**False Claims Act Developments: 2020 Year in Review**

**By Emma K. Bass[[1]](#footnote-1)**

The past year has been historic for many reasons, including but not limited to a once in a lifetime pandemic, a dramatic election season, and the transition to a new Presidential administration. Along with these major events, there have been consequential developments for the False Claims Act (FCA). In 2020, the Department of Justice (DOJ) recorded a total of $2.2 billion in recoveries resulting from False Claim Act actions, which brings the total to $64 billion since the 1986 amendments.[[2]](#footnote-2) The DOJ notes that $1.8 billion was related to healthcare fraud schemes such as paying kickbacks to doctors, improperly utilizing co-pay foundations, and billing for medically unnecessary procedures.[[3]](#footnote-3) The DOJ also highlighted other substantial recoveries involving procurement fraud in which federal contractors overbilled for labor and violated contractual requirements.[[4]](#footnote-4) Further, $1.6 billion of this $2.2 billion came from actions brought by whistleblowers under the FCA’s *qui tam* provisions.[[5]](#footnote-5)

We are tracking FCA settlements, and we predict this number will increase due to the unprecedented economic crisis connected to the COVID-19 pandemic and the government-spending bills passed to combat it. On March 29, 2020, Congress passed the nearly $2 trillion CARES Act, and recently, the DOJ announced the first FCA settlement regarding CARES Act fraud in the Eastern District of California.[[6]](#footnote-6) In this case, Slidebelts, Inc. agreed to pay $100,000 to settle allegations that they defrauded the government by submitting false statements to banks that indicated they were not in bankruptcy in order to receive payment from the Paycheck Protection Program (PPP).[[7]](#footnote-7) In addition to this $100,000, they returned their entire $350,000 PPP loan.[[8]](#footnote-8) There will certainly be more CARES Act settlements to come, and with the new administration (and President Biden’s proposed American Rescue Act), there is likelihood that Congress will pass another significant package soon.[[9]](#footnote-9) In response to this, TAFEF has established a COVID-19 Anti-Fraud Task Force that works with federal and state governments in order to identify COVID-19 fraud trends, and increase capability to tackle fraud schemes head on. As more cases come to light, we will keep our members and the general public up to date on these developments.

2020 has also been extremely busy on the litigation side of the False Claims Act. Through the year, TAFEF played a key role, filing 11 *amicus curiae* briefs on issues ranging from the FCA’s knowledge standards to the public disclosure bar and original source exception. These briefs were filed with the help of many of our members on the *Amicus* Committee. Below, we dive further into these topics and highlight major developments in case law in various District and Circuit Courts around the country, along with emerging trends such as issues regarding the government dismissal authority and third-party litigation funding. Thank you to all who helped make 2020 a successful year, and we’re looking forward to seeing what 2021 has in store.

# Liability

## **Falsity**

In *United States ex rel. Paradies v. AseraCare, Inc.*,[[10]](#footnote-10) the Eleventh Circuit affirmed in part and vacated in part the district court’s holding overturning a jury verdict in favor of the plaintiffs. The plaintiffs alleged that AseraCare violated the FCA by submitting claims to Medicare for hospice care for patients that were not eligible for hospice because they did not have a prognosis of six months or less to live. The plaintiffs relied on expert testimony to prove that the claims were false and that hospice case was not warranted by certain patients’ medical records. The jury agreed, and returned a verdict in favor of the plaintiffs, but the district court overturned that verdict, finding that the plaintiffs were required to show that there was an objective falsehood and that a difference in expert opinion could not serve as the basis for proving falsity. The court explained that clinical judgements regarding hospice eligibility “cannot be ‘false’—and thus cannot trigger FCA liability—if the underlying clinical judgment does not reflect an objective falsehood.”[[11]](#footnote-11) The court remanded to the district court ordering a new trial with jury instructions that clearly conveyed that “the mere difference of reasonable opinion between physicians, without more, as to the prognosis for a patient seeking hospice benefits does not constitute an objective falsehood.”

This year, the Third and Ninth Circuit released opinions relating to falsity and this standard of “objective falsehood” in *United States ex. rel. Druding v. Care Alternatives*[[12]](#footnote-12) and *United States ex. rel. Winter v. Gardens Regional Hospital and Medical Center, Inc*.[[13]](#footnote-13) In *Druding*, the Third Circuit considered a similar question as the question posed in *AseraCare*: what role does clinical judgment have in determining falsity? The relators brought a *qui tam* action against Care Alternatives, alleging that it admitted ineligible patients for hospice care. Like the Eleventh Circuit in *AseraCare*, the district court found that difference of medical opinion could not constitute proof of falsity, and granted the defendant’s motion for summary judgement, explaining that the relators must “provide evidence of an objective falsehood.”[[14]](#footnote-14) The relators appealed and the Third Circuit reversed and remanded, rejecting the district court’s “objective falsehood” standard, and explaining that such a standard conflated the scienter and falsity[[15]](#footnote-15) elements and that the question of falsity should not be limited to “factual falsity” but expanded to “legal falsity.”[[16]](#footnote-16) The court explicitly pushed back on the Eleventh Circuit’s ruling in *AseraCare*, determining that “the common-law definition of fraud permits a finding that subjective opinions may be considered false and that medical opinions can be false and are not shielded from scrutiny.”[[17]](#footnote-17) In doing so, they conclude that this difference of clinical judgement could “create a genuine dispute of material fact.”[[18]](#footnote-18)

This rejection of “objective falsity” is echoed in *United States ex. rel. Winter v. Gardens Regional Hospital and Medical Center, Inc*.[[19]](#footnote-19) In this case, the relator brought *qui tam* action against the hospital, claiming that it submitted false claims to Medicare for medically unnecessary services. The district court granted the defendant’s motion to dismiss and the relator appealed to the Ninth Circuit. The circuit court explained that “a doctor’s Medicare certification that inpatient hospitalization is medically necessary can be false or fraudulent, within the meaning of the FCA.”[[20]](#footnote-20) The circuit court observed that the district court misguidedly relied on a standard of “objective falsity,” when in fact “Congress imposed no requirement of proving ‘objective falsity,’ and we have no authority to rewrite the statute to add such a requirement.”[[21]](#footnote-21) The court noted that its decision was not directly at odds with the Eleventh Circuit’s ruling in *AseraCare*, explaining that Eleventh Circuit’s understanding of the “‘objective falsehood’ requirement did not necessarily apply to a physician’s certification of medical necessity.”[[22]](#footnote-22)

In sum, on the heels of *AseraCare* came two reasonably favorable decisions for FCA plaintiffs regarding falsity. We will continue to track developments of the courts’ interpretation of “objective falsehood” in the coming months.

## **Anti-Kickback Statute**

There were a few notable cases involving the federal Anti-Kickback Statute in 2020, including *United States ex. rel. Benaissa v. Trinity Health*[[23]](#footnote-23) in the Eighth Circuit, *Stop Illinois Health Care Fraud LLC v. Sayeed*[[24]](#footnote-24) in the Seventh Circuit, and *United States v. Shah*[[25]](#footnote-25) in the Eleventh Circuit.

In *Benaissa,* the relator brought a *qui tam* action alleging that the hospital where he was formerly employed and its parent company and affiliates submitted claims tainted by violations of the Stark Law and Anti-Kickback Statute (AKS) to the government in violation of the FCA. The relator identified five physicians whom the defendants allegedly paid in excess of the 90th percentile of compensation for their specialties, and that these physicians’ high salaries were not merited by their skills, credentials, or personal productivity, but that the defendants paid them for illegally referring patients for additional services at the hospital. He alleged that the claims submitted by those physicians were all fraudulent as a result of the AKS and Stark Law violations.

The district court granted the defendants’ motion to dismiss, explaining that the relator failed to allege any representative examples of false claims actually submitted, and that his argument that because Medicare reimbursements made up a large portion of the defendants’ annual revenue, some claims must necessarily have been submitted to the government was too speculative. The Eighth Circuit agreed, finding that the relator’s allegations lacked sufficient “indicia of reliability”[[26]](#footnote-26) because the plaintiff was an anesthesiologist and not employed in the billing department, thus he had no firsthand knowledge of whether claims were actually submitted. The court found these allegations too conclusory to meet the requirements of Rule 9(b).

In *Stop Illinois Health Care Fraud LLC v Sayeed,*[[27]](#footnote-27)the Seventh Circuit addressed the issue of what constitutes a referral. Stop Illinois Health Care Fraud LLC brought *qui tam* action against Asif Sayeed, the owner of Management Principles Inc. (MPI), along with Healthcare Consortium of Illinois (HCI), alleging that they participated in a kickback scheme wherein MPI made payments to HCI in exchange for access to their client data so that it could solicit patients. These payments came in the form of gift cards and a “Management Services Agreement,”[[28]](#footnote-28) under which MPI paid HCI $5,000 per month. The relator alleged “that the defendants used the agreement ‘to get referrals for essentially any patients that they wanted by having HCI open their files.’”[[29]](#footnote-29) The district court held that while the evidence showed that “an MPI employee gave low-value gift cards to a few HCI caseworkers and that the Management Services Agreement existed, there was no evidence that either was intended to induce patient referrals,”[[30]](#footnote-30) and granted the defendants’ motion for judgment on partial findings. The Seventh Circuit reversed and remanded, explaining that it was “unable to confirm that the [district] court employed the proper definition of a proscribed referral” with respect to the Management Services Agreement, and that the district court should not have so readily dismissed the “file-access theory of referral.”[[31]](#footnote-31)

In an important decision, the Eleventh Circuit established in *United States v. Shah*[[32]](#footnote-32)that plaintiffs do not need to prove the motivation of the defendant in paying or accepting payments in order sufficiently show a violation of the AKS. The government alleged that Shah violated the FCA by receiving payments from a pharmaceutical company in exchange for prescribing the company’s drugs, causing false claims to be submitted for the drugs in violation of the FCA. At trial, the district court instructed the jury that “the Government must only prove that obtaining payment in return for the purchasing, ordering or leasing was one of the defendant’s purposes in soliciting or receiving the remuneration or kickback.”[[33]](#footnote-33) After the jury returned a verdict in favor of the government, the defendant appealed, argued that “the government was required to prove that his main or only reason for accepting the payment was because it was made in return for writing prescriptions.”[[34]](#footnote-34) The Eleventh Circuit found that the district court did err in its instructions, however, it concluded that not only was the government not required to prove that the primary reason for accepting payment was because it was made in return for writing prescriptions, but that there was no requirement that the government prove the motivation behind accepting payments at all. The circuit court concluded that the jury instructions did not harm Shah, and thus affirmed the ruling of the district court.

In other AKS news, some major settlements with certain pharmaceutical corporations were announced this year. One of particular note was Novartis’s agreement to pay over $642 million to settle allegations that it 1) used Patient Assistance Programs to pay co-pays for patients using government healthcare plans, which “subsidized the high price of Novartis’s drugs at the expense of American taxpayers”[[35]](#footnote-35) and 2) engaged in a kickback scheme to induce doctors to prescribe Novartis drugs. There is a current case pending in the Southern District of New York involving allegations of Novartis’s practice of hosting “speaker programs and related events under the guise of providing educational content,” when in reality they were kickback payments.[[36]](#footnote-36)

We will continue to monitor opinions and settlements regarding the AKS.

# Common Defenses

## **Materiality**

2020 included a flurry of opinions regarding the materiality requirements of the FCA. In 2016, the Supreme Court’s decision in *Universal Health Services, Inc. v. United States ex. rel. Escobar*,[[37]](#footnote-37) clarified that “implied false certification theory can be a basis for FCA liability,”[[38]](#footnote-38) while at the same time underscoring that the “materiality standard is demanding,”[[39]](#footnote-39) noting that “a misrepresentation cannot be deemed material merely because the Government designates compliance with a particular requirement as a condition of payment. Nor is the Government’s option to decline to pay if it knew of the defendant’s noncompliance sufficient for a finding of materiality.”[[40]](#footnote-40) In *United States ex rel. Ruckh v. Salus Rehabilitation*[[41]](#footnote-41) and *United States ex rel. Bibby v. Mortgage Investors Corporation*[[42]](#footnote-42) each addressed materiality under *Escobar*.

In *Ruckh,* the relator brought *qui tam* action against the operators of specialized nursing facilities alleging that they engaged in schemes involving upcoding and ramping in order to overcharge Medicare, and failed to maintain required plans of care in violation of the FCA. After the jury returned a verdict in against the defendant, the district court set aside the jury’s verdict as unsupported by the evidence and granted judgment as a matter of law. The plaintiffs appealed and the Eleventh Circuit reversed the district court’s decision. With respect to materiality, the circuit court explained that Medicare paying more than they otherwise should have was “plain and obvious materiality went to the heart of the [defendants’] ability to obtain reimbursement from Medicare.”[[43]](#footnote-43) Similarly, their ramping scheme “[was] material, as it directly affects the payments Medicare makes to [the defendants].”[[44]](#footnote-44) However, the court found that the relators failed to show that the failure to maintain plans of care was material, explaining that under *Escobar*, “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material”[[45]](#footnote-45) and that the relators failed to present evidence that the government declines payment when an skilled nursing facility fails to comply with the care plans requirement.[[46]](#footnote-46)

In *Bibby*,[[47]](#footnote-47)the relators brought a *qui tam* action against a mortgage lender alleging that it defrauded the Department of Veterans Affairs (VA) by falsely certifying that it did not charge unallowable fees to veterans applying for VA mortgage loans, causing the VA to insure loans originated by the defendant in violation of the FCA. The district court granted the defendant’s motion for summary judgement finding “that no reasonable jury could find [the defendant’s] alleged fraud was material.”[[48]](#footnote-48) The relators appealed to the Eleventh Circuit and the circuit court reversed, finding that “genuine issues of material fact remain[ed] on the element of materiality.”[[49]](#footnote-49) The court explained that *Escobar* required a holistic view of materiality, and that the defendants did not offer “very strong evidence” of immateriality. The court explained that even if it “viewed the VA’s continued issuance of guaranties as ‘strong evidence’ of immateriality, that evidence [was] not unrebutted.”[[50]](#footnote-50)

In another important opinion from 2020, *United States v. Strock*,[[51]](#footnote-51) the Second Circuit reversed in part the district court’s dismissal of the government’s action against Strock Contracting, Inc, its owner, Veteran Enterprises Company, Inc. (VECO), a purportedly service-disabled veteran-owned business, and a VECO employee, Terry Anderson. In this case, the government alleged that Strock actually owned and operated VECO and falsely certified that it was a service-disable veteran-owned business in order to receive set aside government contracts in violation of the FCA. The district court granted the defendants’ motion to dismiss, finding that the government had not adequately pled materiality.[[52]](#footnote-52) The government appealed, and the Second Circuit reversed in part, finding that “the district court’s conclusion as to materiality relied on an unduly restrictive understanding of the FCA materiality analysis set out in *Escobar*.”[[53]](#footnote-53) Turning to the government’s behavior “post-award” and “pre-award”[[54]](#footnote-54) to examine the government’s decision to pay, the court found that government’s actions supported a finding of materiality. The court explained that pre-award, the government takes action to root out businesses that are not qualified for contracts before it awards them, and “post-award,” though not as strongly supportive of materiality, the complaint “alleg[ed] that the contracting officers *might* have taken steps to cease payments, terminate the contracts, or both had they learned” that the businesses were not qualified.[[55]](#footnote-55) The court concluded that “given both decisions are part of the government’s ‘payment decision,’ these considerations taken together indicate that this factor supports materiality, if weakly.”[[56]](#footnote-56)

## **Statute of Limitations**

In April of 2020, the Sixth Circuit issued an opinion in *United States ex. rel. Houpt v. Wells Fargo Bank, N.A.*[[57]](#footnote-57) involving the FCA’s statute of limitations. The relator brought a *qui tam* action against Wells Fargo Bank, alleging that they violated the FCA by submitting false statements and certifications to the Small Business Association (SBA).[[58]](#footnote-58) The defendant’s alleged violations occurred in 2010 and the complaint was not filed until 2017, outside of the six-year statute of limitations under § 3731(b)(1).[[59]](#footnote-59) The district court granted the defendant’s motion for summary judgment and the relator appealed to the Sixth Circuit. The court found that the relator’s claims were barred by the statute of limitations, and that the limitations period was not extended by the three-year statute of repose under § 3731(b)(2), because “if Wells Fargo repaid the loan guarantee to the SBA in April 2014, then the SBA either knew or reasonably should have known of the facts material to [the relator’s] FCA claims no later than April 30, 2014,” which fell outside of the three-year window.[[60]](#footnote-60)

# Jurisdictional Issues

## **Public Disclosure Bar**

2020 marked a busy year for the FCA’s public disclosure bar in cases across the country. In the Sixth Circuit case, *United States ex rel. Holloway v. Heartland Hospice, Inc.*,[[61]](#footnote-61) the relator brought *qui tam* action against Heartland Hospice, alleging that Heartland submitted false claims to Medicare and Medicaid for reimbursement. The district court granted the defendant’s motion to dismiss, concluding that the relator’s complaint was not precluded by the public disclosure bar, however, she failed to meet the requirements of Rule 9(b). On appeal, the Sixth Circuit affirmed the decision to grant the motion to dismiss on Rule 9(b) grounds, but also held that the relator’s claims were barred by the public disclosure provisions of the FCA. The Court noted the existence of previous FCA actions against the parent company of Heartland Hospice, HCR ManorCare. The court rejected the relator’s argument that “a *qui tam* relator is not the government’s agent and, therefore, that the case is not ‘public’ unless the government intervenes,”[[62]](#footnote-62) explaining that “the *qui tam* relator is, in all cases, the government’s agent under § 3730(e)(4)(A)(i)”[[63]](#footnote-63) and that the facts underlying the relator’s claims were publicly disclosed.[[64]](#footnote-64)

Also, in the Sixth Circuit, in *United States ex. rel. Maur v. Hage-Korban*,[[65]](#footnote-65)the relator brought a *qui tam* action alleging that the defendants engaged in a scheme to submit false claims to Medicare for unnecessary cardiac testing and procedures in violation of the FCA. The district court granted the defendants’ motion to dismiss, finding that “[a]lthough Maur includes several new Defendants, and describes different specific patient examples, there is not only ‘substantial identity’ between the fraudulent scheme he alleges in his Amended Complaint and the fraudulent scheme that the *Deming qui tam* action publicly exposed—it is the same fraudulent scheme.”[[66]](#footnote-66) The relator appealed to the Sixth Circuit. The circuit court affirmed, finding that the allegations in Maur’s complaint were “substantially the same”[[67]](#footnote-67) as those in the previous *qui tam* action and that Maur was not an “original source,” because he “did not communicate anything to the government prior to those public disclosures”[[68]](#footnote-68) including the prior *qui tam* actions, DOJ press releases regarding the defendants’ previous settlements, and the Integrity Agreement with the HHS-OIG that resulted from the previous case.[[69]](#footnote-69)

Finally, in *United States ex. rel. Banigan v. PharMerica, Inc.*,[[70]](#footnote-70)the First Circuit addressed the “original source” exception under the public disclosure bar. The relators brought a *qui tam* action against a pharmacy company and its subsidiaries alleging that the defendants engaged in a scheme to accept kickbacks from pharmaceutical companies in exchange for switching patients’ prescriptions to the company’s drug and submitted claims tainted by the kickbacks to the government in violation of the AKS. The district court granted the defendants’ motion to dismiss, finding that the relators’ claims were publicly disclosed in previous *qui tam* actions and that the relators were not an original sources of their allegations. The relators appealed and the circuit court reversed in part, finding that while the relators’ claims were publicly disclosed, the relators were original sources. The circuit court rejected the defendants’ argument that in order to be an “original source,” one would “have either participated in the fraud or observed it in operation”[[71]](#footnote-71) because in order to qualify as an original source, the relator must have “direct and independent knowledge of the information on which the allegations are based.”[[72]](#footnote-72) The court explained that that because one relator learned of the fraud through “conversations with… the architects and primary perpetrators of the fraudulent scheme” and “documents generated as part of the fraudulent scheme that he obtained through his own investigative efforts,”[[73]](#footnote-73) he had “direct knowledge” of the fraud and was an original source.[[74]](#footnote-74) The court acknowledged that Congress enacted the FCA “to preclude parasitic claims,” not to “reward as original sources only those who participated in the fraud.”[[75]](#footnote-75)

In response to various other district court orders dismissing *qui tam* actions on public disclosure grounds, TAFEF filed several of *amicus curiae* briefs on the proper interpretation of this provision in 2020. These briefs have been filed in the Ninth Circuit in *United States ex rel. Silbersher v. Valeant Pharm.*, in the Ninth Circuit in *United States ex rel. Integra Med Analytics v. Providence Health & Servs.*, in the Massachusetts Supreme Court in *Commonwealth of Massachusetts ex rel. Rosenberg v. JPMorgan Chase et al.*, and in the Sixth Circuit in *United States ex rel. Rahimi v. Rite Aid*.

## **First-to-File Bar**

In *In Re: Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)*,[[76]](#footnote-76)the relator-partnership brought a *qui tam* action against two pharmaceutical companies alleging off-label marketing in violation of the FCA. After the complaint was filed, an outside-relator replaced one of the relator’s in the partnership, and the district court granted the defendants’ motion to dismiss pursuant to the first-to-file rule, finding that the replacement of the partner resulted in a new partnership, and that the new partnership could not proceed with a case while the case filed by the original partnership was pending. The Third Circuit vacated and remanded, finding that the district court erred when determining what constitutes an intervention under the first-to-file bar.[[77]](#footnote-77) The circuit court concluded that the first-to-file provision barred 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.”[[78]](#footnote-78)

The Third Circuit also ruled that the first-to-file bar was not jurisdictional, noting that “if Congress had meant to make the first-to-file bar jurisdictional, it would have logically placed the bar in one of two other sections that mention jurisdiction.”[[79]](#footnote-79) In doing this, the Third Circuit sided with the D.C., First, and Second Circuit on this issue, while the Fourth, Fifth, Sixth, Ninth, and Tenth Circuit have held the opposite. However, the Third Circuit here relied on Supreme Court guidance in *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013), which came after most of these “contrary circuit cases,” and held that “unless Congress states clearly that a rule is jurisdictional, we will treat it as nonjurisdictional.”[[80]](#footnote-80)

# Procedure

1. **Rule 9(b)**

There were a few cases of note involving Rule 9(b) in 2020. In *United States ex rel. Benaissa v. Trinity Health*,[[81]](#footnote-81) the relator brought a *qui tam* action alleging that the hospital where he was formerly employed and its parent company and affiliates submitted claims tainted by violations of the Stark Law and Anti-Kickback Statute to the government in violation of the FCA. The relator identified five physicians whom the defendants allegedly paid in excess of the 90th percentile of compensation for their specialties, and that these physicians’ high salaries were not merited by their skills, credentials, or personal productivity, but that the defendants paid them for illegally referring patients for additional services at the hospital. He alleged that the claims submitted by those physicians were all fraudulent as a result of the AKS and Stark Law violations. The district court granted the defendants’ motion to dismiss, explaining that the relator failed to allege any representative examples of false claims actually submitted, and that his argument that because Medicare reimbursements made up a large portion of the defendants’ annual revenue, some claims must necessarily have been submitted to the government was too speculative. The Eighth Circuit agreed, finding that the relator’s allegations lacked sufficient “indicia of reliability”[[82]](#footnote-82) because the plaintiff was an anesthesiologist and not employed in the billing department, thus he had no firsthand knowledge of whether claims were actually submitted. The court found these allegations too conclusory to meet the requirements of Rule 9(b).

*United States ex rel. Integra Med Analytics v. Baylor Scott & White Health*[[83]](#footnote-83) involved a relator-entity that used publicly available claims data in part to develop its theory of liability. The relator alleged that the defendant, a hospital system, improperly upcoded claims that submitted to the government for treatment that was not given or not required in order to receive higher reimbursements. The relator alleged that it analyzed the claims data and determined that the defendant used the codes for the highest levels of care, which resulted in the highest possible reimbursements at a level far above the national average and which could not be explained by the patient population.

The district court granted the defendant’s motion to dismiss, finding that the allegations were conclusory and did not meet the requirements of Rule 9(b). The Fifth Circuit agreed. The court explained that the facts showed that hospital systems around the country began using the same codes as the defendant shortly after the defendant did. The court observed that “a legal and ‘obvious alternative explanation’ for the statistical data presented by [the relator] is that [the defendant] was simply ahead of the healthcare industry at implementing” new Medicare reimbursement guidelines. The court hedged a bit, noting that the “conclusion [did] not exclude statistical data from being used to meet the pleading requirements of Federal Rule of Civil Procedure 8(a) and, when paired with particular details, Rule 9(b). Our conclusion merely means that statistical data cannot meet those pleading requirements if, among other possible issues, it is also consistent with a legal and obvious alternative explanation.”[[84]](#footnote-84)

There were a number of cases decided at the district court level that involved group pleading and Rule 9(b) and it is important to keep in mind how to properly plead claims involving multiple defendants. In *United States v. Hart*,[[85]](#footnote-85) the court denied the defendants’ motion to dismiss, finding that the relator sufficiently alleged who engaged in the fraud scheme by identifying the corporation and individuals within the company who engaged in the fraudulent conduct, noting that corporations were “persons” for the purposes of the FCA.[[86]](#footnote-86) In *United States ex rel. Sirls v. Kindred Healthcare, Inc*.,[[87]](#footnote-87) the relator alleged fraud against nursing home operators and their parent company. The court found that the relator sufficiently alleged that the parent and subsidiaries were alter egos such that the parent could be held liable under the FCA. The court noted that “the relator’s allegations of undercapitalization and siphoning of funds are sufficient to allege alter ego liability between defendants and their nursing facilities. In this case, piercing of the corporate veil is appropriate where ‘the parent so dominated the subsidiary that it had no separate existence.’ Moreover, as the Third Circuit has held, the corporate veil can be pierced where ‘the Medicare statute can be circumvented [the defendant] is not personally liable.’ In this case, failing to hold defendants liable for facility conduct would circumvent the statute by preventing full recovery because the nursing facilities are grossly undercapitalized and entirely dependent on defendants.” (internal citations omitted).[[88]](#footnote-88) Finally, the analysis changes when dealing with multiple unrelated entities. In *United States ex rel. Hunt v. Cochise Consultancy, Inc*.,[[89]](#footnote-89) the court found that the relator sufficiently alleged his claims against each of the unrelated entities by explaining the role of each in the fraud. The court further explained that the relator’s use of “Defendants” was not vague or confusing, noting that there are multiple places in the complaint in which the relator specifically identified which defendant was alleged to have engaged in which conduct, and that in the instances in which referenced “the Defendants,” it was clear that those allegations referred to both parties.[[90]](#footnote-90)

## **Statistical Sampling**

In 2020, the Eastern District of California issued an opinion regarding the use of statistical sampling to determine liability in False Claims Act cases. In *United States ex rel. Schmuckley v. Rite Aid Corporation*,[[91]](#footnote-91) the relator brought *qui tam* action against Rite Aid, in which the State of California intervened, alleging that it violated the FCA and the California False Claims Act by submitting false claims to Medi-Cal. When deciding whether to intervene, the government “deployed statistical sampling techniques to ‘determine whether intervention in this *qui tam* matter was worthy and meritorious.’”[[92]](#footnote-92) The plaintiffs also intended to continue the use of statistical sampling of Medi-Cal claims to prove liability after government intervention.[[93]](#footnote-93) The court ruled that “plaintiffs’ proposed use of statistical sampling is allowable in their effort to prove the falsity element of plaintiffs’ FCA and CFCA causes of action.”[[94]](#footnote-94)

Next, the court addressed Rite Aid’s motion to exclude the plaintiff’s statistical sampling methodology because the methodology proposed “fails to use the federally endorsed methodology to assess patients’ claim histories: cluster sampling.”[[95]](#footnote-95) Rite Aid argued that this would “‘likely exclude relevant information, lead to erroneous conclusions,’ and ultimately ‘inflate an estimate of allegedly false claims in the universe.’”[[96]](#footnote-96)

The court denied Rite Aid’s motion to exclude the plaintiff’s statistical sampling methodology, relying on guidance from the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[[97]](#footnote-97)the standard by which courts can determine the validity of scientific methodologies.[[98]](#footnote-98) First, addressing the question of whether the sampling methodology had been tested, the district court determined based on expert testimony that it was “sufficiently reliable at [that] stage in the litigation,”[[99]](#footnote-99) and noted that if doubts arose, Rite Aid would have the ability to “vigorously expose those flaws through cross-examination.”[[100]](#footnote-100) Second, addressing the potential error rate of the methodology, the court concluded that the “plaintiffs’ methodology [was] valid because measurement error [would] largely be calculated as data unfold[ed] and plaintiffs cross-check[ed] sampling data against the individual medical records associated with each claim.”[[101]](#footnote-101) Finally, as for the other *Daubert* factors, such as acceptance in the scientific community, the court found these “easily satisfied” as “stratified random sampling and total survey design are well-established, well-supported testing methods.”[[102]](#footnote-102)

# Litigation Developments

## **Government Dismissal Authority**

Section 3730(c)(2)(A) of the FCA provides that:

The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

There has been circuit split regarding the implications of this provision, namely whether the government has “unfettered discretion” to dismiss a *qui tam* action (the *Swift* standard)[[103]](#footnote-103), or whether more is required, specifically whether the government can demonstrate a valid government purpose that is rationally related to dismissal (the *Sequoia Orange* standard).[[104]](#footnote-104)

One of significant 2020 decisions regarding this authority was *United States ex. rel. Thrower v. Academy Mortgage.*[[105]](#footnote-105)In *Thrower*,the government moved to dismiss the action, and the district court denied the motion to dismiss, following the *Sequoia Orange* standard, finding that the government failed to demonstrate a valid governmental purpose related to the dismissal and failed to fully investigate the allegations of the complaint. The government appealed under the collateral order doctrine. The Ninth Circuit found that the interests implicated by the district court’s denial of the government’s motion to dismiss were not sufficient to justify an appeal under the collateral order doctrine, particularly where the government declined to intervene. The court noted that it could not “escape the conclusion that the Government’s true interest in dismissing this case [was] what it [had] repeatedly maintained throughout this litigation: avoiding burdensome discovery expenses in a case the Government does not think will ultimately be worth the cost.”[[106]](#footnote-106) The court explained that “it would not be appropriate for us to expand the collateral order doctrine to accommodate these atypical cases.”[[107]](#footnote-107)

In *United States ex. Rel. CIMZNHCA v. UCB, Inc.*,[[108]](#footnote-108) the Seventh Circuit took a different approach. In weighing the whether the standard for reviewing the government’s dismissal authority should be the *Sequoia Orange* or *Swift* standard, the court opined that “the correct answer lies much nearer to [*Swift*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003124963&pubNum=0000506&originatingDoc=I550b0110e0ad11eabaabff88df14112a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)).”[[109]](#footnote-109) The court decided to treat the government’s motion to dismiss as a motion to intervene, which it maintained the government was required to do prior to dismissal, then reversed the decision of the district court denying the defendant’s motion to dismiss, explaining that once the government intervenes, Rule 41(a)(1)(A)(i), which “provides that ‘the plaintiff may dismiss an action’ by serving a notice of dismissal any time ‘before the opposing party serves either an answer or a motion for summary judgment,’” applies. The court explained that in this case, the defendant had not answered and so the government had an unfettered right under Rule 41 to dismiss the case. However, the court noted that in the event that the defendant had answered and the case was further into the litigation cycle, the relator may be entitled to a hearing to see “what terms of dismissal are ‘proper.”

## **Litigation Funding**

One emerging trend TAFEF is monitoring is third-party litigation funding and the ways the courts interpret the relationship between relators and these outside parties. Specifically, one of the questions that courts have addressed, and will continue to address, is whether these outside parties affect the interests of the relator after they enter a funding agreement.

In *United States ex rel. Ruckh v. Salus Rehabilitation*,[[110]](#footnote-110) the relator brought a *qui ta*m action against the operators of skilled nursing facilities and affiliated entities, alleging that they defrauded Medicare and Medicaid by failing to maintain plans of care and misrepresenting services through “upcoding” and “ramping.”[[111]](#footnote-111)

After the district court overturned a jury verdict in favor of the relator, she appealed to the Eleventh Circuit. During the pendency of the appeal, the relator entered into an agreement with a third party to partially fund the litigation in exchange for 4% of whatever relator’s share she may receive at the conclusion of the case. On appeal, the defendant argued that the relator did not have the standing to serve as a *qui tam* relator because “she no longer belongs to the class of *qui tam* plaintiffs authorized to bring suit under the FCA and, therefore, the appeal must be dismissed.”[[112]](#footnote-112) The circuit court disagreed, noting that the agreement was explicit that the third party had “no power to influence or control this litigation,”[[113]](#footnote-113) and that the relator had “given only a small interest—less than 4% of her share of the potential recovery in this case—to [the third party] in exchange for immediate liquidity,”[[114]](#footnote-114) which was not significant enough to show that she is no longer the “government’s assignee.”[[115]](#footnote-115) The court observed that the FCA did not prohibit the relator’s entry into a third party litigation funding agreement.

1. **Alternate Remedies**

There were no major decisions handed down involving alternate remedies in 2020, but there are at least two cases on the horizon that you should keep your eye on in 2021. The first, *United States ex rel. Guardiola v. Renown Health* (Case No. 20-15831) involves relator’s claim for an alternate remedy of funds recovered by Medicare’s Recovery Audit Contractors (RAC) during audits that took place after the relator brought her claims. The government argued, and the district court held, that funds recovered during RAC audits were not alternate remedies because the audits are not “fraud proceedings.” The case is on appeal in the Ninth Circuit.

In *United States ex rel. Kennedy v. Novo A/S* (Case No. 20-7062), the relator claimed that she was entitled to an alternate remedy after the government intervened in her case and settled it, then proceeded to pursue a Food, Drug, and Cosmetic Act case against the defendants to recover additional funds for the same conduct alleged by the relator. The government argued, and the district court held, that an alternate remedy was never available to a relator if the government has intervened in her case. The case is on appeal in the District of Columbia Circuit.

1. Edited by Jacklyn DeMar. [↑](#footnote-ref-1)
2. https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [↑](#footnote-ref-2)
3. *Id*. “Health Care Fraud” [↑](#footnote-ref-3)
4. *Id*. “Procurement Fraud” [↑](#footnote-ref-4)
5. *Id*. “Recoveries in Whistleblower Suits” [↑](#footnote-ref-5)
6. https://www.natlawreview.com/article/first-reported-fca-cares-act-settlement-announced?link\_id=6&can\_id=d0194dbcaba9cd8b48be0d76bc0fe6eb&source=email-false-claims-act-recovers-22-billion-in-fy2020&email\_referrer=email\_1051446&email\_subject=first-reported-fca-cares-act-settlement-announced [↑](#footnote-ref-6)
7. https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act [↑](#footnote-ref-7)
8. *Id*. [↑](#footnote-ref-8)
9. https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/ [↑](#footnote-ref-9)
10. 938 F.3d 1278 (11th Cir. Sep. 9, 2020). [↑](#footnote-ref-10)
11. *Id*. at 1296-1297. [↑](#footnote-ref-11)
12. 952 F.3d 89 (3rd Cir. Sep. 10, 2020). [↑](#footnote-ref-12)
13. 953 F.3d 1108 (9th Cir. Mar. 23, 2020). [↑](#footnote-ref-13)
14. *Id.* at 91. [↑](#footnote-ref-14)
15. *Id*. at 95. [↑](#footnote-ref-15)
16. *Id*. at 98. [↑](#footnote-ref-16)
17. *Id*. at 100. [↑](#footnote-ref-17)
18. *Id*. at 101. [↑](#footnote-ref-18)
19. 953 F.3d 1108 (9th Cir. Mar. 23, 2020). [↑](#footnote-ref-19)
20. *Id.* at 1111. [↑](#footnote-ref-20)
21. *Id*. at 1113. [↑](#footnote-ref-21)
22. *Id*. at 1119. [↑](#footnote-ref-22)
23. 963 F.3d 733 (8th Cir. June 25, 2020). [↑](#footnote-ref-23)
24. 957 F.3d 743 (7th Cir. April 29, 2020). [↑](#footnote-ref-24)
25. 981 F.3d 920 (11th Cir. Nov. 24, 2020). [↑](#footnote-ref-25)
26. *Id*. at 740. [↑](#footnote-ref-26)
27. 957 F.3d 743 (7th Cir. April 29, 2020). [↑](#footnote-ref-27)
28. *Id*. at 748. [↑](#footnote-ref-28)
29. *Id*. at 747. [↑](#footnote-ref-29)
30. *Id*. at 748. [↑](#footnote-ref-30)
31. *Id*. at 751. [↑](#footnote-ref-31)
32. 981 F.3d 920 (11th Cir. Nov. 24, 2020). [↑](#footnote-ref-32)
33. *Id*. at 924. [↑](#footnote-ref-33)
34. *Id*. at 922. [↑](#footnote-ref-34)
35. https://www.justice.gov/opa/pr/novartis-pays-over-642-million-settle-allegations-improper-payments-patients-and-physicians [↑](#footnote-ref-35)
36. *Id*. [↑](#footnote-ref-36)
37. 136 S.Ct. 1989 (2016). [↑](#footnote-ref-37)
38. *Id*. at 1993. [↑](#footnote-ref-38)
39. *Id*. at 2003. [↑](#footnote-ref-39)
40. *Id*. at 1995. [↑](#footnote-ref-40)
41. 963 F.3d 1089 (11th Cir. June 25, 2020). [↑](#footnote-ref-41)
42. 2021 WL 137739 (11th Cir. Jan. 15, 2020). [↑](#footnote-ref-42)
43. 963 F.3dat 1105. [↑](#footnote-ref-43)
44. *Id*. at 1106. [↑](#footnote-ref-44)
45. *Id*. at 1109. [↑](#footnote-ref-45)
46. *Id*. at 1109. [↑](#footnote-ref-46)
47. 2021 WL 137739 (11th Cir. Jan. 15, 2020). [↑](#footnote-ref-47)
48. *Id*. at 1. [↑](#footnote-ref-48)
49. *Id*. at 3. [↑](#footnote-ref-49)
50. *Id*. at 9. [↑](#footnote-ref-50)
51. 982 F.3d 51(2nd Cir. Dec. 3, 2020). [↑](#footnote-ref-51)
52. *Id*. at 56. [↑](#footnote-ref-52)
53. *Id*. at 56-57. [↑](#footnote-ref-53)
54. *Id*. at 62. [↑](#footnote-ref-54)
55. *Id*. at 64. [↑](#footnote-ref-55)
56. *Id*. at 65. [↑](#footnote-ref-56)
57. 800 Fed.Appx. 533 (6th Cir. Apr. 6, 2020). [↑](#footnote-ref-57)
58. *Id*. at 534. [↑](#footnote-ref-58)
59. *Id*. [↑](#footnote-ref-59)
60. *Id*. at 534-535. [↑](#footnote-ref-60)
61. 960 F.3d 836 (6th Cir. June 3, 2020). [↑](#footnote-ref-61)
62. *Id*. at 845. [↑](#footnote-ref-62)
63. *Id*. [↑](#footnote-ref-63)
64. *Id*. [↑](#footnote-ref-64)
65. 981 F.3d 516 (6th Cir. Dec. 1, 2020). [↑](#footnote-ref-65)
66. *Id.* at 521. [↑](#footnote-ref-66)
67. *Id*. at 520. [↑](#footnote-ref-67)
68. *Id.* at 527. [↑](#footnote-ref-68)
69. *Id*. [↑](#footnote-ref-69)
70. 950 F.3d 134 (1st Cir. Feb. 19, 2020). [↑](#footnote-ref-70)
71. *Id*. at 145. [↑](#footnote-ref-71)
72. *Id*. at 146. [↑](#footnote-ref-72)
73. *Id*. at 146. [↑](#footnote-ref-73)
74. *Id*. at 147. [↑](#footnote-ref-74)
75. *Id*. at 146. [↑](#footnote-ref-75)
76. 974 F.3d 228 (3rd Cir. June 25, 2020). [↑](#footnote-ref-76)
77. *Id*. at 231. [↑](#footnote-ref-77)
78. *Id*. at 235. [↑](#footnote-ref-78)
79. *Id.* at 232. [↑](#footnote-ref-79)
80. *Id*. at 232. [↑](#footnote-ref-80)
81. 963 F.3d 733 (8th Cir. June 25, 2020). [↑](#footnote-ref-81)
82. *Id*. at 740. [↑](#footnote-ref-82)
83. 816 Fed.Appx. 892 (5th Cir. May 28, 2020). [↑](#footnote-ref-83)
84. *Id*. at 898. [↑](#footnote-ref-84)
85. 2020 WL 6051599 (S.D. Iowa April 1, 2020). [↑](#footnote-ref-85)
86. *Id*. at \*6. [↑](#footnote-ref-86)
87. 469 F.Supp.3d 431 (E.D. Pa. June 29, 2020). [↑](#footnote-ref-87)
88. *Id*. at 455. [↑](#footnote-ref-88)
89. 2020 WL 5408212 (N.D. Ala. September 9, 2020). [↑](#footnote-ref-89)
90. *Id*. at \*4. [↑](#footnote-ref-90)
91. 2020 WL 3970201(E.D. Cal. July 14, 2020). [↑](#footnote-ref-91)
92. *Id*. at \*2. [↑](#footnote-ref-92)
93. *Id*. at \*10. [↑](#footnote-ref-93)
94. *Id*. [↑](#footnote-ref-94)
95. *Id*. at \*11. [↑](#footnote-ref-95)
96. *Id.* [↑](#footnote-ref-96)
97. 113 S.Ct. 2786 (S. Ct. June 28, 1993). [↑](#footnote-ref-97)
98. https://www.law.cornell.edu/wex/daubert\_standard [↑](#footnote-ref-98)
99. *Rite Aid* at 11. [↑](#footnote-ref-99)
100. *Id*. at 12. [↑](#footnote-ref-100)
101. *Id*. [↑](#footnote-ref-101)
102. *Id*. [↑](#footnote-ref-102)
103. *Swift v. United States,* 318 F.3d 250 (D.C. Cir. Feb. 11, 2003). [↑](#footnote-ref-103)
104. *United States ex rel. Sequoia Orange v. Baird-Neece Packing Corp.,* 151 F.3d 1139 (9th Cir. 1997). [↑](#footnote-ref-104)
105. 968 F.3d 996 (9th Cir. Aug. 4, 2020). [↑](#footnote-ref-105)
106. *Id*. at 1008. [↑](#footnote-ref-106)
107. *Id*. at 1009. [↑](#footnote-ref-107)
108. 970 F.3d 835 (7th Cir. Aug. 17, 2020). [↑](#footnote-ref-108)
109. *Id*. at 840. [↑](#footnote-ref-109)
110. 963 F.3d 1089 (11th Cir. June 25, 2020). [↑](#footnote-ref-110)
111. *Id*. at 1097. [↑](#footnote-ref-111)
112. *Id*. at 1101. [↑](#footnote-ref-112)
113. [↑](#footnote-ref-113)
114. *Id*. at 1101. [↑](#footnote-ref-114)
115. *Id*. [↑](#footnote-ref-115)