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Focus

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FEATURE COMMENT: The Top FCA Developments Of 2020

With the onset of a global pandemic that continues to rage, 2020 was anything but normal. When it comes to the False Claims Act, the various relief funds created in the wake of COVID-19's devastating impacts on business have opened significant new areas of exposure and enforcement. In addition, many other developments affect contractors, from other expanding areas of enforcement to new case law on materiality, causation, pleading requirements, bars to qui tam actions and more. This Feature Comment highlights these and other top FCA developments and looks ahead to what is in store for Government contractors in 2021.

Recovery Statistics and Notable Settlements—Department of Justice recoveries and settlements in FCA matters in 2020 dropped to its lowest level in 12 years. On Jan. 14, 2020, DOJ announced that it recovered $2.2 billion in settlements and judgments in fiscal year (FY) 2020. This was down from the over $3 billion that DOJ recovered in FY 2019, and was the lowest amount recovered since 2008 when it recovered $1.4 billion. While there are likely several factors contributing to this downturn, the most obvious was a significant drop in the number of nine-figure settlements that have played a large role in DOJ's total haul in recent years. Additionally, while there was an uptick in recoveries towards the end of the year, there was a marked slowdown at the beginning of the COVID-19 pandemic, with many businesses, Government offices and courts around the country either operating at reduced capacity or closing altogether.

But while the pandemic may have slowed down many courts and businesses, newly filed cases were on the rise. Whistleblowers filed 672 qui tam suits in FY 2020, an increase from the 638 qui tam suits filed in FY 2019. Perhaps even more interesting, DOJ itself brought 250 new actions, the highest on record (by far) since 1994. Agencies other than the Department of Health and Humans Services accounted for 133 of these actions, including 29 concerning the Department of Defense, more than doubling the 13 DOD-related actions filed by DOJ in FY 2018 and 2019, respectively. Lest there be any doubt, private relators and the Government continue to prioritize FCA enforcement as the primary means of combatting and deterring fraud against the Government, and with a focus that expands far beyond the healthcare industry. While the total amount recovered by the Government was down from FY 2019, there were still many noteworthy settlements and decisions.

As in years past, the Government focused its enforcement efforts on the healthcare industry. Healthcare-related settlements and judgments made up the majority of the recoveries in 2020 and accounted for over $1.8 billion of the $2.2 billion recovered by the Government. Most notably, Novartis Pharmaceuticals Corp. agreed to pay over $642 million to resolve claims that it used various foundations as conduits to pay the copayments of Medicare patients taking Novartis's drugs, and that it paid kickbacks to doctors to proscribe Novartis drugs. On the heels of the Novartis settlement, Universal Health Services Inc. and Turning Point Care Center LLC agreed to pay $122 million to resolve allegations that they billed the Government for medically unnecessary inpatient behavioral health services, failed to provide appropriate services and paid illegal inducements to federal healthcare beneficiaries.

Building on policies implemented in 2018, the Government continued its commitment to holding individuals accountable in corporate enforcement cases. Several corporate settlements announced in 2020 required senior executives or other individuals to contribute. For example, stemming from the Government's FCA allegations against SpineFron-

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tier Inc., several orthopedic surgeons agreed to pay over $3.2 million to resolve allegations that they accepted improper consulting fees and kickbacks from SpineFrontier and a third-party entity owned by the company's CEO. Rather than basing their consulting fees on actual time spent consulting, the doctors based their hours on the number of times they used a SpineFrontier product each month, and sought consulting fees from SpineFrontier for time spent in surgery when Medicare or other federal healthcare programs were already paying them.

While healthcare-related cases produced the largest settlements in 2020, there were other notable settlements, particularly with respect to customs enforcement. As DOJ noted in January 2020, the FCA can be used to promote compliance with customs laws and to protect U.S. businesses from unfair trade practices. In September 2020, Linde GmbH and its U.S. subsidiary agreed to pay over $22 million to settle a qui tam suit alleging Linde attempted to evade duties on Chinese imported steel pipes by misrepresenting the nature, classification and value of the imported goods.

The Government also continued to use the FCA to deter and punish fraud in the Small Business Administration's programs. For example, in May 2020, DOJ announced that Northland Associates Inc., its president, the Diverse Construction Group LLC and their bonding company agreed to pay roughly $4.5 million to resolve allegations that they engaged in a scheme to fraudulently obtain contracts reserved for veteran-owned small businesses and small businesses operating in historically underutilized business zones. Similarly, in June 2020, the Ross Group Construction Corp. and its corporate affiliates agreed to pay over $2.8 million to settle FCA allegations that they improperly obtained set-aside contracts reserved for disadvantaged small businesses.

What do these statistics tell us about FCA enforcement in 2021? Despite the colossal disruptions caused by COVID-19, the Government and relators continue to bring new cases at a steady clip. And while the Government's overall haul was down from prior years, its focus and enforcement priorities largely remain unchanged; if anything, they are expanding, with enforcement related to COVID-19 undoubtedly the next golden goose for both DOJ and relators alike.

COVID-19 Fraud and Enforcement—Since the COVID-19 outbreak, Congress has passed several measures to provide more than $2.5 trillion in financial relief to individuals and businesses impacted by COVID-19, including, most notably, the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The CARES Act created multiple avenues for businesses to seek relief from economic hardship resulting from COVID-19, including the Provider Relief Fund, the Paycheck Protection Program (PPP), and the Main Street Lending Program. Under these programs, eligible recipients must make various attestations and certifications, submit loan applications that include express and implied certifications, and comply with specific terms and conditions when using appropriated funds.

To investigate and root out potential fraud and abuse relating to the unprecedented level of federal aid distributed through these programs, the CARES Act created three new oversight bodies: the Congressional Oversight Commission, which provides oversight over the activities of the Treasury, the Federal Reserve and other federal agencies administering CARES Act funds; the Office of the Special Inspector General for Pandemic Recovery, responsible for conducting investigations and making reports related to loans made under the CARES Act; and the Pandemic Response Accountability Committee (PRAC), composed of 21 existing agency inspectors general whose mission is to prevent and detect fraud, waste, abuse and mismanagement in connection with funds distributed pursuant to the CARES Act.

The PRAC has broad oversight and investigative powers, including the power to conduct independent investigations, hold public hearings, issue subpoenas for documents and compel witness testimony. Although the PRAC has not yet exercised the full extent of its powers, it released a report this past summer derived from information provided by 37 offices of inspector general (OIGs), identifying the top challenges that agencies face with regard to COVID-19 relief funds. The report identified the primary challenge as the potential for fraud and abuse of Government funding under the various COVID-19 relief programs and emphasized a general commitment across all 37 agencies to aggressively investigate and combat potential fraud with DOJ and other enforcement sources using anti-fraud and auditing work. The SBA OIG also issued a report in the summer of 2020, titled, "Serious Concerns of Potential Fraud in the Economic Injury Disaster Loan Program Pertaining to the Response to COVID-19," that called for "immediate attention and action" concerning the emergency funding provided under the Economic Injury Disaster Loan

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and Advance grant programs. Both reports highlight the significance that OIGs place on rooting out fraud in these programs, which has been confirmed by the SBA OIG opening dozens of investigations into relief fund applicants in the last quarter of 2020.

In addition to the SBA OIG, DOJ, the Federal Bureau of Investigation, the U.S. Secret Service and the IRS Criminal Investigation Division have engaged in substantial investigative work to date. This work is, in part, a result of Attorney General William Barr's direction to all U.S. attorneys to prioritize the investigation and prosecution of coronavirus-related fraud schemes and Deputy Attorney General Jeffrey Rosen's direction to U.S. attorneys to appoint a Coronavirus Fraud Coordinator for their federal judicial districts. Recent months have seen increased coordination between main Justice and individual U.S. attorney offices, as well as collaboration between the civil and criminal divisions of those offices as the types of fraud schemes grow more sophisticated and coordinated. In a speech last June, now former Deputy Assistant Attorney General for DOJ's Civil Division, Ethan Davis, confirmed that DOJ will "energetically" and "vigorously" use the FCA to enforce fraud associated with the various pandemic relief funds, from PPP and Main Street loans to the Provider Relief Fund, and its reach may include lenders and even private equity firms investing in companies receiving such funds. At the same time, Davis noted DOJ's commitment not to pursue companies that made honest mistakes or misunderstood pertinent terms and conditions associated with these relief funds. Time will tell. Considering DOJ's commitment to aggressively pursuing fraud related to COVID-related stimulus programs and the uptick in fraud investigations and prosecutions that has historically followed federal crisis relief programs, we expect abundant FCA investigations and prosecutions relating to COVID-19 funding, including qui tam actions brought by relators, in 2021 and beyond.

Customs Enforcement—Importers continue to face additional scrutiny and potential liability for their actions when importing goods into the U.S. Customs duties are a major source of revenue for the Government. Importers who evade customs duties stand to gain a significant advantage over competing domestic manufacturers and deprive the Government of a critical source of substantial revenue. In addition to administrative penalties imposed by U.S. Customs and Border Protection (CBP), 2020 showed that relators and the Government are having more success bringing cases under the FCA to crack down on importers who make false statements as to tariff classification, entered valuation, country of origin, the applicability of antidumping or countervailing duties, or free trade eligibility.

In July 2020, a California district court judge denied a motion to dismiss in *U.S. v. Vandewater Int'l Inc.*, 2020 WL 5372352 (C.D. Cal. July 21, 2020). The complaint alleged that defendants imported welded outlets from China under false descriptions or mixed them with duty-free products to escape paying a 183-percent tariff that resulted in over $200 million in unpaid fees to the Government. The judge found that the "litigation concerns concrete, non-hypothetical allegations that Defendants made specific false statements" that caused the Government losses. That same month, CWD Holdings LLC agreed to pay $8 million to resolve allegations in two qui tam cases that it violated the FCA by knowingly avoiding paying tariffs on imported brake pads by falsely claiming that the mounted pads it imported, which carried a 2.5-percent tariff, were unmounted brake pads not subject to any tariff. See *U.S. ex rel. Jeffrey Hawk v. CWD Holdings, LLC, et al.*, No. 17-12225 (E.D. Mich. Sept. 2, 2020); *U.S. ex rel. Steven Hughes v. CWD Holdings, LLC*, No. 19-CV-7089 (C.D. Cal. Dec. 7, 2020).

In September 2020, the Government announced one of its largest ever FCA settlements involving customs duties in *U.S. ex rel. Johnson v. Linde AG*, No. 17-cv-1012 (E.D. Pa. Sept. 24, 2020). Linde GmbH and its U.S. subsidiary agreed to pay more than $22 million to settle allegations that they attempted to avoid duties on Chinese imported steel pipes. The whistleblower alleged that Linde avoided paying tariffs and duties for nearly six years by misrepresenting the nature, classification and value of imported goods, as well as the applicability of free trade agreements. At the time of the settlement, Jeffrey Bossert Clark, the Acting Assistant Attorney General for the Civil Division, noted that DOJ would continue to "zealously pursue" companies trying to gain an unfair competitive advantage by bringing underpriced goods into U.S. markets. With customs-based FCA claims on the rise, contractors operating in the international trade arena are likely to be subjected to additional potential liability as CBP, DOJ and, importantly, relators collaborate to stem unfair trade practices.

Materiality—Materiality remained front and center in the fourth year after the Supreme Court's

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landmark decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); 58 GC ¶ 219. Whether at the pleading stage, summary judgment, trial or on appeal, this element is now often the most material of them all in evaluating the viability or merits of an FCA case. In an important decision for defendants this past year, *U.S. ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533 (10th Cir. 2020), the U.S. Court of Appeals for the Tenth Circuit affirmed summary judgment because the relator failed to establish materiality. The Tenth Circuit first rejected the relator's argument that the materiality analysis focuses solely on an objective, reasonable person standard. Instead, the Tenth Circuit observed that the Supreme Court in *Escobar* focused on the likely reaction of the recipient, which included both subjective and objective analysis. As a result, the Tenth Circuit found that evidence that the Government was notified of defendant's allegedly improper conduct—including from detailed allegations from a former employee—but did not take action against defendant demonstrated immateriality, even if the Government did not have actual knowledge of the alleged noncompliance. Instead, the Government's inaction in the face of those allegations undermined a finding of materiality.

In *U.S. v. Strock,* 982 F.3d 51 (2d Cir. 2020), the U.S. Court of Appeals for the Second Circuit reversed the dismissal of an FCA complaint after conducting the holistic analysis that most circuit courts, including the Tenth Circuit in *Janssen*, have found was intended by the factors set forth by the Supreme Court in *Escobar*. Despite the result, the Second Circuit's analysis offers several important rulings for defendants. First, the Court held that the materiality inquiry in a fraudulent inducement case applies both to the Government's decision to award the contract and to its decision to pay the claims submitted under that contract. Second, analyzing the complaint's allegations with respect to the Government's response to noncompliance in the mine run of cases, the Court discounted the importance of post hoc prosecutions or other enforcement actions, finding that allowing the Government to rely on such actions to satisfy the materiality requirement would be "materiality manufacturing." Instead, the Court emphasized the importance of allegations that the Government actually refused to pay the claims upon learning of the noncompliance in question, noting the Supreme Court's admonition in *Escobar* that alleging that the Government had the option not to pay was not probative of materiality.

These decisions illustrate the holistic analysis that courts conduct on materiality, both at the pleading and merits stages. *Janssen* highlights the demanding standard that must be met to demonstrate materiality and rejects the notion that a materiality inquiry does not consider the actual effect on the Government. *Strock* clarifies the application of materiality in fraudulent inducement cases and, like *Janssen*, emphasizes the importance of the Government's decision to pay when faced with noncompliance over enforcement actions taken long after the fact.

Circuit Split Widens Over the Government's Dismissal Authority—2020 was a headline year for circuit courts reviewing the Government's qui tam dismissal authority pursuant to 31 USCA § 3730(c)(2)(A). Over a single two-week period, the Seventh and Ninth circuits became the first two circuit courts to issue decisions on lower court denials of a motion to dismiss by DOJ, with the Seventh Circuit enumerating a new standard for evaluating such requests.

In *U.S. ex rel. CIMZNHCA v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020), the Seventh Circuit addressed two central questions: first, whether it had jurisdiction to consider the district court's denial of the Government's motion to dismiss the qui tam suit under § 3730(c)(2)(A); and second, on the merits, what standard of review applies to such a motion. On the jurisdictional question, the Seventh Circuit determined that it had jurisdiction, by treating the Government's motion to dismiss as a motion to intervene under § 3730(c)(3) and then to dismiss under § 3730(c)(2)(A) "because intervention was in substance what the government sought and in form what the False Claims Act requires." The district court's denial of "what amounted to" a motion to intervene was appealable. See McLaughlin, Alves, Pugh, Gorton and Griffin, Feature Comment, "You Win Some, You Lose Some: In Wake Of Ninth Circuit Defeat, The Government Gets A Big Win From Seventh Circuit Ruling Expanding Its Dismissal Authority Over FCA Qui Tam Actions," 62 GC ¶ 254.

The parties' arguments on the merits concentrated on the application of two distinct standards for DOJ motions to dismiss: (1) the D.C. Circuit's standard under *Swift v. U.S.*, 318 F.3d 250 (D.C. Cir. 2003); 45 GC ¶ 93, which recognizes the Government as possessing "unfettered" discretion to dismiss; and (2) the Ninth Circuit's standard under *U.S. ex rel.*

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Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998), which requires that the Government identify a "valid government purpose" and show "a rational relation between dismissal and accomplishment of the purpose." Ultimately, the Seventh Circuit declined to apply either standard, instead articulating a third approach pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). According to the Seventh Circuit, a plaintiff's right to dismiss is virtually "absolute" and the Government can dismiss as the "plaintiff" in a qui tam by intervening for good cause. The Seventh Circuit explained that while certain circumstances—such as those that "shock the conscience," or "offend ... hardened sensibilities"—would preclude the Government's non-enforcement decision, those concerns were not at issue. Reversing the denial of DOJ's motion to dismiss, the Seventh Circuit stated that the district court should not have second-guessed the Government's facially valid reasoning, observing that DOJ only need show "reasoned decision-making" as a matter of administrative law.

Only two weeks before the Seventh Circuit issued the *UCB* decision, the Ninth Circuit reviewed the only other lower court denial of a Government motion to dismiss brought pursuant to its § 3730(c)(2)(A) authority. In *U.S. v. Acad. Mortgage Corp.*, 968 F.3d 996 (9th Cir. 2020), the Government appealed the district court's denial of its motion to dismiss. The Government argued that a denial of a motion to dismiss brought pursuant to the Government's powers to dismiss under the FCA was appealable under the collateral estoppel doctrine, which permits appeals of prejudgment decisions when they are "collateral" to the merits of the action and "too important" to be denied immediate appellate review. The Ninth Circuit disagreed and dismissed the appeal for lack of jurisdiction, passing on the opportunity to address the merits. In so doing, the Ninth Circuit was reticent to treat § 3730(c)(2)(A) "as tantamount to a grant of immunity" for the Government to dismiss non-intervened qui tam suits brought by relators, and noted that the Government's concerns should be "substantially diminished by the extraordinarily low likelihood of an erroneous denial" under § 3730(c)(2)(A).

The Ninth Circuit also suggested that jurisdiction might have been present had the Government (1) asked the district court to certify an interlocutory appeal under 28 USCA § 1292(b), which "allows for appeals of orders that involve a controlling question of law as to which there is substantial ground for difference of opinion, when an immediate appeal may materially advance the ultimate termination of the litigation[,]" or (2) sought a writ of mandamus, available in "extreme" cases, such as where classified information may be disclosed. Last, seemingly foreshadowing the Seventh Circuit's decision in *UCB* two weeks later, the Ninth Circuit also suggested that, even where its motion to dismiss had been denied, the Government could intervene for good cause to take control over a qui tam it initially declined. Whether the Ninth Circuit would agree with the Seventh Circuit's conclusion that intervention would permit the Government to dismiss a qui tam remains to be seen.

Finally, just before the end of the year, the Second Circuit declined an opportunity to enter the fray on the bounds of the Government's dismissal authority. In *U.S. ex rel. Borzilleri v. AbbVie, Inc.*, 2020 WL 7039048 (2d Cir. Dec. 1, 2020), the relator appealed the district court's dismissal in response to the Government's motion to dismiss. Affirming the lower court decision, the Second Circuit noted that it did not need to decide whether the *Swift* or *Sequoia* analyses were proper because the Government's arguments—namely that the case would likely require significant expenditure of Government resources, the relator's claims were unlikely to result in any material recovery for the Government, and the relator was not an appropriate advocate for the Government—met even the "more stringent" *Sequoia* standard.

It is clear from these recent decisions that the reach and limitations of the Government's § 3730(c)(2)(A) dismissal authority are a source of potential disagreement. Even so, in the face of many opportunities to raise the bar the Government must meet to dismiss a qui tam action, the circuit courts continue to decline to do so. While the Seventh Circuit set forth a new standard, its decision confirms what the D.C. and Ninth circuits previously held—that the Government is afforded great deference in determining whether a qui tam should be permitted to proceed.

Causation—2020 saw circuit courts adopting heightened causation standards for both false claims and retaliation causes of action under the FCA. The FCA's anti-retaliation provision imposes liability on employers when an employee is "discriminated against in the terms and conditions of employment because of lawful acts done by the employee ... in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter." 31 USCA § 3730(h)(1). In many circuits,

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however, district courts—drawing from precedent in discrimination cases—disagree on whether an employee must show that the protected conduct was a "but for" cause of the employer's actions or only that it was a "motivating factor." The latter standard is more plaintiff-friendly, as it requires only a showing that the protected conduct was one motivating factor for the adverse employment decision. The stricter "but for" standard, on the other hand, requires a showing that the retaliatory harm would not have occurred in the absence of the protected conduct. In 2020, the First and Eleventh circuits joined the Third, Fourth and Fifth circuits in adopting the "but-for" standard for causation in FCA retaliation claims. See *Nesbitt v. Candler Cty*., 945 F.3d 1355, 1360 (11th Cir. 2020); 62 GC ¶ 20; *Lestage v. Coloplast Corp.*, 982 F.3d 37, 46 (1st Cir. 2020); 63 GC ¶ 17.

A heightened standard also found circuit court support with respect to pleading and proving false claims under the FCA. Defendants who themselves do not directly submit claims are not immune from the reach of the FCA; rather, a defendant who "causes to be presented" false claims to the Government is subject to its penalties. 31 USCA § 3729(a)(1)(A). In *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089 (11th Cir. 2020); 62 GC ¶ 228, the Eleventh Circuit for the first time addressed this issue, holding that a "proximate causation" test provides a "useful and appropriate standard by which to determine whether there is a sufficient nexus between the defendant's conduct and the submission of a false claim." Joining the Tenth Circuit in adopting this test, the Eleventh Circuit observed that such a heightened standard was important to "cull those claims with only attenuated links between the defendant's conduct and the presentation of the false claim." Whether a defendant is facing allegations of false claims, FCA retaliation, or both, these decisions are welcome developments in guarding against tenuous theories of liability.

Rule 9(b) Pleading—In *U.S. ex rel. Benaissa v. Trinity Health*, 963 F.3d 733 (8th Cir. 2020), the Eighth Circuit provided a welcome decision for defendants with respect to Rule 9(b)'s heightened pleading requirement for claims alleging fraud. While there are varying approaches to the particularity that a relator must plead, many circuit courts require that a relator be able to identify at least one false claim representative of the others alleged or, alternatively, plead the specific details of a scheme to submit false claims as well as "reliable indicia" that support a strong inference that false claims were in fact submitted. The district court in *Benaissa* dismissed the complaint, finding that the relator had failed to plead either of these. Affirming the district court, the Eighth Circuit held that the relator's lack of firsthand knowledge of the defendants' billing practices, and failure to plead details about those billing practices that would indicate a reliable basis for knowledge regarding the submission of false claims, such as dates or descriptions of particular services as well as a description of the billing system utilized, doomed his claim. In so doing, the Eighth Circuit rejected relator's argument that its reasoning would preclude anyone other than a member of the billing department from becoming a relator. This decision adds support for defendants facing similarly conclusory pleading by relators without true insider knowledge of the fraud they allege.

Statute of Limitations—FCA cases must be brought either within six years of the alleged FCA violation or three years after material facts "are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," up to a maximum of 10 years after the violation occurred. See 31 USCA § 3731(b)(2). In 2019, the Supreme Court in *Cochise Consultancy Inc. et al. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507 (2019); 61 GC ¶ 149, resolved a circuit split by finding that the three-year limitations period was just as applicable in cases in which the Government elects not to intervene as those in which it does. The court, however, declined to clarify who from the Government qualifies as the "official" whose knowledge counts for purposes of the three-year tolling provision.

On remand from the high court, the defendants in *U.S. ex rel. Hunt v. Cochise Consultancy, Inc.*, 2020 WL 5408212 (N.D. Ala. Sept. 9, 2020), filed renewed motions to dismiss, arguing, in part, that the relator's claims were time barred because the three-year clock began to run when the contracting officer became aware of the fraudulent conduct giving rise to the action. Significantly, the relator alleged that a CO participated in the fraudulent scheme, accepting a bribe in return for directing the award of the contract at issue. While the defendants argued that the "official of the United States" included this CO, the district court declined to accept the defendants' interpretation of the statute, finding that it would lead to "absurd and unfair results," because it would shorten the time period for a relator to bring an action under the FCA whenever a Government official is involved in the alleged

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fraud. Given the unique facts of the case, the court's decision leaves open the possibility that a CO may still qualify as the "official" whose knowledge triggers the start of the three-year limitations period.

In *Houpt ex rel. U.S. v. Wells Fargo Bank, N.A.*, 800 Fed. Appx. 533 (9th Cir. April 6, 2020), the relator alleged that Wells Fargo made false statements and certifications that induced the SBA into improperly paying the guaranteed portion of an SBA loan. On appeal, the Ninth Circuit affirmed the grant of summary judgment after finding that the relator's claims were barred under both statute of limitations provisions. As for the three-year limitations period, the Ninth Circuit found that the SBA either knew or should have known of the material facts when it received payment of the guarantee from Wells Fargo and closed its loan file in April 2014, which was more than three years before the relator filed his complaint. In a footnote, the Ninth Circuit explained that it assumed "without deciding" that the SBA official's knowledge was relevant to determining whether the relator's claims are barred under the three-year limitations period. As more cases turn on the broader limitations exception espoused by the high court in 2019, we expect to see further guidance as to who qualifies as the "official of the United States" and when material facts "reasonably should have been known" to that official.

The Relators' Bar(s)—The circuit courts also continued to clarify the parameters of the procedural barriers relators must overcome to bring an FCA qui tam action, including the first-to-file and public disclosure bars.

In *U.S. ex rel. Maur v. Hage-Korban*, 981 F.3d 516 (6th Cir. 2020), the Sixth Circuit analyzed whether a relator could overcome the public disclosure bar, which is intended to limit "parasitic" lawsuits based on facts already in the public domain, by providing additional details about an allegedly ongoing fraudulent scheme that had been previously memorialized in an integrity agreement in a prior qui tam action. In affirming the district court's dismissal, the Sixth Circuit determined that a qui tam action relied on what the relator admitted was "the exact scheme" that was at issue in the prior qui tam action, and accordingly was prohibited. Considering whether the relator was nevertheless an "original source of the information," in which case his suit could proceed despite the qualifying public disclosure, the Sixth Circuit concluded otherwise because the relator (1) did not disclose any information to the Government prior to the public disclosure, and (2) did not disclose any additional, material information—i.e., that would affect a person's decision-making—to the Government prior to filing the qui tam complaint. See 31 USCA § 3730(e)(4)(B). While the relator in *Maur* identified what he asserted were additional, ongoing examples of the alleged fraud, the Sixth Circuit held that such facts failed to "bring something to the table that would add value for the government," particularly because the Government already was reviewing the defendant's ongoing conduct pursuant to the integrity agreement.

Only a few months before *Maur*, the First Circuit held in favor of the relator after being presented with a similar question on the application of the public disclosure bar in a relator's qui tam action alleging "the same scheme" to defraud Medicare as a prior qui tam action. In *U.S. ex rel. Banigan v. PharMerica, Inc.,* 950 F.3d 134 (1st Cir. 2020), the First Circuit agreed with the lower court that the public disclosure bar applied, as the facts alleged were "indistinguishable in all material respects from the fraudulent scheme disclosed" in a prior qui tam action, but reversed as it concluded that one of the two relators was an original source of the information. The First Circuit reasoned that the defendant's arguments—that the relator could not be an original source because he did not have "direct" and "contemporaneous" knowledge of the scheme—were not supported by the text of the FCA. The First Circuit also concluded that, if the defendant was correct, the FCA would only permit relators that actively participated in the fraudulent scheme, which was antithetical to the FCA's purpose of ferreting out fraud.

The Third Circuit similarly took an opportunity to clarify a relator's hurdles to filing a qui tam action in 2020 by clarifying its position on the first-to-file bar. In *In re Plavix Mktg., Sales Practices & Prod. Liab. Litig. (No. II)*, 974 F.3d 228 (3d Cir. 2020), a "partnership" consisting of three individuals brought a qui tam lawsuit as the relator. During the litigation, one of the individual partners was replaced by a fourth individual and a new partnership was formed. The defendant then moved to dismiss the amended complaint filed by the "new partnership" as barred by the first-to-file rule, which provides, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 USCA 3730(b)(5). The district court granted the dismissal motion, and the Third Circuit reversed.

The Third Circuit joined the First, Second, and D.C. circuits in holding that the first-to-file bar is not jurisdictional. This ruling inhibits the first-to-file bar's

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power to serve a gatekeeping function in the race to the courthouse in qui tam actions, turning the burden on the defendant and requiring that the defense be raised in a Rule 12(b)(6) motion or otherwise waived. The Third Circuit also held that the first-to-file bar did not prohibit the new partnership from participating as a relator in the former partnership's qui tam lawsuit. In so finding, the Third Circuit explained, "The first-to-file bar reaches intervention under Rule 24 or the bringing of a new action on the same facts, but not other methods of joining an existing case like joinder, substitution of parties, or amendment of a complaint." On the whole, these decisions underscore the role that the public disclosure and first-to-file bars can play in actions brought by qui tam relators under the FCA.

Government Officials as Defendants—In *U.S. ex rel. Citynet, LLC v. Gianato*, 962 F.3d 154 (4th Cir. 2020), the Fourth Circuit held that state government officials, too, are subject to the reach of the FCA. In *Citynet*, the relator alleged that two state government officials knowingly engaged in a scheme to defraud the U.S. when obtaining funding under the American Recovery and Reinvestment Act of 2009. The district court determined that the relator pleaded sufficient facts to survive a motion to dismiss, but punted on a question of whether the officials had qualified immunity to the summary judgment stage. The defendant officials sought interlocutory appeal. The Fourth Circuit ruled against the defendants and directed the lower court to deny the qualified immunity argument in their motion to dismiss, reasoning that qualified immunity does not protect government officials against FCA claims because, "by acting intentionally and recklessly, a government official necessarily forfeits any entitlement to qualified immunity."

2021 Vision: The Year Ahead for the FCA—Looking forward, and with a new, Democratic administration assuming office, we have little reason to think that DOJ's lower total recoveries in FCA actions is a trend. To the contrary, with more new cases being filed, and multiple new and developing areas for enforcement, we see 2021 as a year in which the FCA will remain alive and kicking. If anything, 2021 will likely see DOJ begin to vigorously wield its FCA authority in new ways, particularly as it shifts resources toward civil enforcement of fraud in connection with the unprecedented level of relief funds issued by the Government in response to the COVID-19 pandemic. Current events may well weigh on DOJ in determining its other FCA enforcement priorities. For instance, the recently publicized SolarWinds cybersecurity data breach should bring heightened interest in an already expanding area for FCA enforcement, pursuing contractors for failing to meet or falsely certifying compliance with new and developing cybersecurity standards. With recent events providing new opportunities for relators and DOJ alike, the FCA will again loom large.

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