAC) enforces economic sanctions and trade embargoes against specific countries, regimes, or individuals, which can impact imports and exports. Under these regimes, the compliance risks go well beyond shipping restricted physical goods. Sharing, storing, or releasing controlled technical data or technology—even electronically—can constitute a violation. That matters more than ever as engineering workflows increasingly rely on additive manufacturing, cloud storage, and cross-border collaboration.

3D Systems Resolutions

The government's parallel civil fraud and administrative resolutions with 3D Systems show how seemingly benign business and engineering documents, like computer-aided design (CAD) files, blueprints, drawings, and specifications, may constitute export-controlled "technology" or "technical data."[3] Under both EAR and ITAR, transmitting items out of the United States constitutes an export, and releasing controlled technology or technical data to a foreign person within the United States may also constitute a "deemed export."[4] That means that e-mailing an export-controlled design package to a foreign affiliate, placing it on a foreign server, giving an unauthorized foreign national access, or even engaging in technical discussions can potentially constitute a violation of the export-control laws.

The DOJ's civil FCA settlement with 3D Systems covered conduct from 2012 through 2017 related to 3D Systems' alleged export of controlled items and/or intellectual property to China without authorization in connection with DOD and NASA contracts.[5] DOJ alleged that 3D Systems submitted, or caused the submission of, claims, statements, or certifications despite the alleged noncompliance, which, according to DOJ, gave rise to liability under the FCA. While 3D Systems did not admit liability,[6] it did agree to pay up to $4,540,429.08, half of which was restitution, to resolve FCA and related claims on behalf of DOD and NASA.[7] The total potential settlement amount could be partially offset by any penalties paid to the Department of Commerce or Department of State in connection with the same or similar export-control violations underlying the FCA settlement, but could not drop below the restitution floor of $2,270,214.54.[8]

At the same time, BIS resolved violations of EAR by 3D Systems. The violations included unauthorized exports of controlled technology (such as blueprints, engineering designs, and CAD files for spacecraft-related commodities and military electronics) to China, as well as storage on a German server that mirrored the company's U.S. e-mail server. 3D Systems admitted to the conduct and agreed to a $2,777,570 civil penalty, audits, and additional compliance measures.[9]

The DDTC also separately resolved alleged ITAR violations with 3D Systems involving the alleged unauthorized export and retransfer of technical data to Germany, China, Taiwan, and certain foreign employees. 3D Systems entered into the consent agreement with DDTC without admitting or denying the allegations.[10] As part of the ITAR consent agreement, 3D Systems agreed to a $20 million civil penalty, with $10 million suspended for approved remedial compliance measures. As with the EAR resolution with BIS, the DDTC agreement required more than just the payment of a civil penalty. It imposed additional compliance obligations on 3D Systems, including the appointment of a Special Compliance Officer and external audits.[11]

Related Cases: Raytheon and Anham/Unitrans

The 3D Systems resolution may be the clearest recent example of alleged violations of EAR/ITAR resulting in FCA liability, but it is not the only instance in which alleged violations of the export-control laws overlapped with the fraud statutes to increase an entity's liability.

In October 2024, Raytheon agreed to pay over $950 million to resolve issues relating to defective pricing on PATRIOT missile and radar contracts, a Foreign Corrupt Practices Act conspiracy involving bribes to a Qatari military official, and an Arms Export Control Act/ITAR conspiracy for failing to disclose those bribes in export license applications.[12] The civil FCA settlement of approximately $428 million resolved the defective-pricing allegations, while the violations of the export control regime were resolved in a parallel criminal matter.[13] So while Raytheon's FCA settlement did not arise from alleged violations of the export control laws, this is yet another instance in which federal agencies coordinated investigations of alleged civil fraud and export control violations, resulting in a large global resolution.

The *Anham/Unitrans* matter (*U.S. ex rel. Maxwell, et al. v. Anham, USA, et al.*, No. 1:14-CV-0156 (E.D. Va. 2019)) provided another lesson in the potential ramifications of sanctions compliance failures. In December 2019, Unitrans agreed to pay $45 million to resolve criminal obstruction charges and civil FCA allegations relating to the illegal transportation of goods across Iran in connection with a Defense Logistics Agency (DLA) contract to support U.S. troops in Afghanistan.[14] Unitrans admitted that its officers obstructed DLA proceedings by inaccurately representing that affiliated company Anham FZCO had not acquired goods from Iran in violation of OFAC sanctions.[15] On the civil FCA side, the settlement resolved allegations that Unitrans and Anham fraudulently induced contract awards by falsely certifying sanctions compliance.[16]

Leveraging the False Claims Act

These cases highlight an important feature of FCA enforcement: each administration can adapt FCA enforcement and existing regulatory regimes to pursue its own priorities. For example, in 2023 DOJ and the Department of Commerce launched the Disruptive Technology Strike Force to investigate and prosecute criminal export violations and disrupt illicit acquisition of sensitive U.S. technology by adversaries.[17]

More recently, in 2025, DOJ and DHS launched the Trade Fraud Task Force to pursue tariff and duty evasion through FCA actions,[18] and the Criminal Division's May 2025 white-collar enforcement plan also identified trade and customs fraud as a priority.[19]

The through line is that DOJ often enters through one regulatory or investigatory door and, once inside, examines the whole contract-performance environment when dealing with a federal government contractor. EAR, ITAR, or OFAC problems tied to federally funded work can result in a civil FCA investigation to the extent the alleged violations intersect with claims, certifications, eligibility, or payment—as the 3D Systems resolution illustrated.

And while EAR and ITAR now exclude from prohibition certain activities, including some properly secured encrypted data transmissions and storage,[20] those exclusions are conditional, generally requiring end-to-end encryption, qualifying cryptographic protections, and restrictions on who can access data in unencrypted form. They are not a blanket safe harbor.

Practical Takeaways

In light of the administration's increased focus on international trade and security, relators, relators' counsel, and the DOJ may have a heightened interest in federal contracts involving technical data, software, drawings, additive manufacturing, cloud storage, foreign affiliates, or foreign-national access. This could result in increased scrutiny of not only trade and tariff issues, but also in internal and external actors probing a company's export classifications and licenses, contract certifications, cybersecurity controls, data-transfer practices, and billing records related to international trade.

For defense counsel and internal investigation teams, this may mean treating FCA risk, export controls, cybersecurity, and trade compliance as potentially related workstreams. The relevant questions go beyond whether an export violation occurred. Did the same alleged export control issues impact or in any way relate to contract eligibility? Certifications? Representations to the government? Claims for payment? For contractors handling controlled technical data related to federal programs, export compliance is no longer just a DDTC or BIS issue. It could also be an FCA issue.[21]

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[1] Press Release, U.S. Attorney's Office, 3D Printing Company to Pay Up to $4.54 Million to Settle False Claims Act Allegations for Export Violations in Connection with NASA and DOD Contracts (Feb. 27, 2023), https://www.justice.gov/usao-ndtx/pr/3d-printing-company-pay-454-million-settle-false-claims-act-allegations-export; *see also* Settlement Agreement Between United States and 3D Systems Corporation (Feb. 27, 2023).

[2] Press Release, Bureau of Industry & Security, BIS Imposes $2.77 Million Penalty on 3D Printing Company for Exports to China and Germany, Including Aerospace and Military Design Documents (Feb. 27, 2023), https://www.bis.gov/press-release/bis-imposes-2.77-million-penalty-3d-printing-company-exports-china-germany-including-aerospace-military; Press Release, U.S. Dep't of State, U.S. Department of State Concludes $20,000,000 Settlement of Alleged Export Violations by 3D Systems Corporation (Feb. 27, 2023), https://2021-2025.state.gov/u-s-department-of-state-concludes-20000000-settlement-of-alleged-export-violations-by-3d-systems-corporation/.

[3] *See* Bureau of Industry & Security, Order Relating to 3D Systems Corporation, at 2–4 (Feb. 27, 2023) (describing exports of design documents classified under ECCNs 9E515, 3E611, and 1C002); U.S. Dep't of State, Proposed Charging Letter for 3D Systems Corporation, at 11–12 (describing technical data controlled under USML Categories IV(i), VII(h), VIII(i), XII(f), and XIII(l)).

[4] *See* 15 C.F.R. § 734.13(a)(1) (defining "export" under EAR as "an actual shipment or transmission out of the United States"); 22 C.F.R. § 120.50(a)(1) (defining "export" under the ITAR as an "actual shipment or transmission out of the United States"); 22 C.F.R. § 120.50(a)(2) (defining "deemed export" as "[r]eleasing or otherwise transferring technical data to a foreign person in the United States").

[5] Settlement Agreement, *supra* note 1, at ¶¶ A–C.

[6] *Id.* at ¶ D ("This Settlement Agreement is neither an admission of liability by 3D nor a concession by the United States that its claims are not well founded.").

[7] Settlement Agreement, *supra* note 1, at ¶ 1.

[8] *Id.* at ¶ 1 (providing that the settlement amount would be reduced by amounts paid to Commerce or State, but not below $2,270,214.54 in restitution).

[9] BIS Order, *supra* note 3, at 5–6 (imposing civil penalty of $2,777,570); *see also* Bureau of Industry & Security, Settlement Agreement with 3D Systems Corporation (Feb. 21, 2023).

[10] Consent Agreement Between U.S. Dep't of State and 3D Systems Corporation, at ¶ 1 (Feb. 24, 2023) (entered "without admitting or denying the allegations").

[11] *Id.* at ¶ 18 (imposing $20 million civil penalty with $10 million suspended for remedial compliance measures); U.S. Dep't of State, Order Relating to 3D Systems Corporation (Feb. 24, 2023).

[12] Press Release, U.S. Dep't of Just., Raytheon Company to Pay Over $950M in Connection with Defective Pricing, Foreign Bribery, and Export Control Schemes (Oct. 16, 2024), https://www.justice.gov/archives/opa/pr/raytheon-company-pay-over-950m-connection-defective-pricing-foreign-bribery-and-export#:~:text=Breadcrumb,in%20Arms%20Regulations%20(ITAR).

[13] *Id.* ("Under the False Claims Act settlement, which is the second largest government procurement fraud recovery under the Act, Raytheon will pay $428 million.").

[14] Press Release, U.S. Dep't of Just., Defense Contractor Agrees to Pay $45 Million to Resolve Criminal Obstruction Charges and Civil False Claims Act Allegations (Dec. 4, 2019), https://www.justice.gov/archives/opa/pr/defense-contractor-agrees-pay-45-million-resolve-criminal-obstruction-charges-and-civil-false.

[15] *Id.* (describing Unitrans's admissions regarding obstruction of DLA proceedings).

[16] *Id.*; *see also U.S. ex rel. Maxwell, et al. v. Anham, USA, et al.*, No. 1:14-CV-0156 (E.D. Va. 2019).

[17] Press Release, U.S. Dep't of Just., FACT SHEET: Disruptive Technology Strike Force Efforts in First Year to Prevent Sensitive Technology from Being Acquired by Authoritarian Regimes and Hostile Nation-States (Feb. 16, 2024) (noting the Strike Force was launched on Feb. 16, 2023, by the Departments of Justice and Commerce), https://www.justice.gov/archives/opa/pr/fact-sheet-disruptive-technology-strike-force-efforts-first-year-prevent-sensitive.

[18] Press Release, U.S. Dep't of Just., Departments of Justice and Homeland Security Partnering on Cross-Agency Trade Fraud Task Force (Aug. 29, 2025), https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-partnering-cross-agency-trade-fraud-task-force.

[19] Memorandum from Matthew R. Galeotti, Head of the Criminal Division, U.S. Dep't of Just., Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime (May 12, 2025), at 4 (listing trade and customs fraud as a priority enforcement area).

[20] *See* 15 C.F.R. § 734.18(a)(5) (EAR exclusions for encrypted technology); 22 C.F.R. § 120.54(a)(5) (ITAR exclusion for certain encrypted transmissions).

The Supreme Court Declines to Kill the Qui Tam — For Now

By George M. Padis

On May 18, 2026, the United States Supreme Court denied the petition for writ of certiorari in *Eli Lilly and Company v. United States ex rel. Streck*, No. 25-1126, leaving intact a nearly $200 million jury verdict against one of the world's largest pharmaceutical companies. For the scores of relators currently prosecuting fraud claims on behalf of the United States under the False Claims Act's qui tam provisions,[1] the denial was welcome news. But the reprieve may be temporary. The Supreme Court may simply be waiting for a circuit split or the right case to kill the qui tam provision once and for all. But for now, the qui tam mechanism—through which private persons sue in the government's name to recover funds lost to fraud—remains very much alive in the lower courts.

The Eli Lilly Petition

The *Eli Lilly* case arose from a qui tam action filed in the U.S. District Court for the Northern District of Illinois by Ronald Streck, a relator who alleged that Eli Lilly knowingly underpaid Medicaid drug rebates by misreporting the prices at which it sold drugs.[2] After nearly a decade of litigation, a federal jury found that Eli Lilly had excluded over $600 million in revenue from its reported prices and knowingly shorted the government more than $61 million, resulting in a trebled monetary award of approximately $184 million.[3] A panel of the U.S. Court of Appeals for the Seventh Circuit unanimously affirmed the jury's verdict.[4]

Eli Lilly's petition to the Supreme Court presented two questions: first, whether the FCA's qui tam provisions are unconstitutional, and second, whether a legal interpretation can be so "objectively unreasonable" as to constitute evidence of fraudulent intent.[5] The constitutional question was the one that attracted the court watchers' attention.

Critically, Eli Lilly had not raised the constitutional argument below to the district court, and on appeal, raised it only in a single footnote in its initial Seventh Circuit briefing. It was not until after a single Florida federal district court's unprecedented, first-of-its-kind decision in *United States ex rel. Zafirov v. Florida Medical Associates*[6] that Eli Lilly petitioned for rehearing en banc, raising the constitutionality argument in full for the first time. The Seventh Circuit denied rehearing, with "all members of the original panel" concluding that Lilly "forfeited if not waived its constitutional argument."[7]

In his response to the petition, Streck hammered the preservation problem, arguing that the Court should not rescue "sophisticated litigants from their own procedural blunders" and noting the absence of any circuit split.[8] As is its usual practice, the Supreme Court gave no reason for denying certiorari, but a failure to preserve an argument below is a common basis for denial.

The Constitutional Battle: Originalism Against Itself

The debate over the constitutionality of qui tam is one of the more intellectually fascinating in contemporary constitutional law, in no small part because it pits jurists typically associated with originalism against the historical evidence of the original understanding of the Constitution.

The case for the qui tam's unconstitutionality rests on Article II's vesting of "all" executive power in the President and on the Appointments Clause's requirement that officers exercising "significant authority" be properly appointed. U.S. District Judge Kathryn Kimball Mizelle's September 2024 decision in *Zafirov* is the fullest articulation of this position.[9] She held that an FCA relator exercises "quintessentially executive power"—initiating civil enforcement actions for punitive sanctions on behalf of the United States—and therefore qualifies as an officer who must be appointed consistent with the Appointments Clause.[10] Importantly, relators remain subject to the Executive Branch, which practically controls whether a relator can take certain actions (like reach a settlement and or voluntarily dismiss claims) and retains the near-absolute authority to dismiss a case or claims under 31 U.S.C. § 3730(c)(2)(A).

But Judge Mizelle concluded that because relators self-appoint rather than receive appointment from the President, a court, or a department head, the qui tam provision is unconstitutional.[11] U.S. Circuit Judge Stuart Kyle Duncan's concurrence in the Fifth Circuit's *Montcrief* decision echoed this reasoning, calling the qui tam device a violation of both the Appointments Clause and the Take Care Clause.[12] U.S. Circuit Judge James Ho added his own concurrence later that year in *United States ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland*, in which he argued that qui tam relators present "constitutional concerns" because "[t]hey presume to represent the United States government in federal court, and to defend the interests of the United States Treasury against fraud" while being "neither appointed by, nor accountable to, the President."[13] Notably Judge Ho acknowledged the court remained bound by the Fifth Circuit's prior en banc decision in *Riley*[14] upholding the FCA's constitutionality, but stated that he joined Judge Duncan in calling for the issue to be revisited.[14]

The irony is that the judges advancing these arguments—Judges Mizelle, Duncan, and Ho and Justice Thomas—are frequently associated with originalism. Originalism is a method of constitutional interpretation holding that the meaning of a legal text was fixed at the time of its enactment and does not change over time; under its dominant variant, original public meaning originalism, interpreters seek the meaning the text would have conveyed to a reasonable, informed reader at the time of ratification, drawing on historical sources, rather than treating subsequent doctrinal developments as having altered the text's meaning.

Yet the originalist historical evidence appears to cut the other way. Qui tam actions have roots in thirteenthcentury England,[16] and the First Congress enacted several statutes containing qui tam provisions, according to legal historians.[17] Perhaps the most persuasive single piece of evidence is the Slave Trade Act of 1794, passed by the Third Congress and signed by President George Washington.[18] The Act prohibited the modification of vessels in United States ports for the purpose of transporting enslaved persons, and authorized a bounty for private citizens—who had no independent injury—to sue those engaged in the international slave trade.[19] As amended in 1800, the Act imposed penalties including forfeiture of the offending vessel, a $2,000 fine divided equally between the United States and the informer, and an additional $200 fine per enslaved person carried, also split equally with the informer.[20] In other words, the 1794 Act provided uninjured informers with "both a bounty and an express cause of action"[21]—precisely the structure of the modern FCA's qui tam provisions. The fact that President Washington himself signed legislation authorizing private citizens to enforce federal law in the government's name is, as Justice Scalia wrote for a unanimous Supreme Court in *Stevens*, "well nigh conclusive" evidence that the Framers viewed qui tam actions as fully consistent with Article II's vesting of executive power in the President.[22]

Indeed, Justice Thomas himself acknowledged this "long historical pedigree" in his *Polansky* dissent, even as he argued that "historical patterns cannot justify contemporary violations of constitutional guarantees."[23] Judge Mizelle similarly dismissed the historical record, finding methodological flaws in the relator's evidence and concluding that "[w]hen the Constitution is clear, no amount of countervailing history overcomes what the States ratified."[24]

In other words, the judges often associated with originalism are dismissing the seemingly robust historical evidence in favor of a doctrinal reading of Article II that post-Watergate separation-of-powers jurisprudence[25] has only relatively recently made possible.

All Eyes on the Eleventh Circuit

The denial of certiorari in *Streck* means the constitutional question continues to be decided in favor of the qui tam provision's constitutionality at the federal appellate level. The Seventh Circuit declined to reach it. Every circuit court to have considered the issue has upheld the qui tam mechanism. The lone outlier remains Judge Mizelle's district court decision in *Zafirov*, which is currently on appeal before the Eleventh Circuit. Every other district court to address the constitutionality of the qui tam provisions after *Zafirov* has declined to follow it.[26]

And this is where the stakes become clear. If the Eleventh Circuit affirms Judge Mizelle —holding the qui tam provisions unconstitutional—it would create a circuit split with, at least, the Fifth Circuit's en banc decision in *Riley v. St. Luke's Episcopal Hospital*, which upheld the FCA's constitutionality in 2001. A circuit split on a question of this magnitude would almost certainly compel Supreme Court review.

Many court watchers, this author included, predict the Eleventh Circuit will reverse Judge Mizelle based on the briefing and oral argument held in December 2025. But predictions are just that. Three Supreme Court Justices—Thomas, Kavanaugh, and Barrett[27]—and two Fifth Circuit Judges have signaled their interest in revisiting the question. The Supreme Court may simply be waiting for the issue to arrive, perhaps after a circuit split develops, in a case where it has been properly preserved and fully briefed at every level.

For now, the denial in *Streck* is an early victory for relators everywhere. But the constitutional challenge to the qui tam is not going away. The FCA's qui tam provisions generated $2.9 billion in settlements and judgments for the benefit of taxpayers in fiscal year 2024, with relators filing a record 979 qui tam lawsuits. With stakes that high, the constitutional fight over whether private citizens may continue to serve as the government's frontline fraud whistleblowers is just getting started.

[1] "Qui tam" is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* (He who brings an action for the king as well as for himself).
[2] *United States ex rel. Streck v. Takeda Pharms. Am., Inc.*, No. 14 C 9412, 2022 WL 595308, at *1–3 (N.D. Ill. Feb. 28, 2022), *aff'd sub nom. United States ex rel. Streck v. Eli Lilly & Co.*, 152 F.4th 816 (7th Cir. 2025).
[3] *Streck*, 152 F.4th at 832.
[4] *Id.* at 854.
[5] Petition for Writ of Certiorari at i–ii, *Eli Lilly & Co. v. United States ex rel. Streck*, No. 25-1126 (U.S. Mar. 23, 2026)
[6] 751 F. Supp. 3d 1293 (M.D. Fla. 2024).
[7] *Id.* at App'x B.
[8] Brief in Opposition at 6–7, 23–24, *Eli Lilly & Co. v. United States ex rel. Streck*, No. 25-1126 (U.S. Apr. 14, 2026).
[9] 751 F. Supp. 3d 1293.
[10] 751 F. Supp. 3d at 1307–24.
[11] *Id.* at 1314–22.
[12] *United States ex rel Montcrief v. Peripheral Vascular Assocs., P.A.*, 133 F.4th 395, 410–12 (5th Cir. 2025) (Duncan, J., concurring).
[13] *United States of Am. ex rel. Gentry v. Encompass Health Rehab. Hosp. of Pearland, L.L.C.*, 157 F.4th 758, 766–67 (5th Cir. 2025) (Ho, J., concurring). *But see* 31 U.S.C. § 3730(c)(2)(A).
[14] *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001).
[14] *Gentry*, 157 F.4th at 767.
[16] *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000).
[17] Examples include: Act of Apr. 2, 1802, ch. 13, § 18, 2 Stat. 139, 145 (7th Cong.; trading with Indians); Act of Apr. 29, 1802, ch. 36, §§ 3–4, 2 Stat. 171, 172 (7th Cong.; copyright); Act of May 3, 1802, ch. 48, § 4, 2 stat. 189, 191 (7th Cong.; mail carriers); Act of Mar. 26, 1804, ch. 38, § 10, 2 Stat. 283, 286 (8th Cong.; La. Slave trade); Act of Mar. 2, 1807, ch. 22, § 3, 2 stat. 426 (9th Cong.; slave trade).
[18] *See Stevens*, 529 U.S. at 776–77 & nn.5–7.
[19] Slave Trade Act of 1794, ch. 11, §§ 1–2, 4, 1 Stat. 347, 349.
[20] *See id.* §§ 2, 4.
[21] *Stevens*, 529 U.S. at 776–77

[22] *Id.* at 774–775.
[23] *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 450 (2023) (Thomas, J., dissenting).
[24] *Zafirov*, 751 F. Supp. 3d at 1321.
[25] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976);
[26] *See, e.g.*, *United States ex rel. Heath v. Wisc. Bell Inc.*, No. 2:14-cv-00903 (E.D. Wis. Dec. 2025); *United States ex rel. Souza v. Embrace Home Loans, Inc.*, 2025 WL 3072653 (D.R.I. Nov. 4, 2025); *United States ex rel. Relator LLC v. Tennyson*, No. 2:23-cv-05887 (C.D. Cal. Sept. 29, 2025); *United States ex rel. Publix Litig. P'ship, LLP v. Publix Super Mkts., Inc.*, 2025 WL 2468832 (M.D. Fla. Aug. 27, 2025); *United States ex rel. Gomez v. Koman Constr.*, No. EP-20-CV-252 (W.D. Tex. Aug. 22, 2025); *United States ex rel. Murphy v. TriHealth, Inc.*, 2025 WL 2104279 (S.D. Ohio July 28, 2025); *United States ex rel. Stenson v. Radiology Ltd., LLC*, 2025 WL 1785266 (D. Ariz. June 27, 2025); *United States v. Sporn Co.*, 2025 WL 1371272 (D. Vt. May 12, 2025); *United States v. UnitedHealthcare of Ga., Inc.*, No. 5:19-cv-00246 (M.D. Ga. Apr. 23, 2025); *United States v. Chattanooga Hamilton Cnty. Hosp. Auth.*, No. 1:21-cv-00084 (E.D. Tenn. Nov. 7, 2024); *United States ex rel. Lagatta v. Reditus Laboratories LLC*, 2024 WL 4351862 (C.D. Ill. Sept. 30, 2024); *United States ex rel. Butler v. Shikara*, 2024 WL 4354807 (S.D. Fla. Sept. 6, 2024).
[27] In a concurrence joined by Justice Barrett, Justice Kavanaugh wrote "I agree with Justice THOMAS that '[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation,'" but did not join Justice Thomas's sua sponte dissent, stating that "the Court should consider the competing arguments on the Article II issue in an appropriate case." *Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring).

Harris continued from 10

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[1] Office of Public Affairs | Civil Division Announces FOCUS Initiative for Data Miners Filing Qui Tam Complaints | United States Department of Justice (Apr. 30, 2026), https://www.justice.gov/opa/pr/civil-division-announces-focus-initiative-data-miners-filing-qui-tam-complaints.

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