FRAUD!

The Growth of Fraud Cases and Corporate Litigation

VORYS
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Presenters

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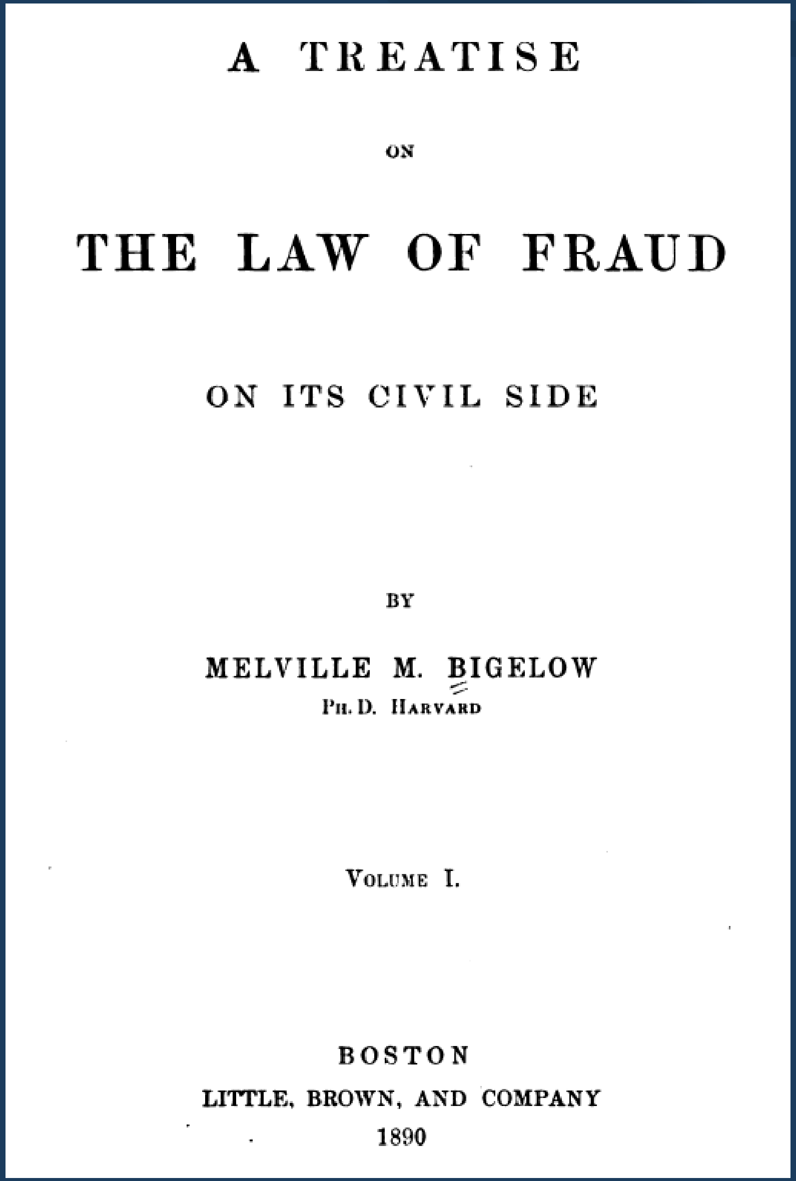


A TREATISE

ON

THE LAW OF FRAUD

ON ITS CIVIL SIDE

BY

MELVILLE M. BIGELOW

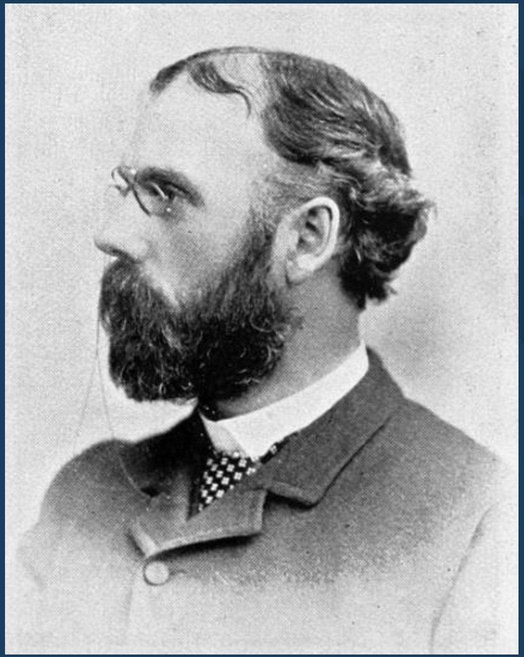
PH. D. HARVARD

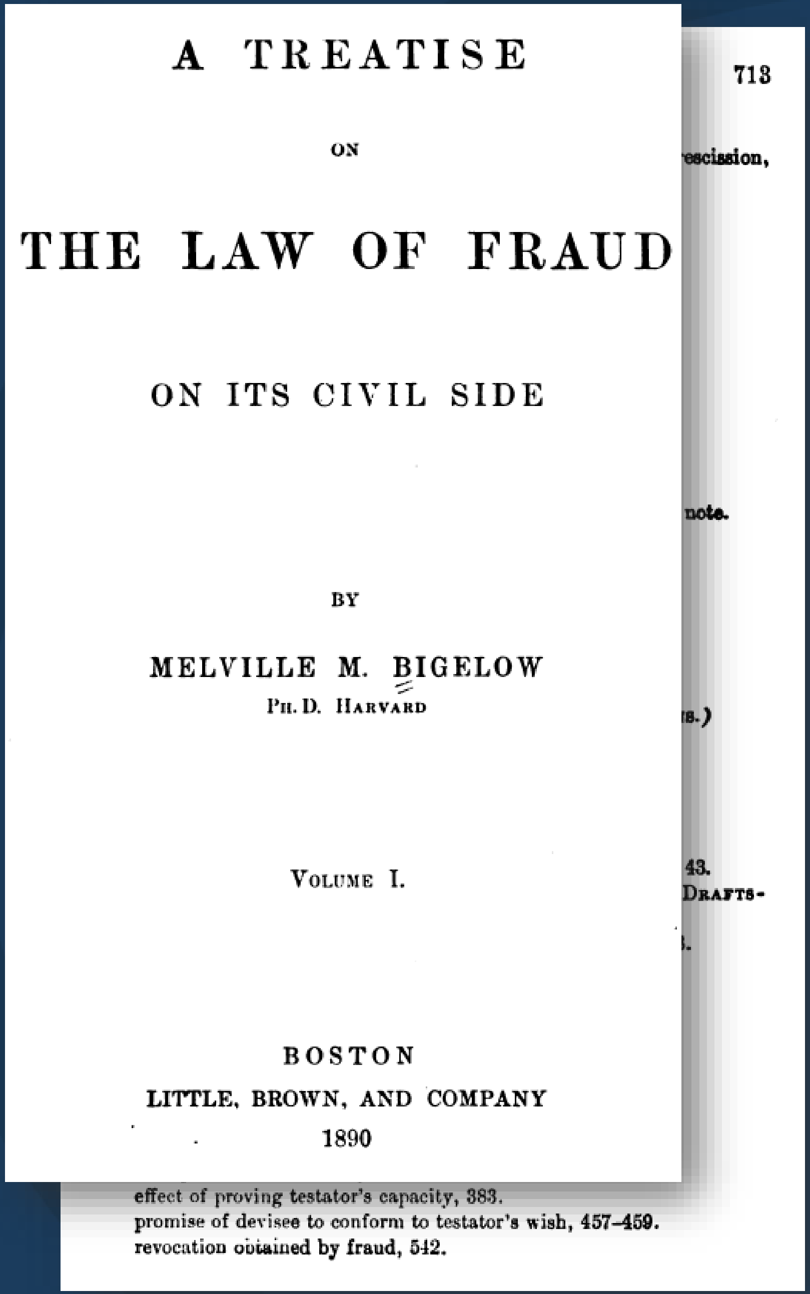
VOLUME I.

BOSTON

LITTLE, BROWN, AND COMPANY

1890

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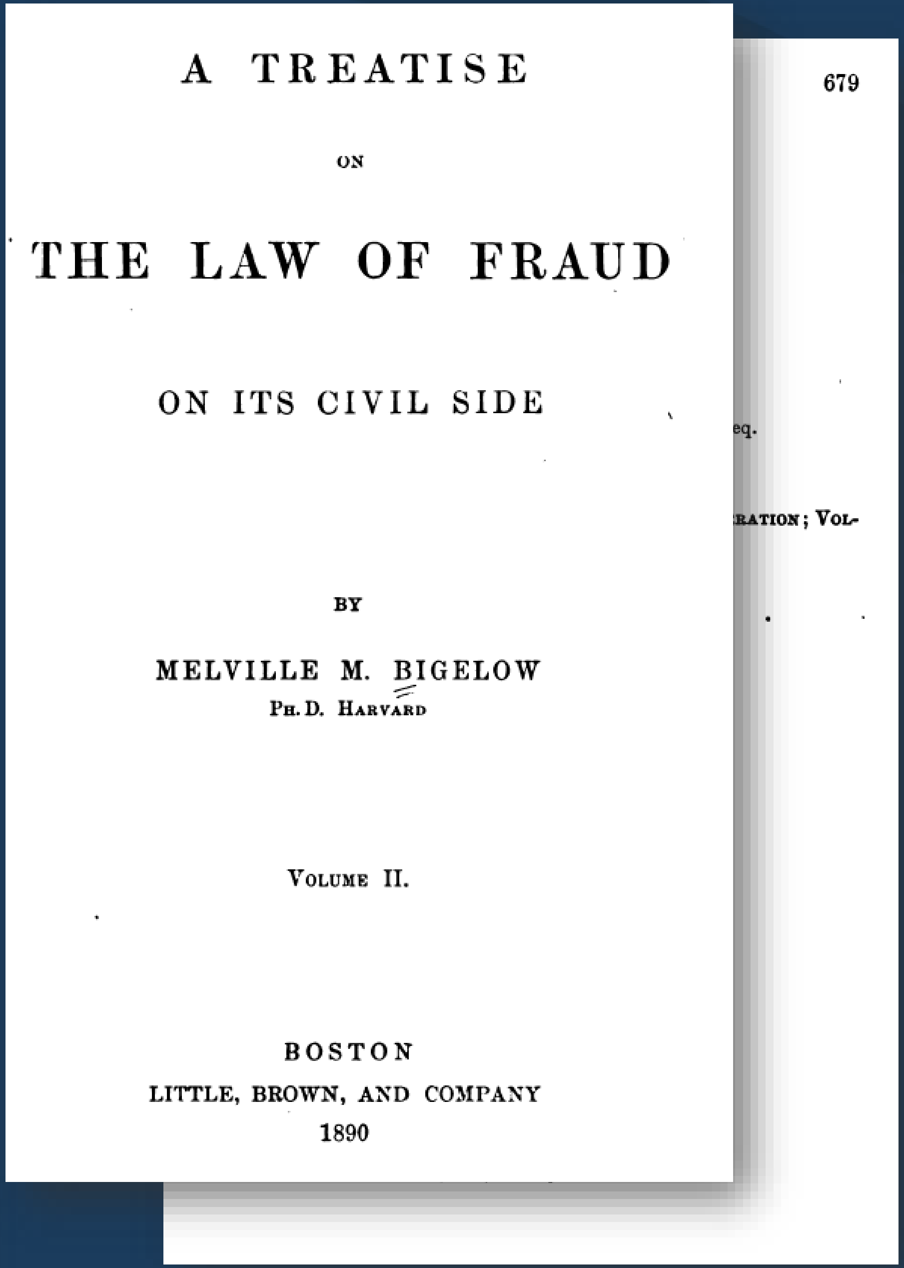
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Two Volumes

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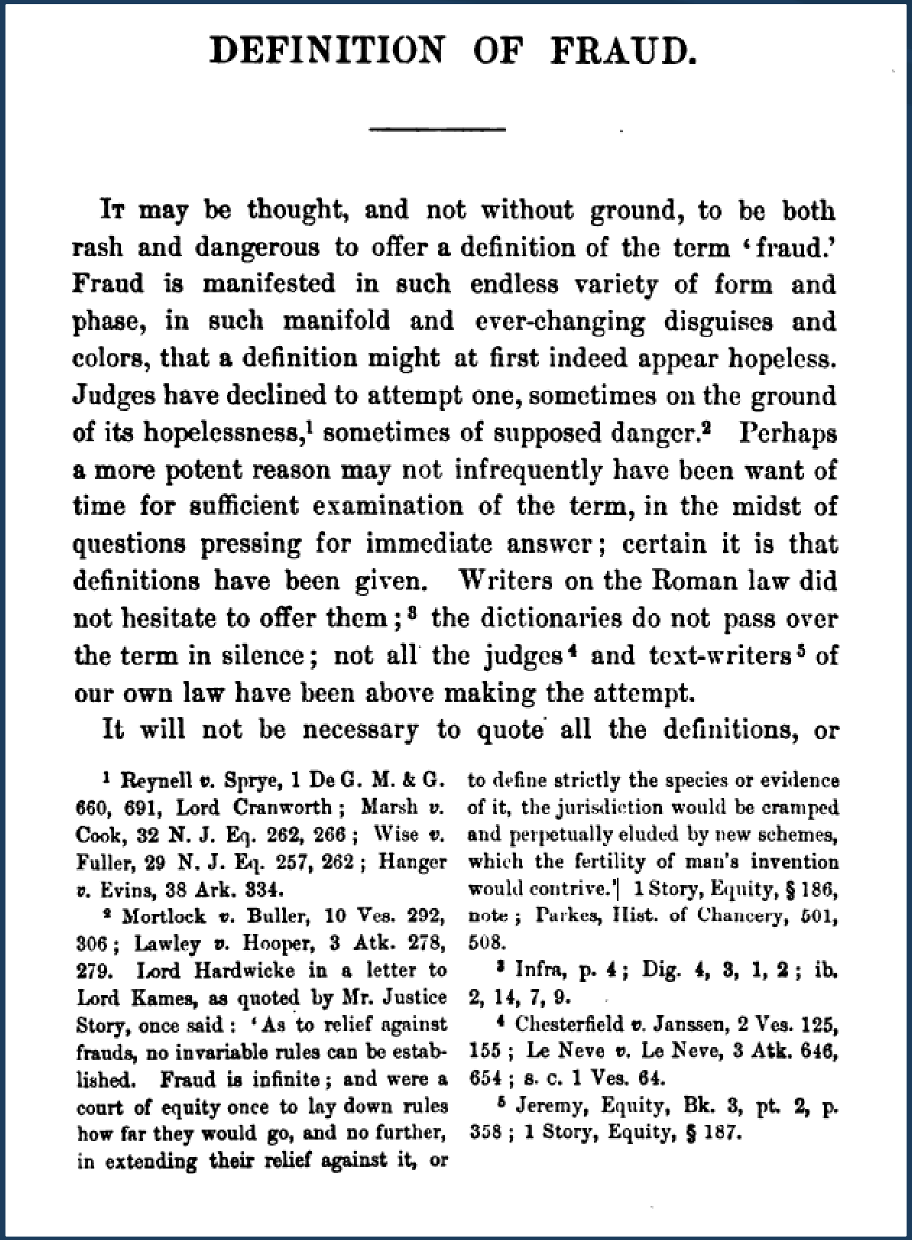

DEFINITION OF FRAUD.

It may be thought, and not without ground, to be both rash and dangerous to offer a definition of the term 'fraud.' Fraud is manifested in such endless variety of form and phase, in such manifold and ever-changing disguises and colors, that a definition might at first indeed appear hopeless. Judges have declined to attempt one, sometimes on the ground of its hopelessness,[1] sometimes of supposed danger.[2] Perhaps a more potent reason may not infrequently have been want of time for sufficient examination of the term, in the midst of questions pressing for immediate answer; certain it is that definitions have been given. Writers on the Roman law did not hesitate to offer them;[3] the dictionaries do not pass over the term in silence; not all the judges[4] and text-writers[5] of our own law have been above making the attempt.

It will not be necessary to quote all the definitions, or

[1] Reynell v. Sprye, 1 De G. M. & G. 660, 691, Lord Cranworth; Marsh v. Cook, 32 N. J. Eq. 262, 266; Wise v. Fuller, 29 N. J. Eq. 257, 262; Hanger v. Evins, 38 Ark. 334.

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[5] Jeremy, Equity, Bk. 3, pt. 2, p. 358; 1 Story, Equity, § 187.

What is fraud?

- Should we even try to define it?
- Could be dangerous.
- Let's not be rash.
- Feels hopeless.

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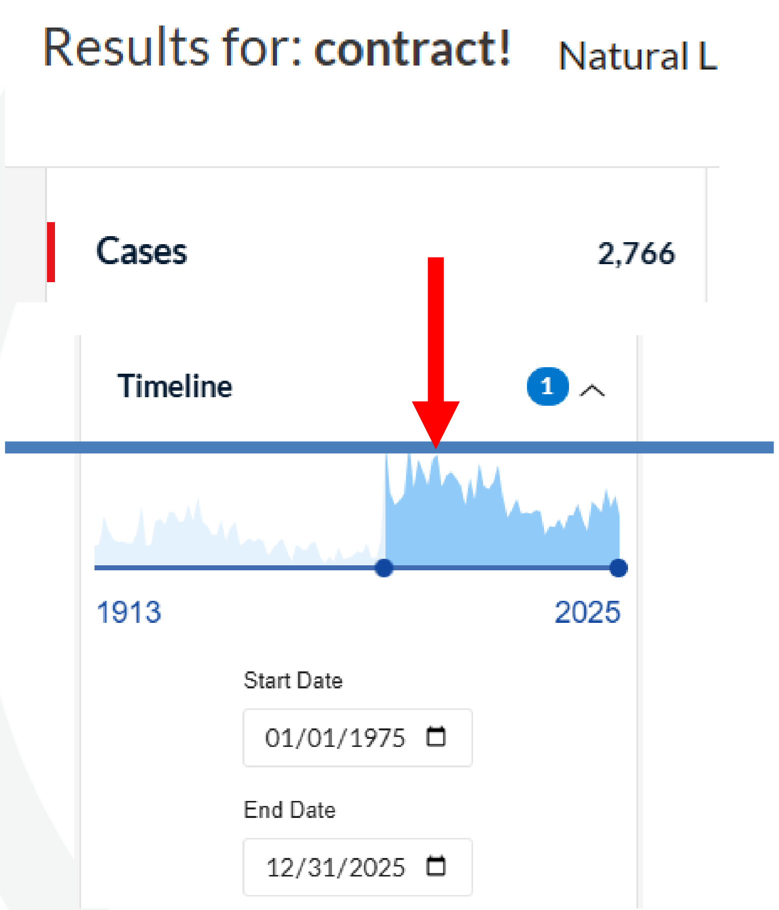
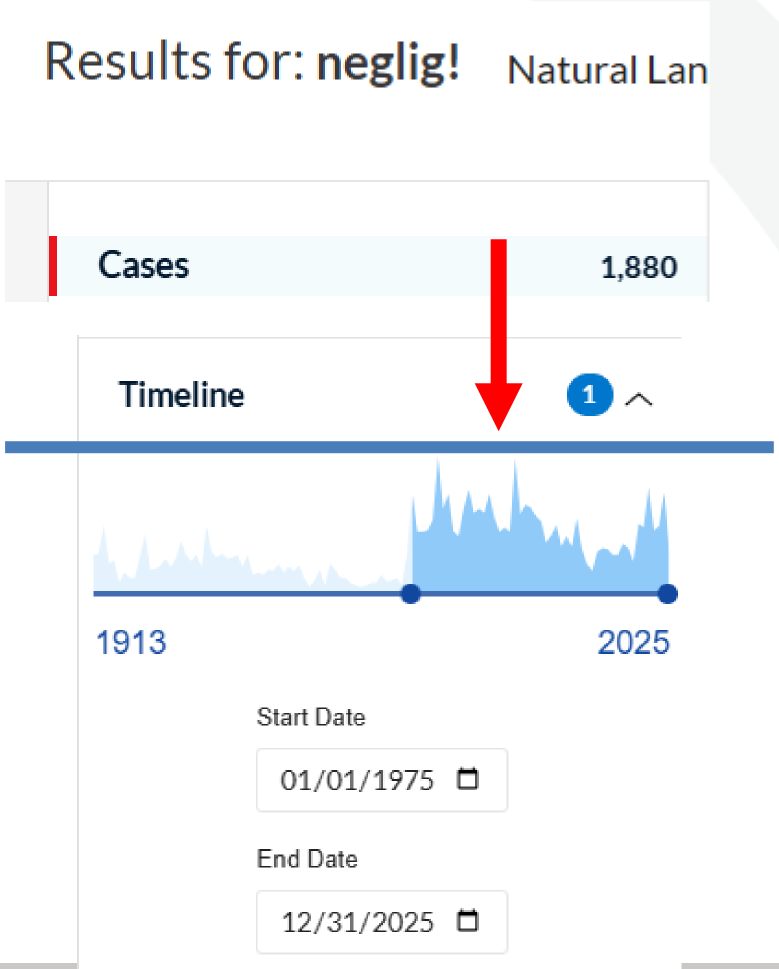
Explosion of Fraud Cases

- It feels like fraud is a bigger part of litigation now than ever.

The fraud explosion (Ohio First District Appeals)

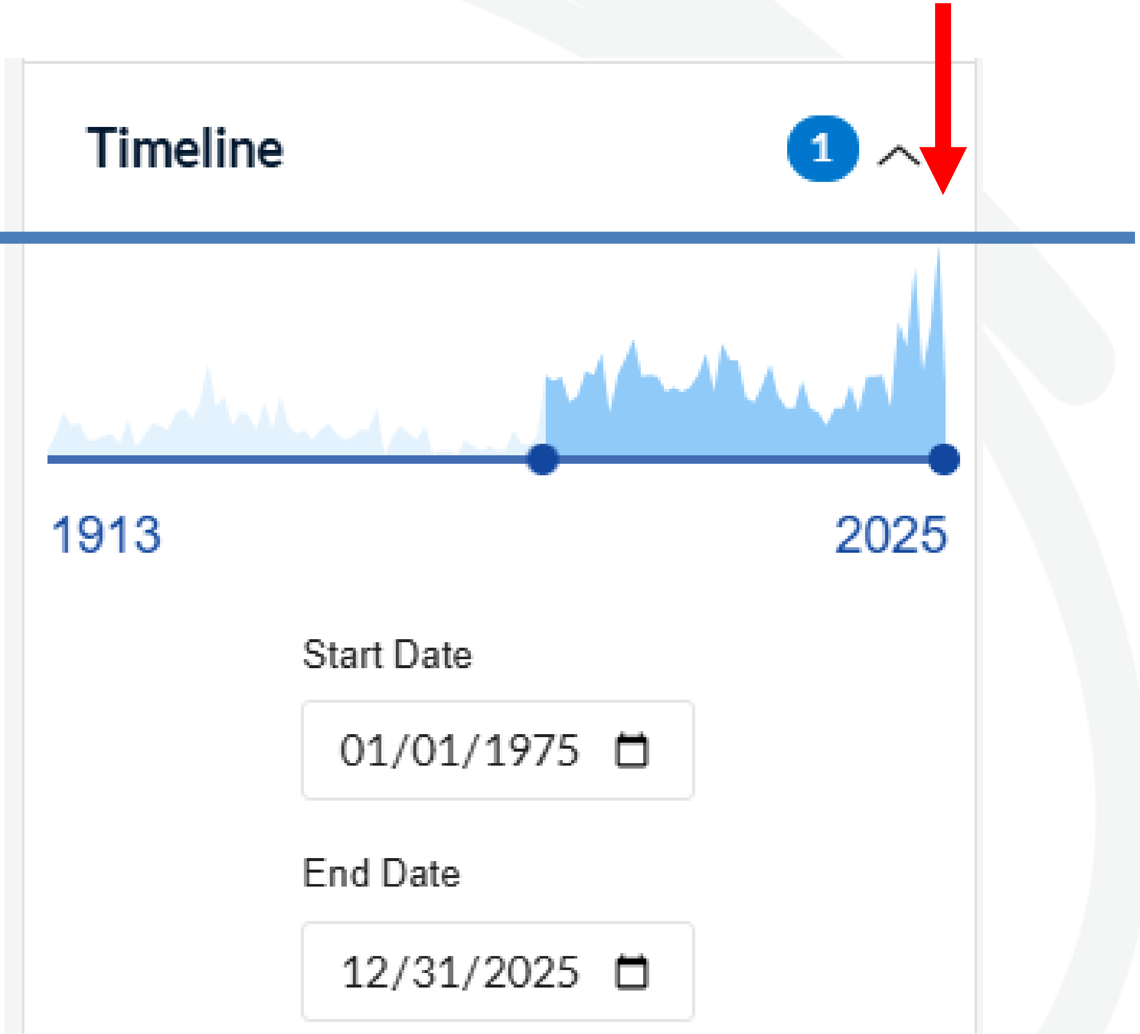




The fraud explosion (Ohio First District Appeals)

Results for: **fraud!** Natural Lang

Cases	1,139



Why the explosion?

- Contracts written to make it hard to sue on contact claims (fraud can get around it)
- Tort reform limits negligence claims (fraud permits punitive damages)
- Creation of statutes giving rise to new types of fraud claims (False Claims Act, Deceptive Trade Practices Act, etc.)

Why the explosion?

- Evolution of class action mechanism allows people to recover for tiny fraud
- Technological innovations that make it easier to commit fraud of strangers
- Technological innovations that make it easier to detect fraud

Breach of Written Contract SoL in Ohio

- Was 15 years
- 2012: shortened to 8 years
- 2021: shortened to 6 years

Tort ref

IN THE GENERAL ASSEMBLY

STATE OF ______________

AMERICAN MEDICAL ASSOCIATION

IN THE GENERAL ASSEMBLY STATE OF ______________

An Act

To provide for the regulation of expert witnesses in medical injury actions

Be it enacted by the People of the State of _____, represented in the General Assembly.

Section 1. Expert Witness Qualifications. In any action for injury or death against a physician, as defined in the (relevant state negligence statute), whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may qualify as an expert witness on the issue of the appropriate medical standard of care if the witness:

(a) is licensed in this state, or some other state, as a doctor of medicine or osteopathy;

(b) is trained and experienced in the same discipline or school of practice as the defendant or has specialty expertise in the disease process or procedure performed

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...e General Assembly:

...osteopathy or hospital

..., employee or agent

...al evaluation or advice or

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...for injury or death against any health care

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...overage for volunteer physicians (PDF)

- Early disclosure and compensation programs (PDF)
- Standard of Care Protection Act (PDF)

The fraud lobby

Home » Media » Press Releases

ROSEN J
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MAY 3, 2024

WASHINGTON, DC ... gislation to help reduce waste, ... *Oversight Act* would create a Gov ... audit federal funding from pand ... ministration loans, the *Bipartisa* ... tion to stop any waste, fraud, a

U.S. Rep. Steil: Introduces bipartisan resolution to recognize the impact of scams on Americans and prevent future scams

May 9, 2024

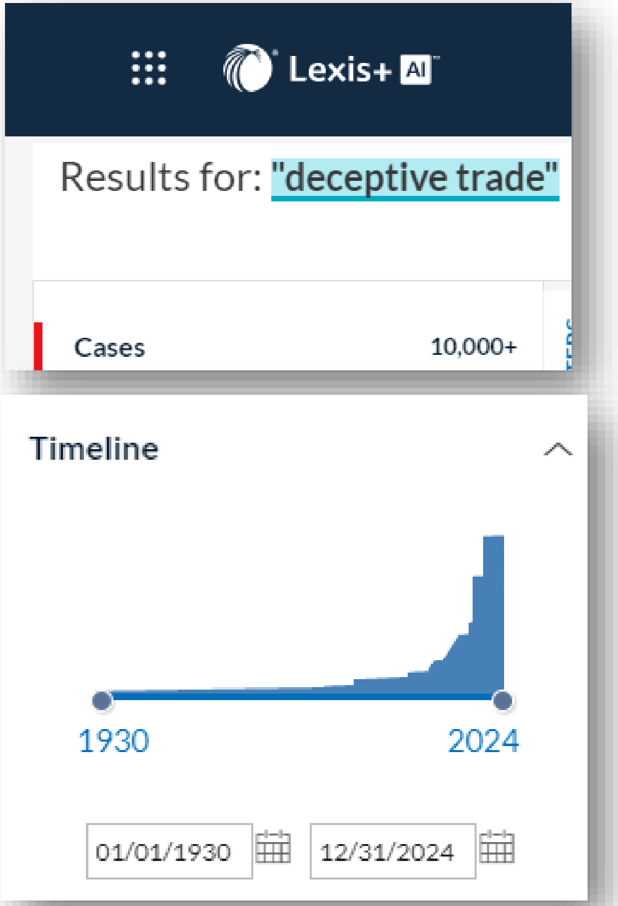
Home » Press Releases » **U.S. Rep. Steil: Introduces bipartisan resolution to recognize the impact of scams on Americans and prevent future scams**

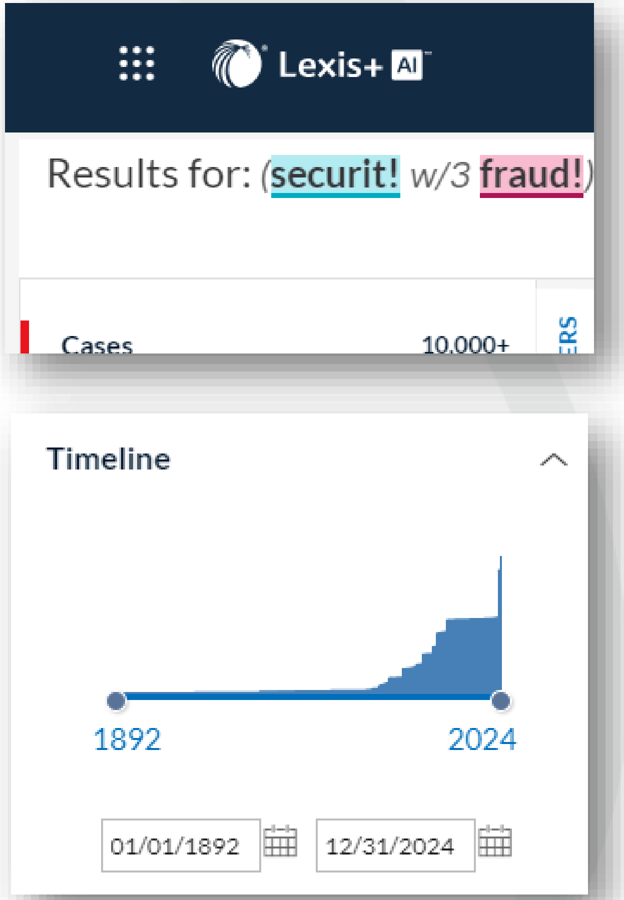
WASHINGTON (May 9, 2024) - Congressman Bryan Steil (WI-01) and Representatives Josh Harder (CA-09), Daniel Meuser (PA-09), Josh Gottheimer (NJ-05), Derrick Van Orden (WI-03), and Brittany Pettersen (CO-07) this week introduced a bipartisan resolution to designate May 9th as National Scam Survivor Day.

"It is estimated that American citizens lost more than $10 billion to sc...

"TIA applauds Congresswoman ... **the Transportation Intermediaries Association (TIA)**. Combating fraud through effective legislation is imperative for the protection of brokers, motor carriers, shippers, consumers, and the integrity of the economic system. Fraudulent activities not only cause significant financial losses but also undermine public trust in institutions and markets. By implementing strong anti-fraud laws, governments can ensure a more stable and

The fraud explosion (Federal Courts)





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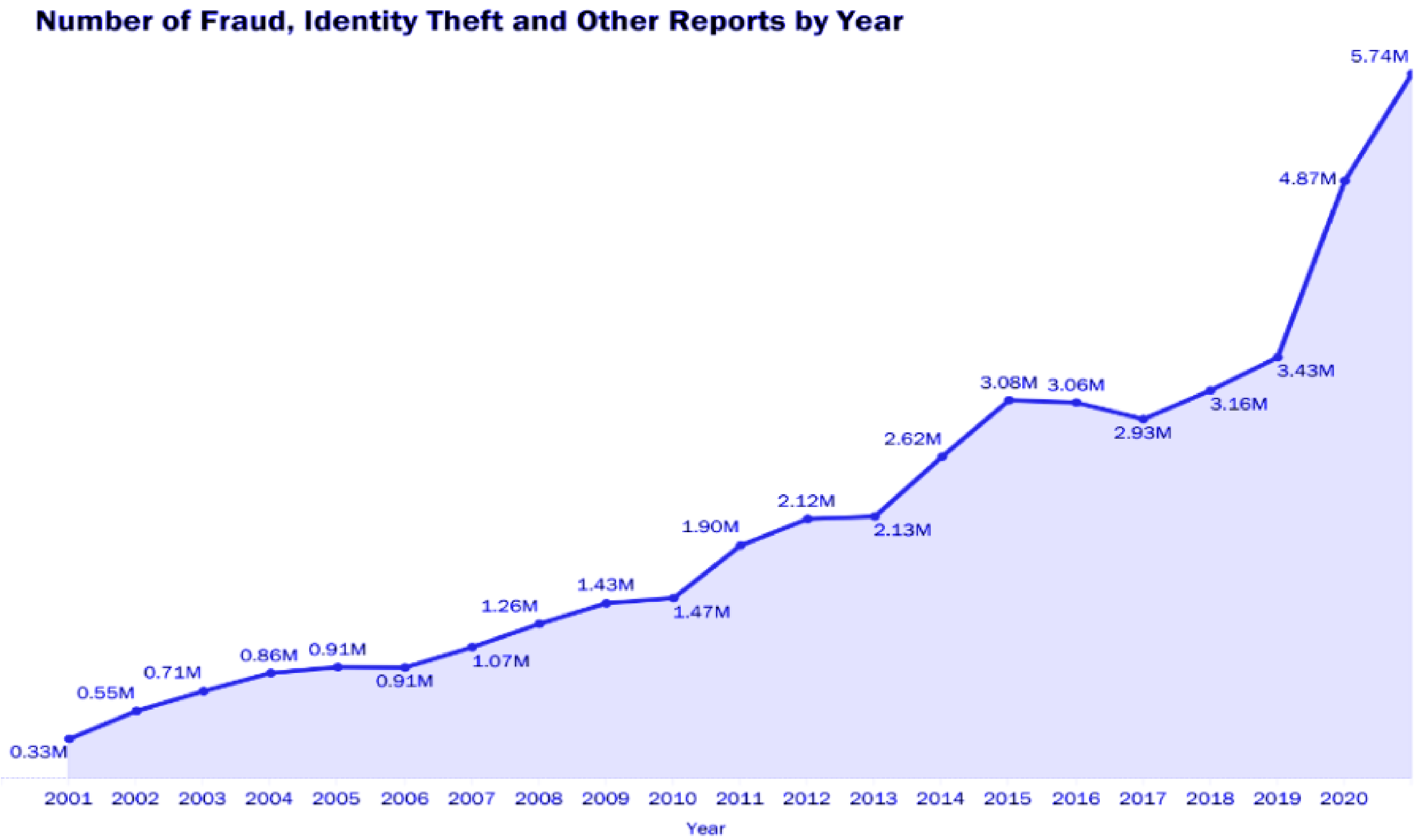
Financial Fraud and Identify Theft



Source **–** *FTC*

Investment Fraud

Year	Number of complaints	Total money lost
2018	3,693	$253M
2019	3,999	$222.2M
2020	8,788	$336.5M
2021	20,561	$1.46B
2022	30,529	$3.31B
2023	39,570	$4.57B

Source: FBI IC3 annual reports

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Investment Fraud

FOR INVESTMENT SCAMS

Generation	Investment fraud victims	Rate per 100k
Gen Z (Under 20)	387	1.8
Gen Z / Young Millennials (Ages 20-29)	3,363	7.6
Millennials (Ages 30-39)	6,654	14.6
Elder Millennials /Young Gen X (Ages 40-49)	6,680	16.2
Gen X (Ages 50-59)	5,608	13.5
Baby Boomers (Ages 60+)	6,404	8.1

Source: Carlson Law analysis of 2023 FBI IC3 reports

Affecting Younger People

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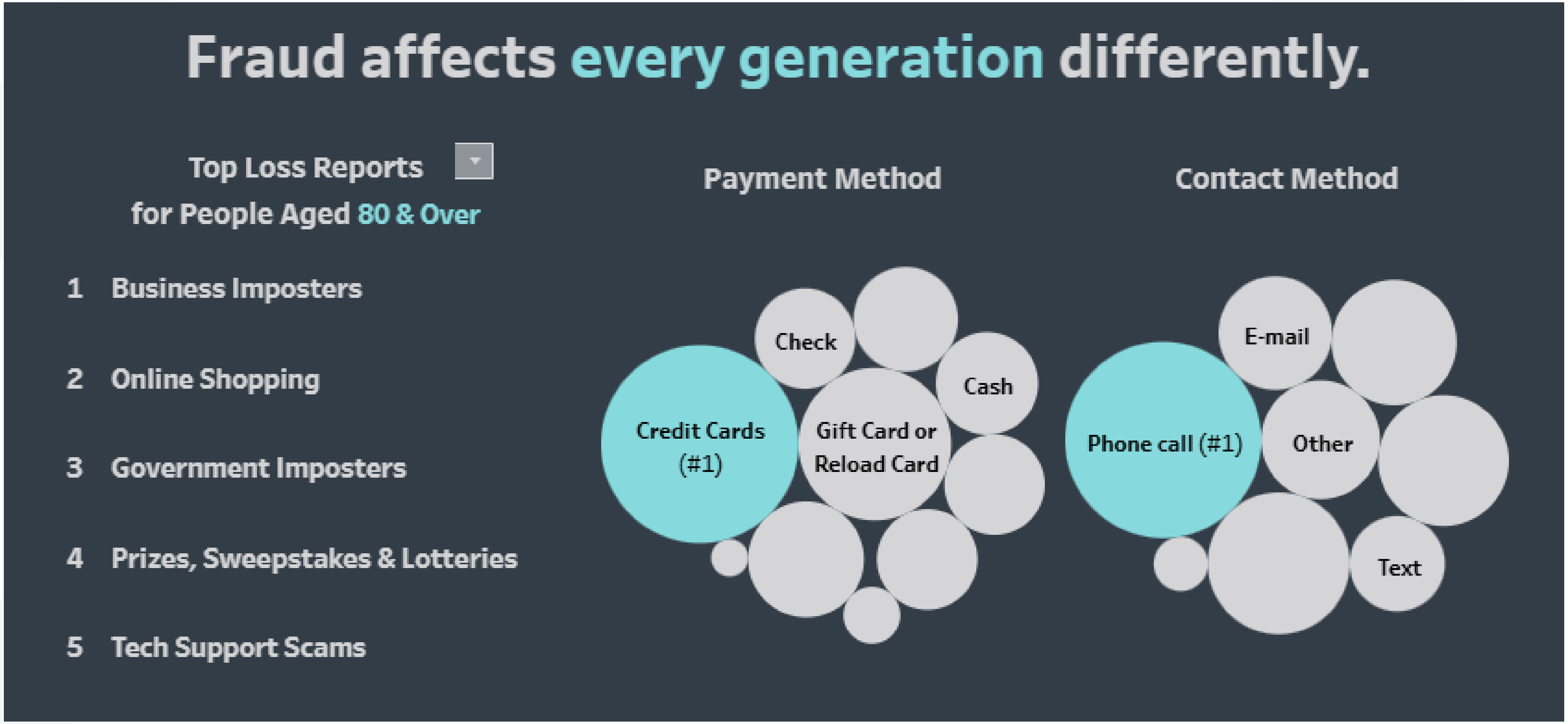
80 and over



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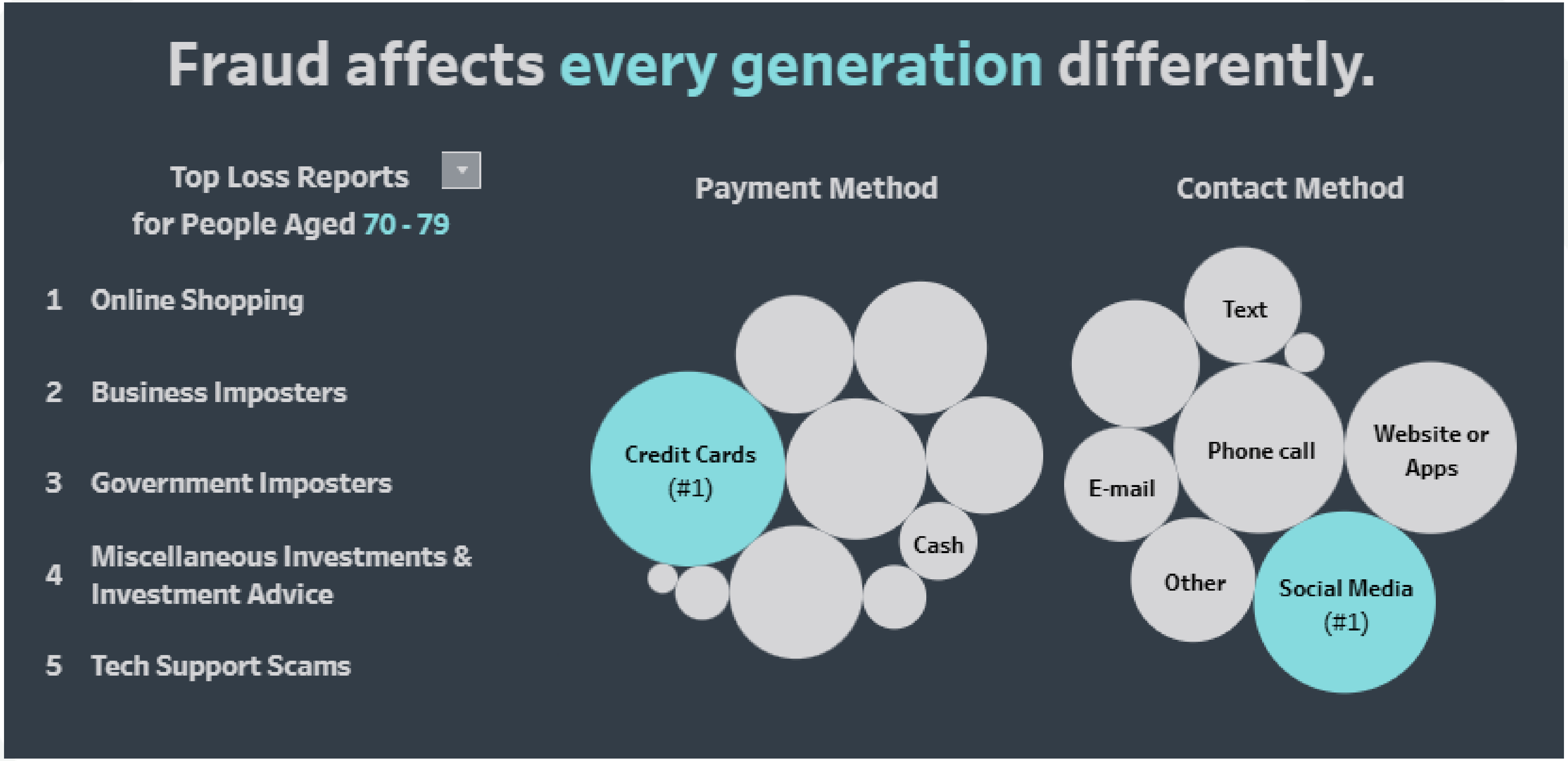
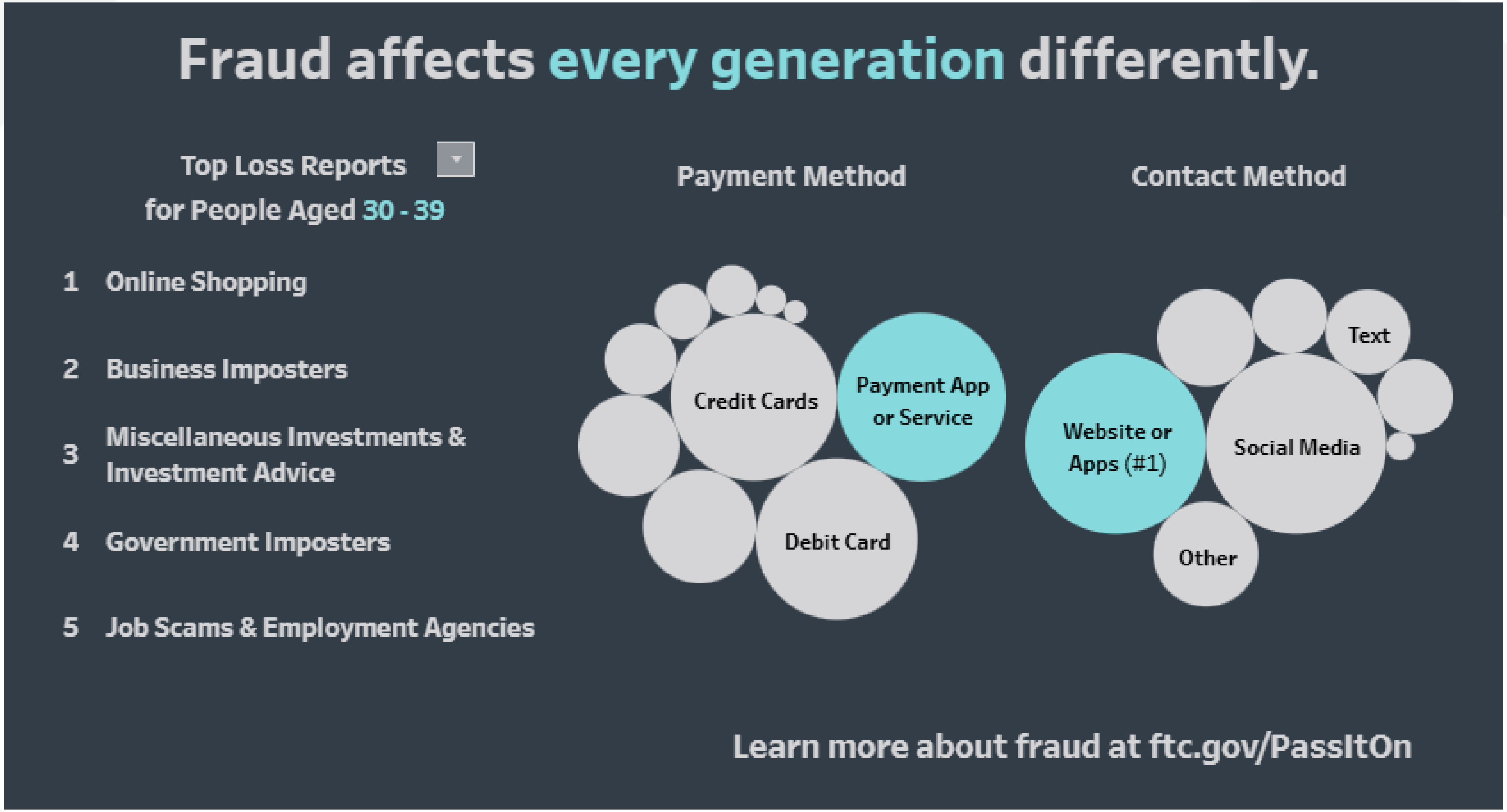
70-79


Fraud affects every generation differently.
Top Loss Reports
for People Aged 70 - 79
1 Online Shopping
2 Business Imposters
3 Government Imposters
4 Miscellaneous Investments & Investment Advice
5 Tech Support Scams
Payment Method
Credit Cards (#1)
Cash
Contact Method
Text
Phone call
Website or Apps
E-mail
Other
Social Media (#1)

30-39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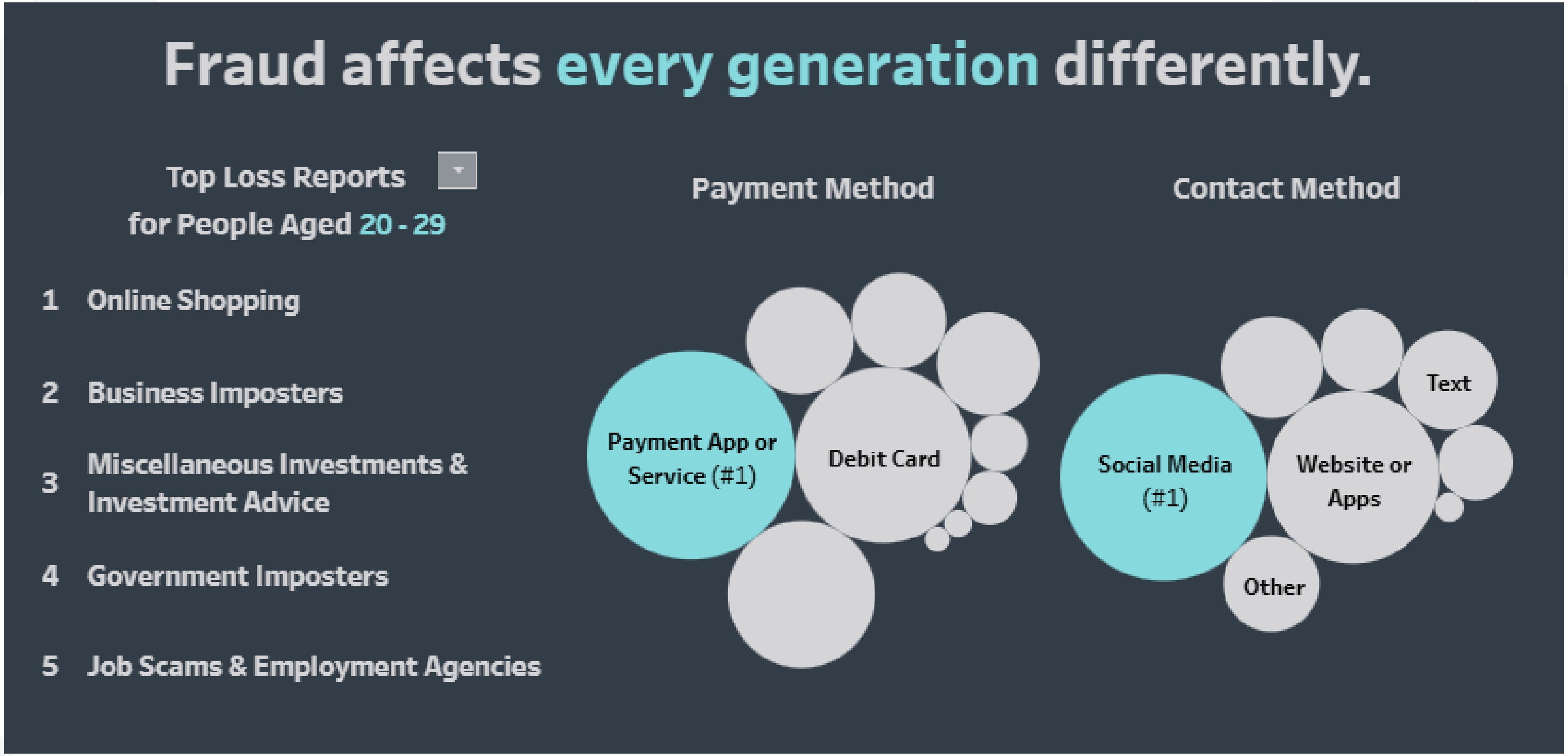
5 Job Scams & Employment Agencies
Payment Method
Credit Cards
Payment App or Service
Debit Card
Contact Method
Text
Website or Apps (#1)
Social Media
Other
Learn more about fraud at ftc.gov/PassItOn

20-29



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Payment App or Service (#1)
Debit Card
Contact Method
Social Media (#1)
Website or Apps
Text
Other

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The Spanish Prisoner Swindle

WOULD NOT FOOL.

McKeesport Man Fails to Bite at a Bait That Promises Him a Fortune.

Pittsburg, Nov. 28.—A pretty senorita, 19 years old, and £75,000 constitutes the prize offered James M. Borland, chairman of the McKeesport Republican committee and a leading merchant of the town. As a preliminary he must send $2,000 to Spain. Mr. Borland has not swallowed the bait, but has notified the police, who in turn have notified the authorities in Spain of what is supposed to be a swindle.

The Nigerian Prince

HELLO Inbox x

Masinga Mbeki <masinga.mbeki@laposte.net> Unsubscribe
to me

Dear Sir,
I am prince Masinga Mbeki from Nigeria. Your help would be very appreciated. I want to transfer all of my fortune outside if Nigeria due to a frozen account. If you could be so kind and transfer a small sum of 3 500 USD to my account, I would be able to unfreeze my account and transfer my money outside of Nigeria. To repay your kindness, I will send 1 000 000 USD to your account.

Please contact me to proceed

Prince Masinge Mbeki

Overseas call centers

Sam Bankman-Fried

Meme Coins

WIRED SECURITY POLITICS THE BIG STORY BUSINESS SCIENCE CULTURE REVIEWS NEWSLETTERS

BY JOEL KHALILI BUSINESS OCT 21, 2025 3:30 PM

Melania Trump Used as 'Window-Dressing' in Elaborate Memecoin Fraud, Legal Filing Claims

The first lady of the United States became a pawn in an intricate memecoin scam that resulted in millions of dollars in losses, crypto investors have alleged.

AI and fraud

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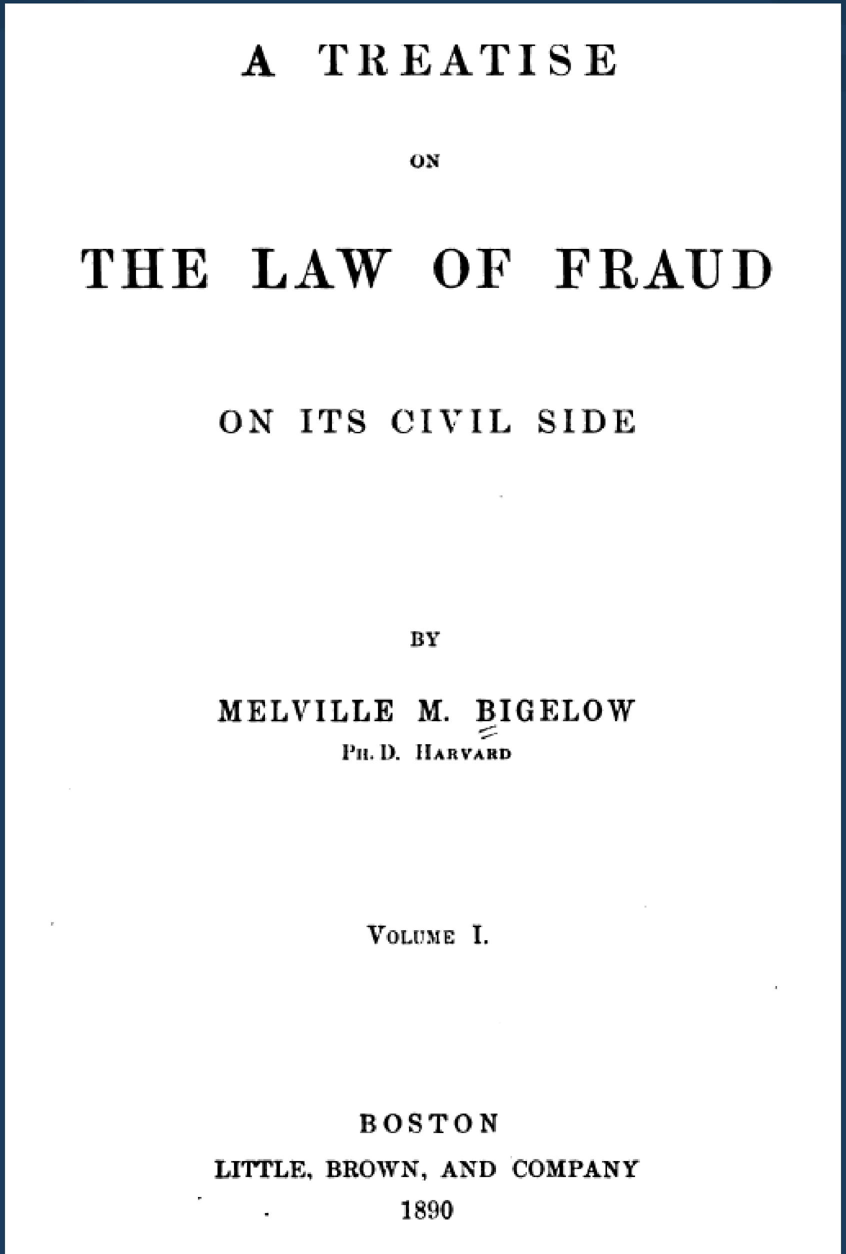

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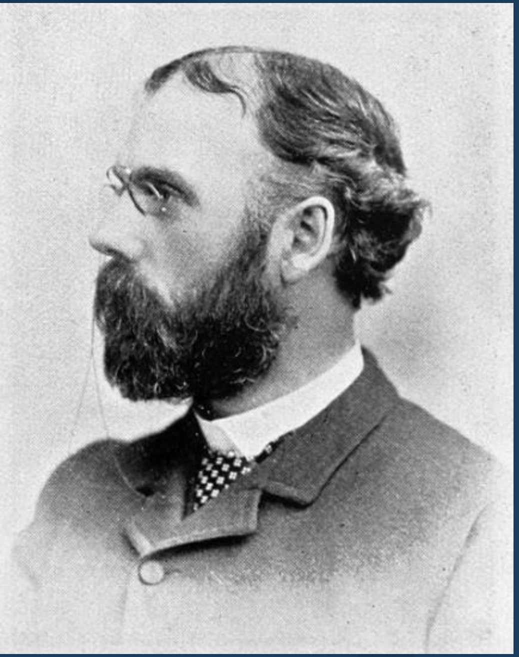

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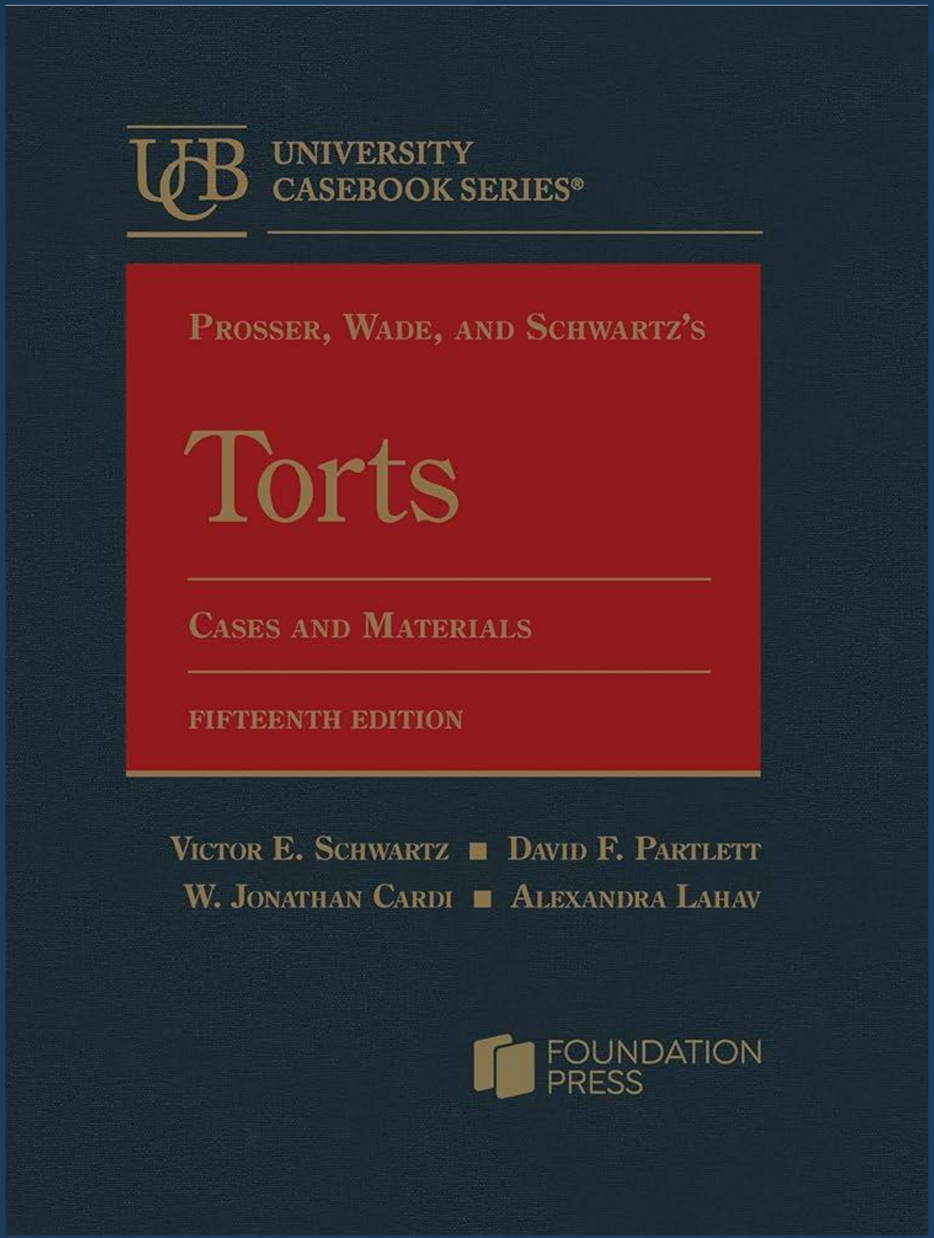
Fraud is infinite

Typical first year law school curriculum

- Contracts
- Torts
- Constitutional Law
- Property
- Civil Procedure

Typical Torts Textbook



Typical Torts Textbook

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How are we dealing with fraud?

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Securities Fraud

Securities Fraud

- Securities lawsuit filings in 2024 remained flat from 2023 and once again reflected the highest number of filings since 2020.
- Suits alleging only Rule 10b-5 claims were the majority of all new cases filed in 2024, with 198 filings in 2024, an increase from 183 in 2023.
- In 2024, there were 583 SEC enforcement actions—down 26% from FY 2023.

Securities Fraud

- On February 18, 2025, President Trump issued an Executive Order entitled “Ensuring Accountability for All Agencies,” in which he decried regulatory authorities’ independence and declared that the executive branch’s policy would be to “ensure Presidential supervision and control of the entire executive branch.”

Securities Fraud

- Trump is shifting away from crypto enforcement actions.
- On February 27, 2025, the SEC announced that it had agreed to dismiss its ongoing enforcement action against Coinbase "[g]iven the pending work of the Crypto Task Force."
- Coinbase is the largest U.S. crypto company and the SEC's lawsuit was premised on its position that currencies sold on Coinbase's platform constituted unregistered securities.

Securities Fraud

- On March 19, 2025, the CEO of Ripple announced that the SEC was planning to drop its appeal in a lawsuit against Ripple.
- The district court had found that Ripple's sale of crypto tokens did not violate federal securities laws.
- Likewise, the SEC has also put a halt to several ongoing crypto investigations.

Securities Fraud

- President Donald Trump pardoned Binance founder Changpeng "CZ" Zhao in October 2025, who had previously pleaded guilty to money laundering charges.
- The pardon came after Zhao served time in prison following a 2023 settlement where Binance paid a $4.3 billion fine, and the White House stated the pardon was to correct what it called an overreach by the previous administration.

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Securities Fraud

Crypto: Bitcoin Summer Erased | Binance Founder Pardoned | Memecoins | Bitcoin Treasury Losses | How Stablecoins Work

Businessweek | The Big Take

A Crypto Billionaire’s Path From Pariah to Trump Moneyman

Justin Sun was facing an SEC fraud case, but $90 million of Trump coins later, he’s doing business with the president’s family.

Securities Fraud

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Financial Reporting

Donald J. Trump
@realDonaldTrump

Subject to SEC Approval, Companies and Corporations should no longer be forced to "Report" on a quarterly basis (Quarterly Reporting!), but rather to Report on a "Six (6) Month Basis." This will save money, and allow managers to focus on properly running their companies. Did you ever hear the statement that, "China has a 50 to 100 year view on management of a company, whereas we run our companies on a quarterly basis???" Not good!!!

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Clarity on Self-Disclosure

- On May 12, 2025, the Criminal Division of the DOJ revised its Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP").
- It clarifies " the outcomes that companies can expect" if a company self-discloses misconduct to the Criminal Division, fully cooperates with its investigation(s), timely and appropriately remediates the misconduct, and no aggravating circumstances exist.
- Provides a detailed written and visual flowchart for the circumstances in which voluntary self-disclosure, cooperation, and remediation will result in declination to prosecute, a non-prosecution agreement, a reduction in penalty, and/or no requirement to engage an independent compliance monitor.

Consumer Financial Protection Board

CFPB

- The Consumer Financial Protection Bureau (CFPB) was authorized by Congress in 2010 through the Dodd-Frank Act, and officially launched in July 2011.
- Occurred in the aftermath of the 2008 financial crisis, as a new agency to regulate financial products and services and protect consumers.
- Politically controversial because it was led by a single director and self-funded, removing it from political oversight.
- Often accused of overreach; had duplicative authority with other agencies.
- Unintended consequences. When you cap “junk” credit card fees, you make it harder for people to obtain credit.

CFPB

- As of December 31, 2024:
- **$21 billion+**: Amount of monetary compensation, principal reductions, canceled debts, and other consumer relief resulting from CFPB enforcement ($19 billion) and supervisory ($1.7 billion) work.
- **205 million+**: Estimated number of consumers or consumer accounts eligible to receive relief from the CFPB's enforcement and supervisory work.
- **$5 billion+**: Civil money penalties imposed by the CFPB on companies and individuals that violate the law, all placed in a fund to provide compensation to consumers who have been harmed by violations of federal consumer financial protection law.

CFPB

- Acting Director Vought ordered a near shutdown of the CFPB in February.
- A court ordered the CFPB to reopen in March, President Trump withdrew his nomination of Jonathan McKernan to CFPB director in May, and the CFPB rescinded nearly 70 guidance documents also in May.

CFPB

- An internal April memo stated that CFPB "will focus its enforcement and supervision resources on pressing threats to consumers, particularly service members and their families, and veterans."
- The memo also stated that the CFPB will deprioritize matters concerning loans for "criminals," "medical debt," "peer-to-peer platforms and lending," "student loans," "remittances,“ "consumer data," and "digital payments.”
- The agency is pursuing less than half (42%) of the 33 lawsuits active at the beginning of Acting Director Vought’s tenure and has pursued only one new enforcement action.

VORYS

CFPB

- Agency on track to shut down in early 2026, when funding runs out.

POLITICO

Finance & Tax | Morning Money newsletter | Friday edition: Capital Risk

Trump administration declares CFPB funding illegal

The decision, disclosed in a court filing, puts the Consumer Financial Protection Bureau on track to shut down in 'early 2026' when its remaining cash runs out.

Acting CFPB Director Russ Vought announced in a court filing that the agency would run out of cash to operate early next year, paving the way for a full shutdown of the agency. | Francis Chung/POLITICO

By MICHAEL STRATFORD
11/11/2025 12:04 PM EST

CFPB

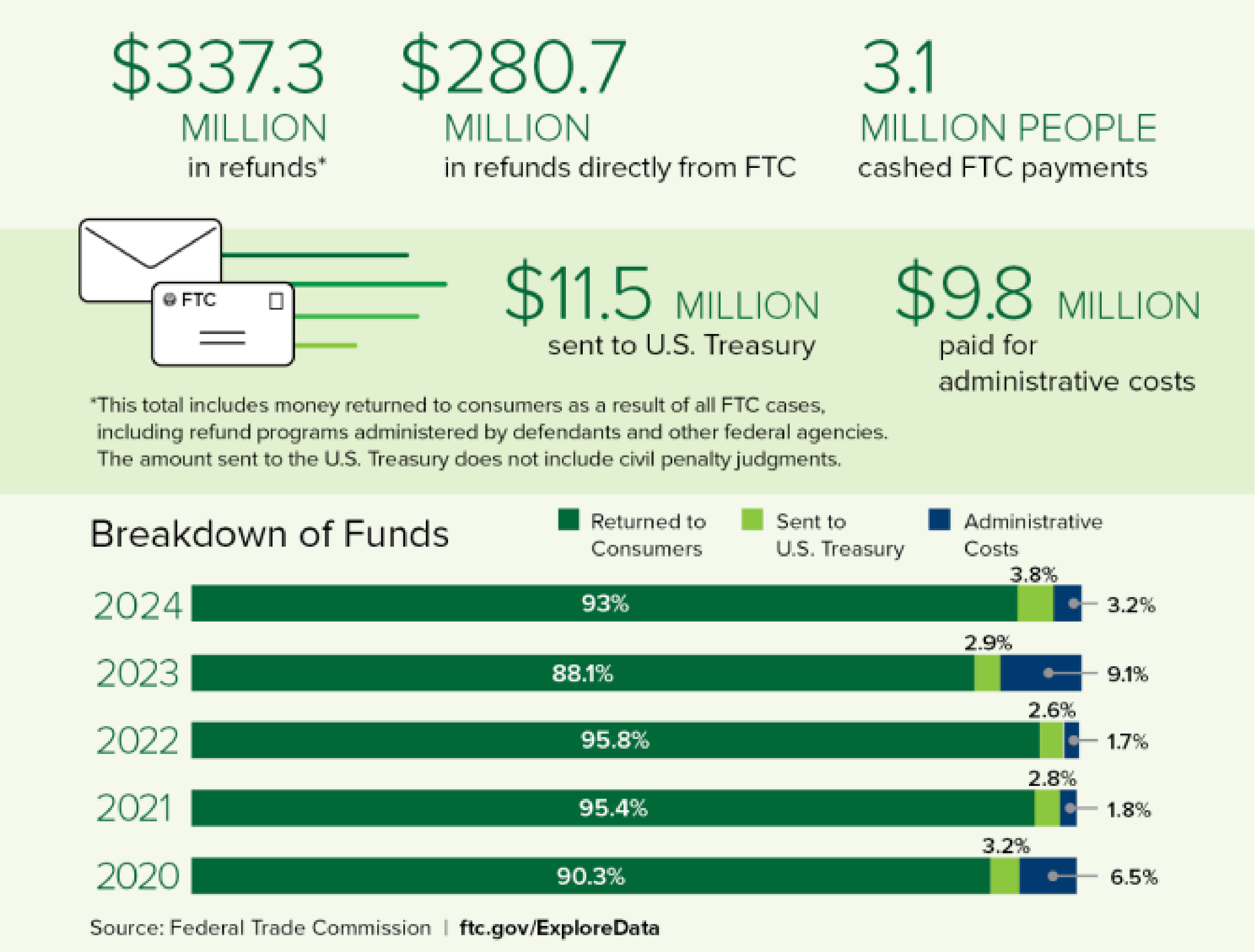
Trump-Led CFPB Pardons Ten Repeat Offender Corporations

October 15, 2025 | Fact Sheet

A new memo by the Consumer Federation of America and Protect Borrowers details how Acting CFPB Director Russell Vought and President Trump have issued 22 corporate pardons to Wall Street banks, predatory lenders, and wealthy executives — including 10 repeat offenders with histories of illegal behavior. Vought's CFPB has gone so far as to revoke or alter 20 settled enforcement actions, eight of which involved repeat offenders required to compensate victims. These actions have stripped consumers of billions of dollars in restitution. In total, the repeat offenders named have previously paid more than $7 billion in penalties from CFPB and other regulatory cases. The memo catalogs these corporations, their past violations, and the status of their Trump-era pardons.

FTC

FTC Refunds to Consumers Snapshot
January 1, 2024 – December 31, 2024



FTC distributions in 2024

Cases with First Distributions in 2024

Case Name	Date Sent	$$ Sent	Eligible Consumers	Consumers Who Cashed a Payment to Date	% of Consumers Who Cashed a Payment to Date
American Vehicle Protection	10/10/2024	$449,255.55	18,255	8,248	45.2%
Apex Capital Group	09/30/2024	$2,824,799.00	153,940	71,983	46.8%
AT&T	04/11/2024	$6,291,749.00	267,734	228,820	85.5%
Benefytt Technologies	03/18/2024	$99,307,988.46	463,629	321,640	69.4%
Brigit (Bridge It)	11/18/2024	$17,043,374.10	1,818,930	1,041,261	57.2%
CafePress	09/18/2024	$370,644.32	20,044	17,899	89.3%
Chaucer/Bates Accessories	11/20/2024	$143,064.55	4,061	2,241	55.2%
Consumer Defense LLC (Preferred Law)	01/09/2024	$1,260,589.74	6,261	4,423	70.6%
Credit Karma	10/31/2024	$2,547,660.24	50,994	42,838	84.0%
Cycra	05/13/2024	$181,994.40	886	766	86.5%
DK Automation	03/28/2024	$2,809,962.72	890	771	86.6%
FloatMe	09/23/2024	$2,691,570.56	449,344	253,210	56.4%
Fortnite (Epic Games)	12/09/2024	$72,003,286.94	629,344	496,187	78.8%
Hey Dude Shoes	08/06/2024	$1,894,041.10	36,757	24,718	67.2%
Instant Brands (Pyrex)	10/01/2024	$88,067.29	10,259	4,465	43.5%
Lanier Law	08/26/2024	$222,149.30	322	302	93.8%
LCA-Vision (LasikPlus)	10/03/2024	$1,102,509.33	12,077	11,236	93.0%
Lurn	06/06/2024	$2,476,473.99	1,922	1,532	79.7%
Mission Hills Federal	03/13/2024	$4,150,896.78	27,584	18,251	66.2%
MyScore LLC	11/21/2024	$1,899,890.31	42,849	18,881	44.1%
National Landmark Logistics	12/10/2024	$543,367.50	1,625	1,133	69.7%
Nexway SASU	02/08/2024	$618,485.72	6,490	4,528	69.8%
Opendoor	04/03/2024	$61,749,423.94	54,689	48,890	89.4%
Rejuvica (Sobrenix)	11/07/2024	$536,816.42	56,686	25,085	44.3%
Response Marketing Group (Nudge)	03/21/2024	$10,154,439.50	4,670	3,683	78.9%
Rhinelander Auto Center	10/29/2024	$1,065,862.21	7,531	5,451	72.4%
Ring LLC	04/23/2024	$5,667,294.00	117,044	80,168	68.5%
SuperGoodDeals.com	12/04/2024	$114,743.57	4,583	2,523	55.1%
The Bountiful Company	03/14/2024	$527,345.29	32,689	19,783	60.5%
Vitagene (1Health.io)	09/09/2024	$49,539.84	2,432	1,283	52.8%
Vivint Smart Home	12/05/2024	$496,546.74	470	374	79.6%
WealthPress Holdings	04/09/2024	$1,201,047.60	19,857	14,061	70.8%
Zurixx LLC	07/31/2024	$12,352,681.90	25,563	17,378	68.0%
Total		**$314,837,561.91**	**4,350,411**	**2,794,012**	**64.2%**

Amazon settlement

- The FTC's complaint, filed in June 2023, alleged that Amazon's user interface designs tricked users into signing up for automatically-renewing Prime subscriptions.
- FTC alleged that Amazon leadership knowingly slowed or rejected changes that would have made cancellation easier because these issues benefited the company's bottom line.

Amazon settlement

- As the result of the FTC's settlement, Amazon is required to pay $1.5 billion for refunds to customers affected by its unlawful Prime enrollment and cancellation practices.
- Amazon is also required to pay a $1 billion civil penalty and cease unlawful enrollment and cancellation practices for Prime subscriptions.

Grubhub settlement

- Grubhub will pay $25 million to settle charges that the food delivery firm deceiving diners about delivery costs and blocking their access to their accounts and funds, deceiving workers about how much money they would make delivering food, and unfairly and deceptively listing restaurants on its platform without their permission.
- Under the proposed settlement, the company must tell consumers the full cost of delivery, honestly advertise pay for drivers, and list restaurants on its platform only with their consent.

FTC

- President Trump designated Andrew Ferguson as Chairman of the FTC on January 20, 2025.
- His dissents as a minority member of suggest that he will exercise less oversight over AI firms.
- He has stated that using “generative AI technology to lie, cheat, and steal” should be punishable, but that the FTC should not “bend the law to get at AI.”

FTC

- Last year, the FTC brought claims against Rytr LLC, a company marketing an AI tool allowing users to generate consumer reviews.
- The FTC accused the company of violating Section 5 of the FTCA by furnishing its users with the “means and instrumentalities” to deceive consumers.
- Ferguson dissented, arguing that treating an AI tool as categorically illegal “merely because of the possibility that someone might use it for fraud is inconsistent with [FTC] precedents and common sense.”

FTC

- Expect to see more focus on Antitrust

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Mark R. Meador

Antitrust's Populist Soul
Remarks, 13th Bill Kovacic Antitrust Salon
Washington, D.C.

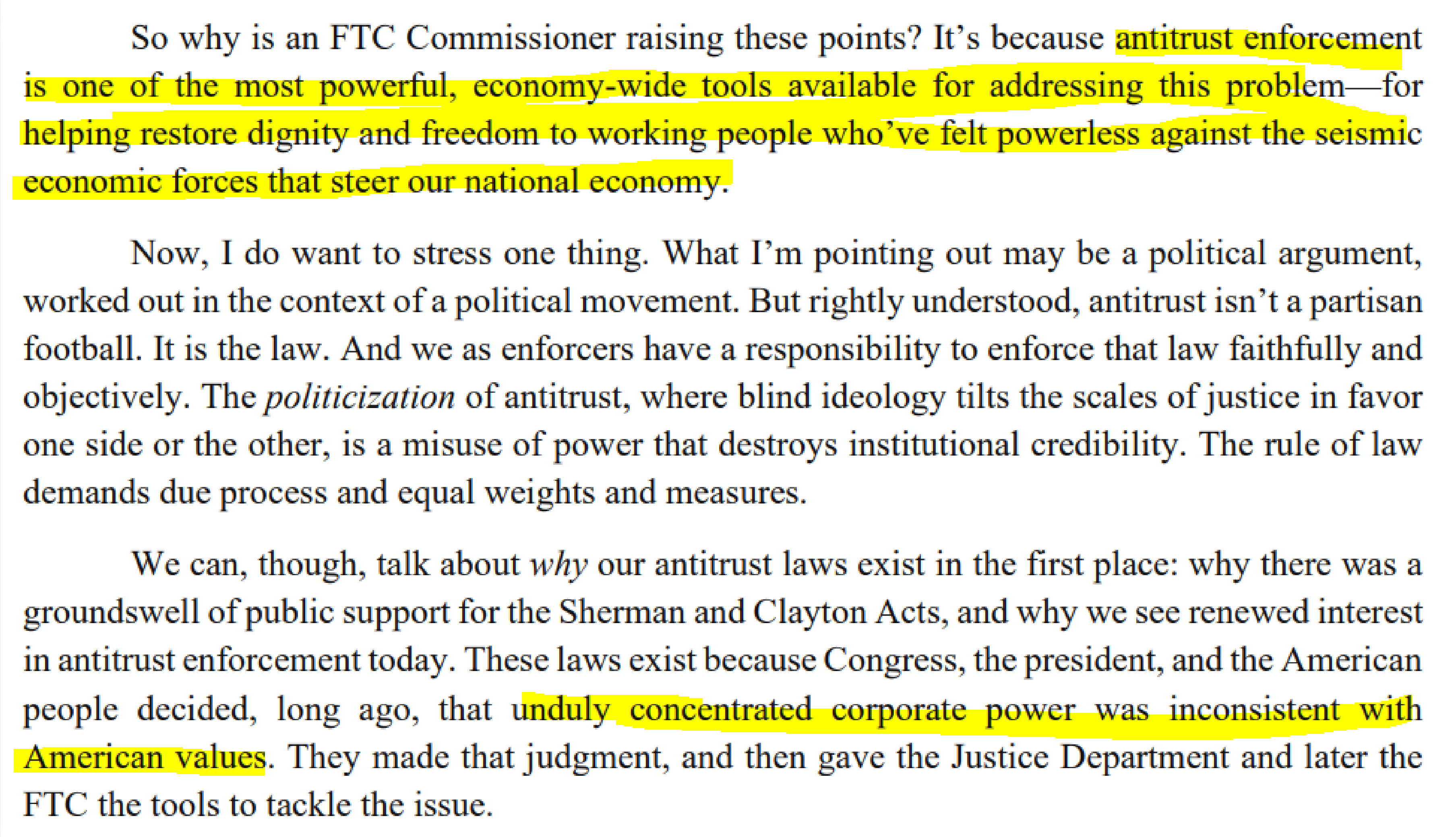
September 15, 2025

Good afternoon, and thank you so much for inviting me to join you all today. It's a privilege to be here. As we bring things to a close, I'd like to offer a few thoughts on the antitrust landscape going forward. This is an issue that's been near and dear to my heart ever since I was a junior staffer at the FTC, and now as a sitting Commissioner.

I think it's fair to say that, for the last five or ten years or so, we've heard a lot about a supposed sea change in antitrust thinking. The conventional wisdom is that under both the prior administration, and President Trump's current administration, there has emerged something of a bipartisan consensus that we need to do more with our antitrust laws. That new consensus looks something like this: antitrust in the Bush and Obama years erred on the side of underenforcement, and this has produced some of the governance challenges we're seeing today, especially in the Big Tech context. So now, a new consensus: antitrust is back.

FTC

- Expect to see more focus on Antitrust



So why is an FTC Commissioner raising these points? It's because antitrust enforcement is one of the most powerful, economy-wide tools available for addressing this problem—for helping restore dignity and freedom to working people who've felt powerless against the seismic economic forces that steer our national economy.

Now, I do want to stress one thing. What I'm pointing out may be a political argument, worked out in the context of a political movement. But rightly understood, antitrust isn't a partisan football. It is the law. And we as enforcers have a responsibility to enforce that law faithfully and objectively. The *politicization* of antitrust, where blind ideology tilts the scales of justice in favor one side or the other, is a misuse of power that destroys institutional credibility. The rule of law demands due process and equal weights and measures.

We can, though, talk about *why* our antitrust laws exist in the first place: why there was a groundswell of public support for the Sherman and Clayton Acts, and why we see renewed interest in antitrust enforcement today. These laws exist because Congress, the president, and the American people decided, long ago, that unduly concentrated corporate power was inconsistent with American values. They made that judgment, and then gave the Justice Department and later the FTC the tools to tackle the issue.

VORYS

FTC

- Expect to see more focus on Antitrust

Reasonable minds can and do debate whether our antitrust laws are doing a good job, or even whether we need them at all. But these laws are on the books today. And it is our job, as part of the Executive Branch, to enforce them.

Antitrust *underenforcement* is as much a betrayal of the law as partisan antitrust enforcement would be. Faithfully enforcing the antitrust laws is part of our democratic mandate. It reflects the will of the American people, whose representatives passed and amended those laws years ago. But over the life of the antitrust laws, we've seen a pattern in which Congress passes an antitrust law, and courts then subsequently water it down. Rinse and repeat. And so, in my view, the resurgence of interest in antitrust is simply a reflection of the underlying democratic impulse that produced these laws in the first place—an impulse that continues to this day and lies at the heart of President Trump's pro-worker agenda.

Now, most working people might have pro-antitrust instincts. But they certainly don't have the resources to bring antitrust suits in their own names. They don't have a ready means of

2

Made in America Claims

- In 2021, the FTC finalized a "Made in USA Labeling Rule" that includes civil penalties of up to $53,000 per violation.
- July 2025 was designated "Made in USA Month" by FTC Chair Andrew Ferguson.
- He sent out a series of warning letters to published warning letters to manufacturers and retailers of flagpoles, footwear, football equipment and personal care products, informing them that the FTC had received information suggesting they may be violating FTC laws surrounding MUSA claims..

Made in America Claims

- FTC says products must meet three key criteria:
  - all or virtually all significant parts and processing must be of U.S. origin;
  - the product must be "substantially transformed" in the U.S. (in line with U.S. Customs standards); and
  - final assembly or processing must occur in the U.S.

Made in America Claims

- Some companies are using:
  - "Made in USA with global components"
  - "Assembled in USA“
  - "60% U.S. content"
  - "Made in USA of U.S. and imported parts"
  - "Couch assembled in USA from Italian Leather and Mexican Frame"

Made in America Claims

- In April 2024, the FTC levied its *largest-ever civil penalty* for false “Made in USA” labeling: $3.17 million against Williams-Sonoma for violating a prior order by marketing imported goods as American-made.

VORYS

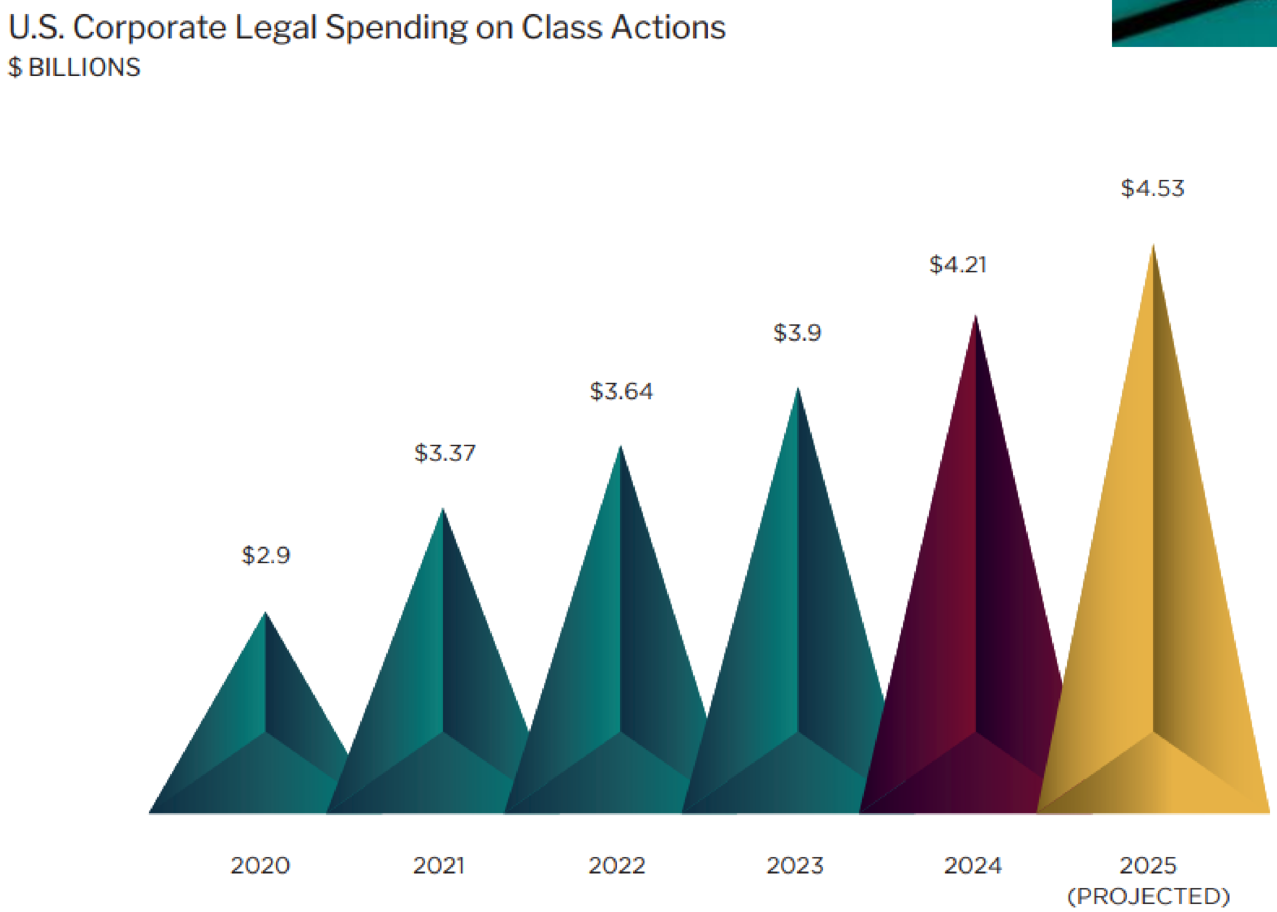
Class Actions and Fraud

Rise in class actions

- Spending on class actions by reporting companies came to about $4.21 billion for 2024. (Carlton Fields survey)
- This was a 12.3% increase from the prior year, amounting to a $300 million increase.
- Spending on class actions now accounts for 12.5% of corporate litigation budgets
- As the government retreats from fraud enforcement, expect plaintiffs' firms to step up efforts.

VORYS

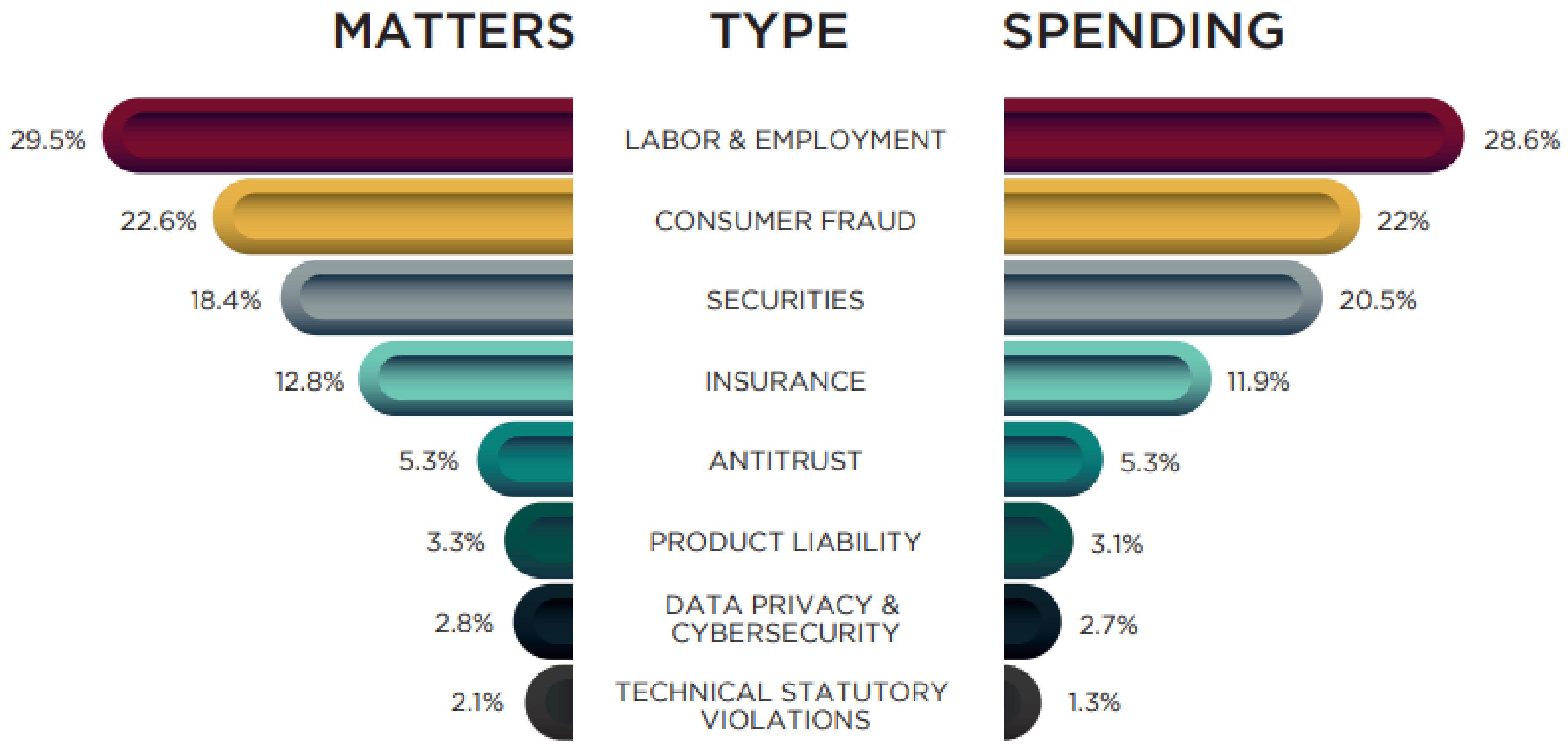
Rise in class actions



Rise in class actions

VORYS

Rise in class actions



VORYS

LEADERSHIP > LEADERSHIP STRATEGIES

Class Action Settlements Topped $40 Billion Again In 2024: New Report

By Edward Segal, Senior Contributor. ⓘ Edward Segal covers crisis-related ne...

Follow Author

Published Jan 07, 2025, 06:28am EST, Updated Jan 09, 2025, 02:46pm EST

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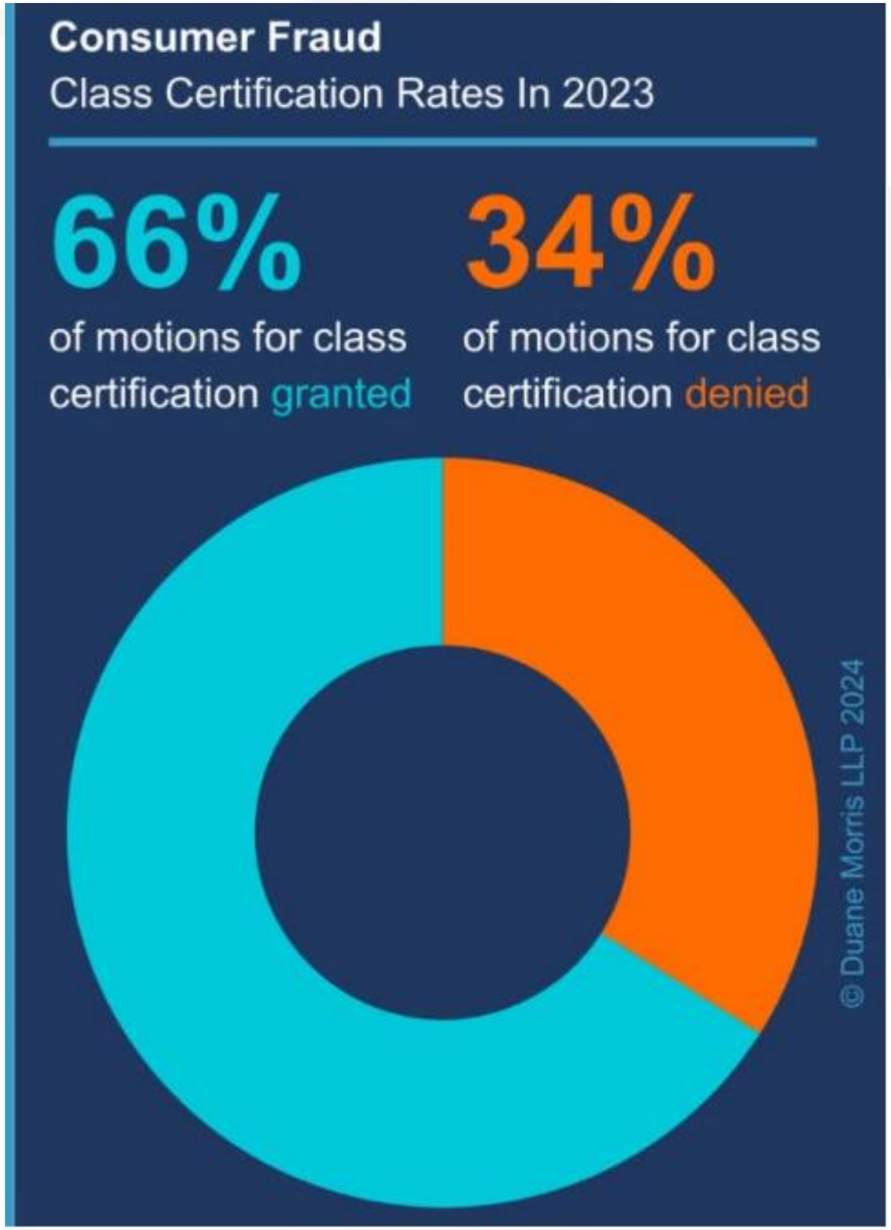
Rise in class actions

Class actions

Combined total of $113 billion in class action settlements in 2022 and 2023.



VORYS

Influencer marketing class actions

- Influencers promote products without disclosing they were paid for it.

Los Angeles Times

BUSINESS

Revolve faces $50-million lawsuit alleging influencers hid paid brand partnerships

Fashion brand Revolve is accused of profiting off of misleading social media marketing practices. (Greg Doherty / Getty Images for Revolve)

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California Invasion of Privacy Act

- Allegation that online tracking tools violate CIPA by capturing data from website visitors without their explicit knowledge.


September 11, 2025

A California Invasion of Privacy Act ("CIPA") Litigation Sanity Check - Where Do Things Stand?

It has been amply documented how the California Plaintiffs' Bar has exploited the California Invasion of Privacy Act ("CIPA")–explicitly designed during the Cold War to address *telephonic* wiretapping and eavesdropping—to assert claims relating to the commonplace Internet use of website tracking technologies and chat features against corporate defendants. CIPA was enacted under the California Penal Code as a wiretap law to protect individuals from the unauthorized interception and eavesdropping of their confidential telephone calls.

Some early successes for creative Plaintiffs counsel contributed to a surge of Plaintiffs claims under CIPA asserting theories of liability relying on expansive notions of the scope of individual privacy pertaining to online personal information.

WRITTEN BY:

PLG Potomac Law Group, PLLC

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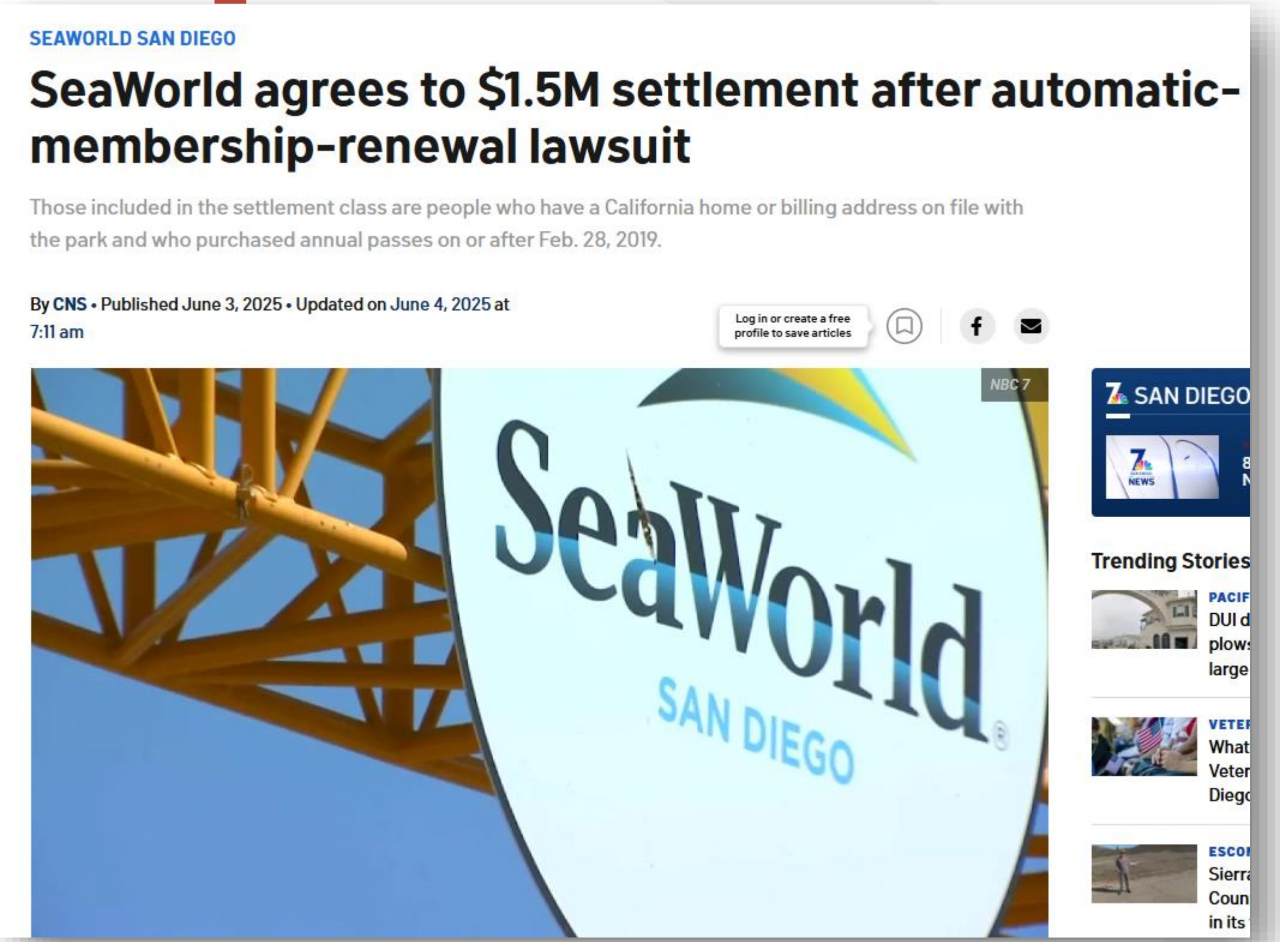
Telephone Consumer Protection Act

- Under federal law, marketing calls or texts cannot be made before 8 a.m. or after 9 p.m. at the recipient's local time.
- Plaintiffs are filing lawsuits against companies sending out mass text messages during these prohibited hours, even when recipients have given prior written consent.

VORYS

Auto-Renewal Subscription

- Allegations that businesses failed to inform users that their subscription would continue past a free trial or initial term, or that they made cancellation intentionally difficult.
- California, New York and other states have passed automatic renewal laws that require clear disclosures, affirmative consent and simple cancellation procedures.



SEAWORLD SAN DIEGO

SeaWorld agrees to $1.5M settlement after automatic-membership-renewal lawsuit

Those included in the settlement class are people who have a California home or billing address on file with the park and who purchased annual passes on or after Feb. 28, 2019.

By CNS • Published June 3, 2025 • Updated on June 4, 2025 at 7:11 am

Greenwashing

- Claims for false environmental marketing like:
  - "carbon neutral"
  - “biodegradable”
  - “Recyclable”

The Environmental Defense Fund has backed the tech giant's carbon offset practices as a class-action lawsuit challenges Apple Watch carbon neutrality

Right now, Apple finds itself at the centre of a class-action lawsuit, with the plaintiffs accusing the tech giant of greenwashing.

The furore all stems from claims the iPhone manufacturer made about the 9th generation of its Apple Watches, which were advertised as 'carbon neutral'.

The lawsuit alleges that the carbon credits Apple used to offset 25% of the emissions related to the manufacturing of its smart watches did very little to remove carbon from the atmosphere.

The story took quite a twist this week, though, as non-profit organisation the Environmental Defense Fund made an unprecedented interjection to proceedings, coming out in support of the tech heavyweight with an amicus brief.

Legal proceedings, which began in February 2025, involve seven of Apple's competitors, all of which dispute the legitimacy of Apple's carbon neutral labelling for its Series 9 Apple Watch models.

Notably, the plaintiffs are contending that the carbon credits Apple relies on from projects in Kenya and China might not significantly reduce carbon emissions.

Number of Servings Claims

- Common with spooned or measured products like coffee or infant formula.

THE KANSAS CITY STAR.

NEWS CHIEFS RESTAURANTS ENTERTAINMENT OPINION GAMES OBITUARIES FINANCE KC FAVORITES CAREERS GUIDES

LOCAL

Missouri man sues Folgers, claims it 'grossly misrepresented' amount of coffee per can

By **Robert A. Cronkleton**

Updated November 29, 2021 1:36 PM

Folgers classic roast ground coffee. *Folgers Facebook*

Fake Sales

- Claims that online discount amounts are not real discounts because real prices are never charged.

Amazon Prime Day is full of 'fake sales,' lawsuit alleges

Mary Walrath-Holdridge
USA TODAY

Oct. 16, 2025 | Updated Oct. 20, 2025, 12:38 p.m. ET

Amazon to refund millions in $2.5B Prime settlement over FTC lawsuit

Amazon will refund millions after settling an FTC lawsuit over Prime subscriptions and cancelation issues.

VORYS

Made in America Claims

- "Made in USA" class actions claims are on the rise.
- More than a dozen were lawsuits asserting such claims in the first half of 2025.
- Up from seven in all of 2024.

THE WALL STREET JOURNAL.

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CMO TODAY

How Trump Inspired One Law Firm to Blitz Brands With 'Made in USA' Challenges

Consumer marketers including Unilever, Goya and Procter & Gamble face lawsuits filed this year by a California firm

By *Patrick Coffee*

June 4, 2025 6:00 am ET

The litigation is being driven largely by one law firm that saw President Trump's re-election as a green light.

"One of the platforms the administration was running on was how important American-made things are," said Abbas Kazerounian, founding partner at Kazerouni Law Group of Costa Mesa, Calif., which filed 10 of this year's new made-in-America lawsuits, up from one last year. "So the American public has out and out said, 'This is something that's important to us.' "

False Claims Act

What is the False Claims Act?

31 U.S.C. §§ 3729-3733

- Permits the Government or a whistleblower to recover government money that was fraudulently obtained or withheld

What is the False Claims Act?

Two kinds of cases –

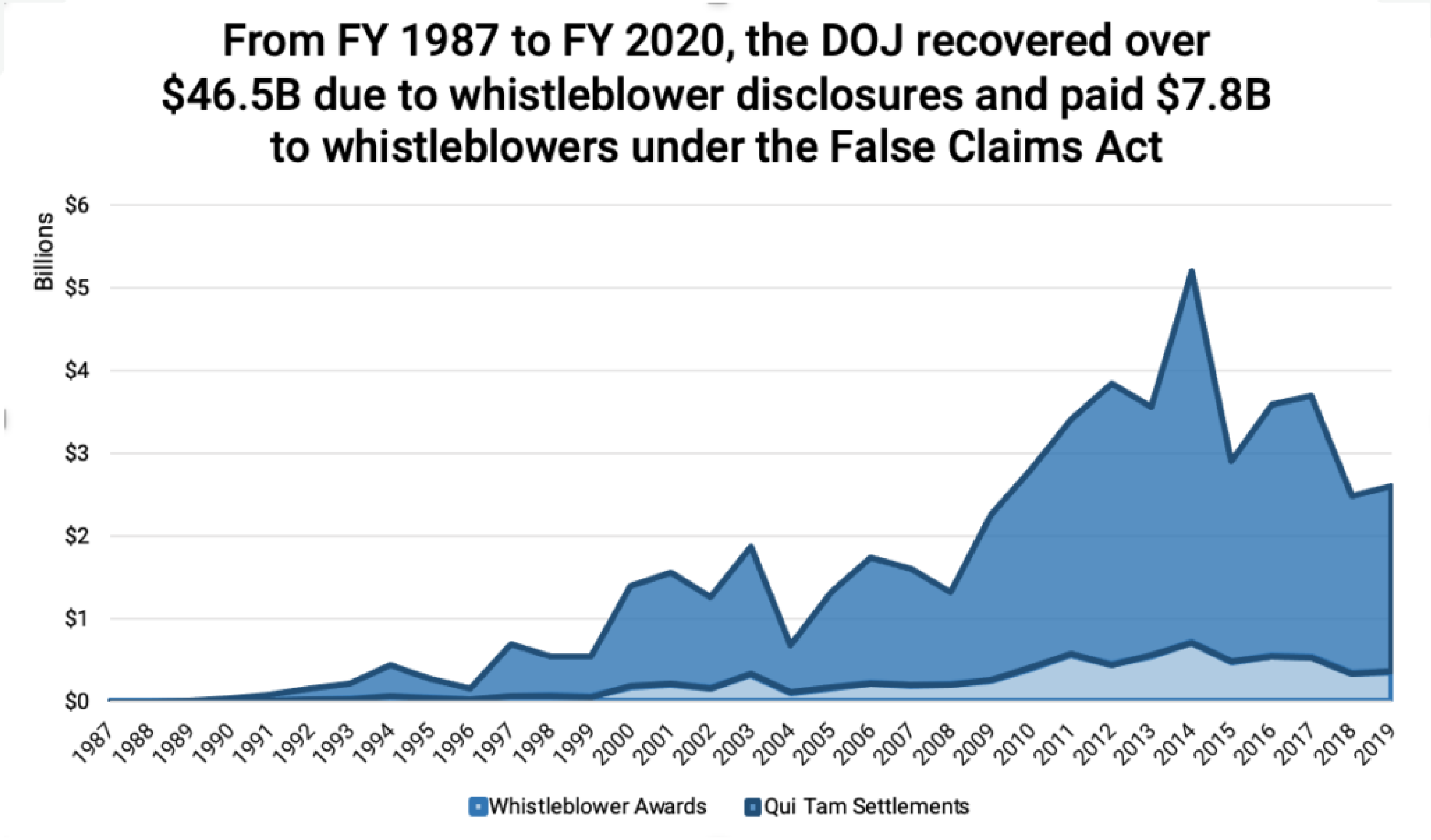
1. Direct actions by the Government
2. *Qui tam* actions by private individuals called "relators" or whistleblowers

Whistleblower Motivations

The Relator's Share 31 U.S.C. 3730(d)

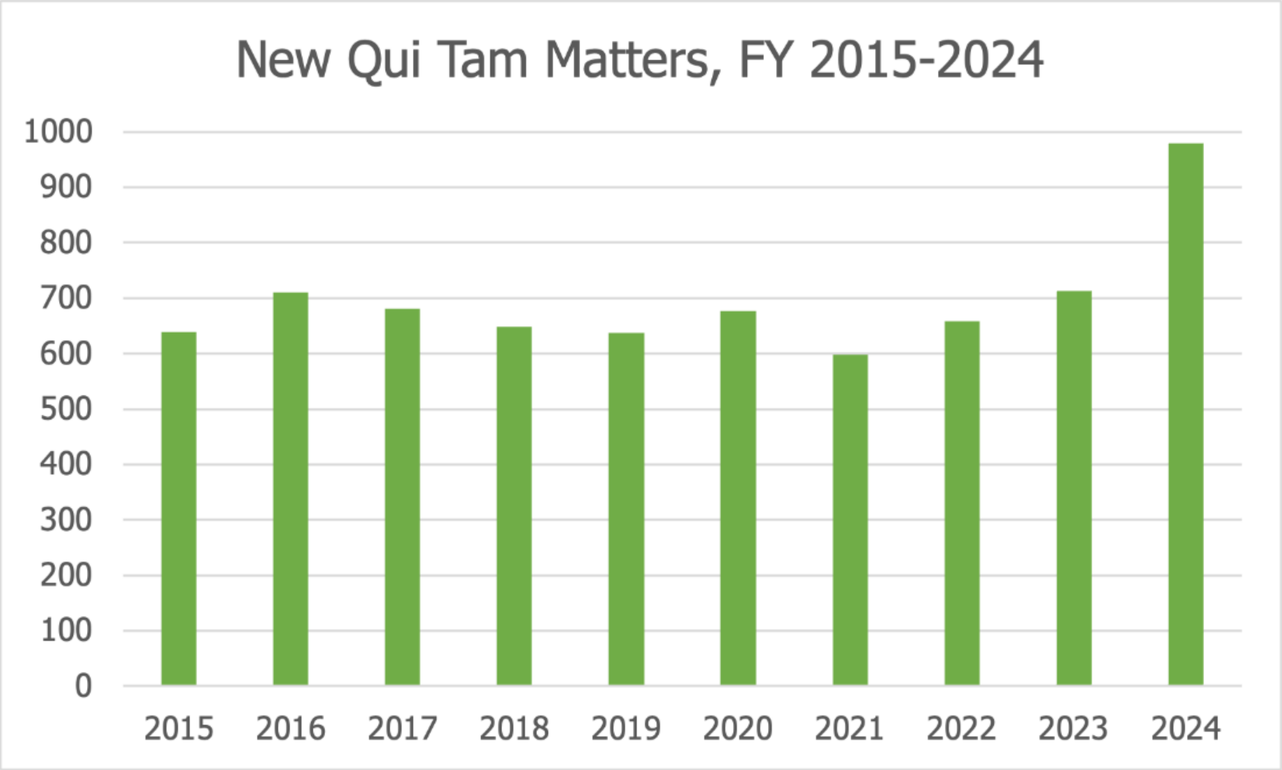
- If the Government intervenes, the relator receives at least 15% and no more than 25% of the proceeds of the action or settlement plus attorneys' fees
- If the Government declines to intervene, the relator receives at least 25% and no more than 30% of the proceeds of the action or settlement

Recoveries since 1986 amendments



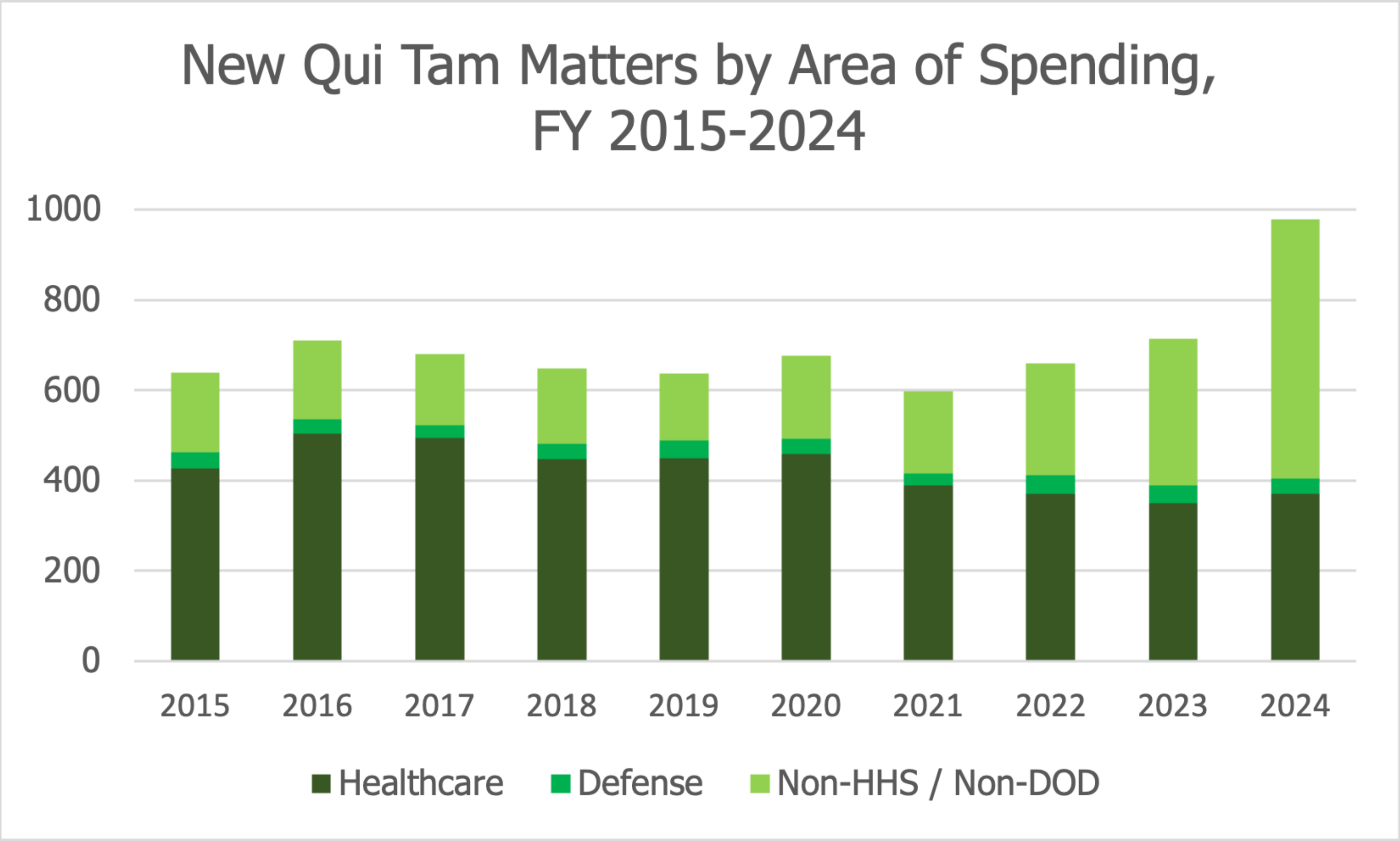
VORYS

Recent Rise in FCA matters



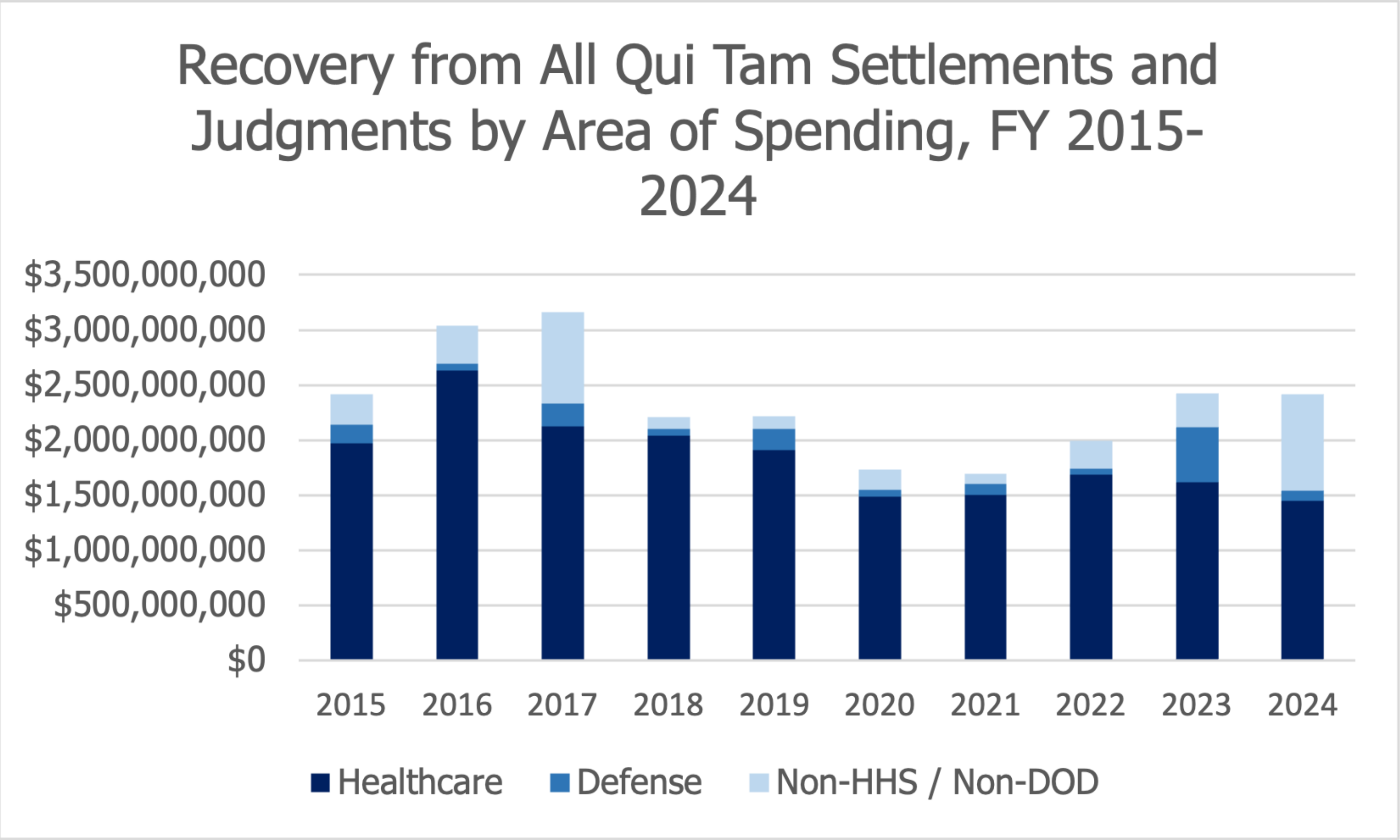
VORYS

For the First Time, the Majority are not Healthcare or Defense



VORYS

Majority are not Healthcare or Defense

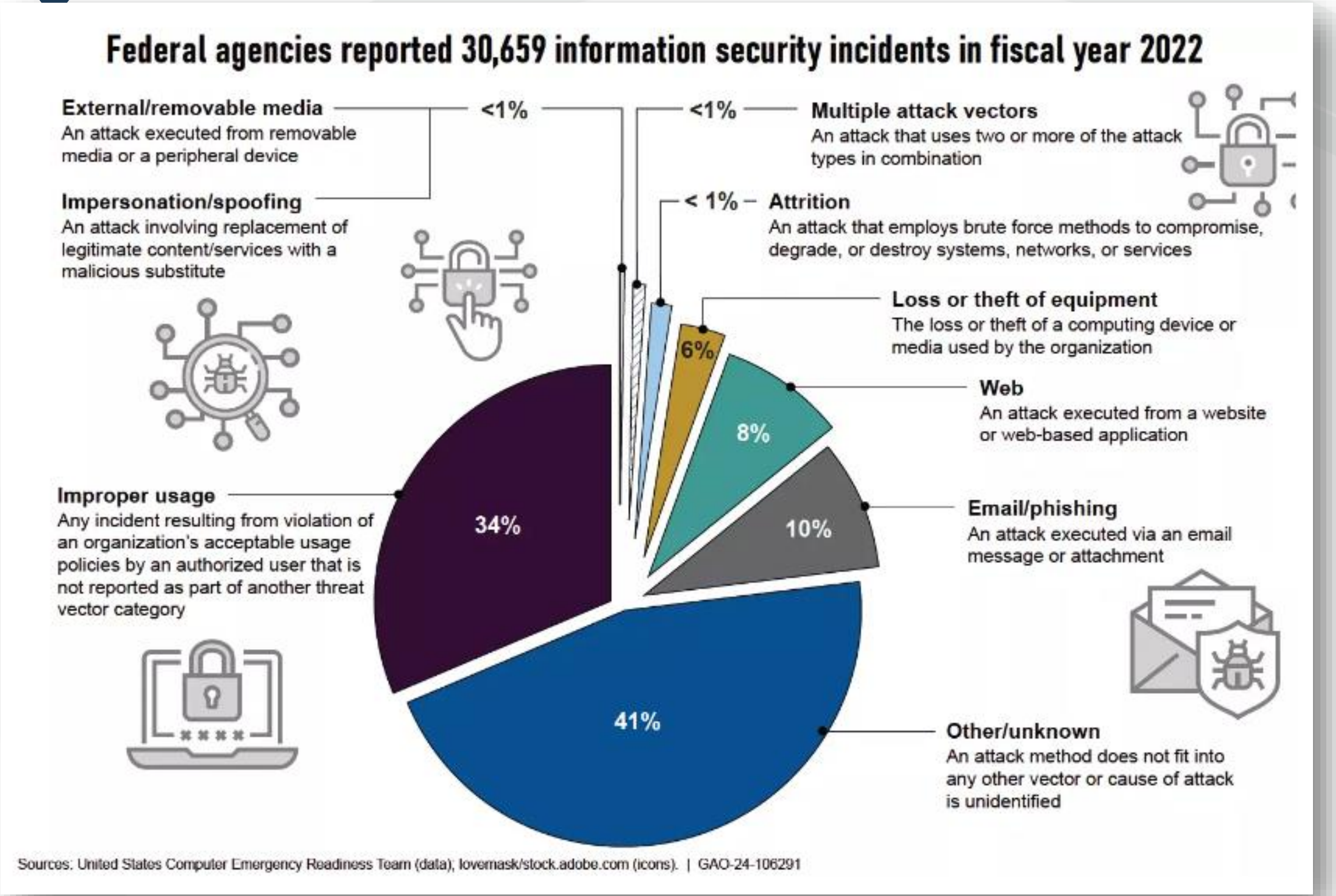


VORYS

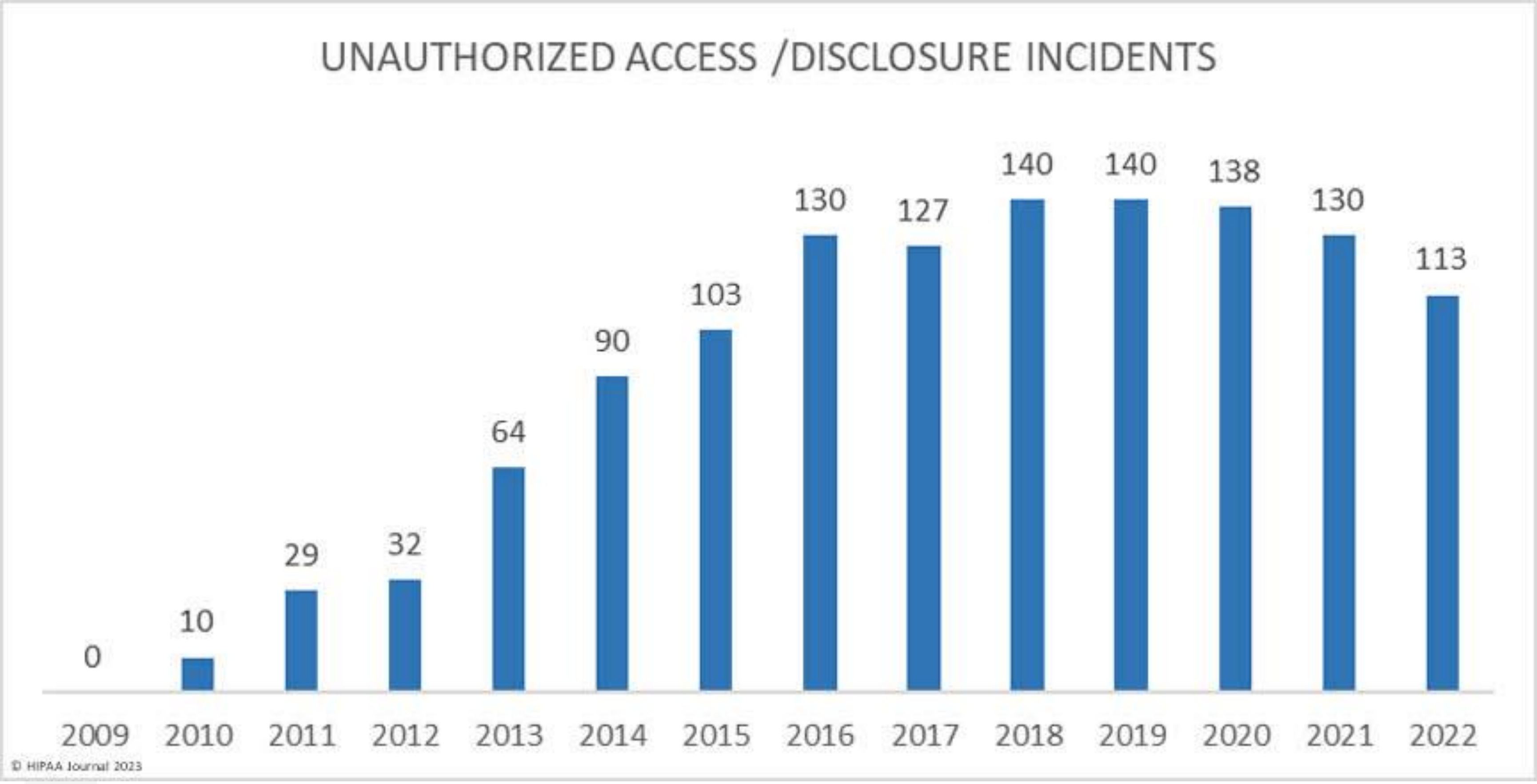
Shift away from healthcare

- Healthcare FDA cases generated approximately 57.3% of the total recoveries in 2024.
- It used to account for over 80% in the past.

Cybersecurity



GSA report on Cybersecurity


UNAUTHORIZED ACCESS /DISCLOSURE INCIDENTS
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DOJ's Civil Cyber-Fraud Initiative

On October 6, 2021, Deputy Attorney General Lisa O. Monaco announced the launch of DOJ's Civil Cyber-Fraud Initiative, combining DOJ's civil fraud enforcement, government procurement and cybersecurity expertise "to combat new and emerging cyber threats to the security of sensitive information and critical systems."

"For too long, companies have chosen silence under the mistaken belief that it is less risky to hide a breach than to bring it forward to report it."

The Civil Cyber-Fraud initiative will use the FCA to pursue cybersecurity-related fraud by government contractors and grant recipients that are "knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches."

Whereas earlier cybersecurity FCA actions were initiated primarily by *qui tam* relators, the announcement reflects the Biden Administration's increasing emphasis on affirmatively policing cybersecurity requirements for government contractors and their suppliers.

SPEECH

Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Cybersecurity and Infrastructure Security Agency (CISA) Fourth Annual National Cybersecurity Summit

Wednesday, October 13, 2021

Share

Location
Washington, DC
United States

Remarks as Delivered

Good afternoon. My name is Brian Boynton and I am the Acting Assistant Attorney General for the Civil Division at the Department of Justice.

Today, I want to talk about the Justice Department's newly announced Civil Cyber-Fraud Initiative. This initiative will combine the department's expertise in civil fraud enforcement, government procurement and cybersecurity to promote the critical mission of combating new and emerging cyber-threats.

First, the False Claims Act is a natural fit to pursue knowing failures to comply with cybersecurity standards. When government agencies acquire cyber products and services, they often require contractors and grantees to meet specific contract terms, which are often based on uniform contracting language or agency-specific requirements. For example, cybersecurity standards may require contractors to take measures to protect government data, to restrict non-U.S. citizen employees from accessing systems or to avoid using components from certain foreign countries. The knowing failure to meet these cybersecurity standards deprives the government of what it bargained for.

Second, False Claims Act liability may be based on the knowing misrepresentation of security controls and practices. In seeking a government contract, or performing under it, companies often make representations to the government about their products, services, and cybersecurity practices. These representations may be about a system security plan detailing the security controls it has in place, the company's practices for monitoring its systems for breaches, or password and access requirements. Misreporting about these practices may cause the government to choose a contractor who should not have received the contract in the first place. Or it could cause the government to structure a contract differently than it otherwise would have. Knowing misrepresentations of this kind also deprive the government of what it paid for and violate the False Claims Act.

Finally, the knowing failure to timely report suspected breaches is another way a company may run afoul of the Act. Government contracts for cyber products, as well as for other goods and services, often require the timely reporting of cyber incidents that could threaten the security of agency information and systems. Prompt reporting by contractors often is crucial for agencies to respond to a breach, remediate the vulnerability and limit the resulting harm.

Staffing Company to Pay $2.7M for Alleged Failure to Provide Adequate Cybersecurity for COVID-19 Contact Tracing Data

Wednesday, May 1, 2024

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For Immediate Release

Office of Public Affairs

Insight Global LLC, headquartered in Atlanta has agreed to pay $2.7 million to resolve allegations that it violated the False Claims Act by failing to implement adequate cybersecurity measures to protect health information obtained during COVID-19 contact tracing.

The United States alleged that during the COVID-19 pandemic, the Pennsylvania Department of Health hired Insight Global to provide staffing for COVID-19 contact tracing and paid Insight Global using funds from the U.S. Centers for Disease Control and Prevention. Insight Global understood that personal health information of contact tracing subjects needed to be kept confidential and secure, but it failed to do so. For example, certain personal health information and/or personally identifiable information of contact tracing subjects was transmitted in the body of unencrypted emails, staff used shared passwords to access such information, and such information was stored and transmitted using Google files that were not password protected and were potentially accessible to the public via internet links.

The United States further alleged that from November 2020 through January 2021, Insight Global managers received complaints from Insight Global staff that such information was unsecure and potentially accessible to the public, but Insight Global failed to start remediating the issue until April 2021. At that point, Insight Global addressed the issue, including by securing such information, investigating the cause and scope of the incident, strengthening

Cooperating Federal Contractor Resolves Liability for Alleged False Claims Caused by Failure to Fully Implement Cybersecurity Controls

U.S. Department of Justice
Office of Public Affairs
September 5, 2023

Verizon Business Network Services LLC, of Ashburn, Virginia, has agreed to pay $4,091,317 to resolve False Claims Act allegations that it failed to completely satisfy certain cybersecurity controls in connection with an information technology service provided to federal agencies. In connection with the settlement, the United States acknowledged that Verizon took a number of significant steps entitling it to credit for cooperating with the government.

"When government contractors fail to follow required cybersecurity standards, they may jeopardize the security of sensitive government information and information systems," said Deputy Assistant Attorney General Michael Granston of the Civil Division's Commercial Litigation Branch. "We will continue to pursue knowing cybersecurity related violations under the Department's Civil Cyber-Fraud Initiative and to provide credit in settlements to government contractors that disclose misconduct, cooperate with pending investigations and take remedial measures, all of which are critically important to protecting the nation against cyber threats."

This settlement relates to Verizon's Managed Trusted Internet Protocol Service (MTIPS), which is designed to provide federal agencies with secure connections to the public internet and other external networks. The settlement resolves allegations that Verizon's MTIPS solution did not completely satisfy three required cybersecurity controls for Trusted Internet Connections with respect to General Services Administration (GSA) contracts from 2017 to 2021. After learning of the issues, Verizon provided the government with a written self-disclosure, initiated an independent investigation and compliance review of the issues and provided the government with multiple detailed supplemental written disclosures. Verizon cooperated with the government's investigation of the issues and took prompt and substantial remedial measures.

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Aerojet Rocketdyne Agrees to Pay $9 Million to Resolve False Claims Act Allegations of Cybersecurity Violations in Federal Government Contracts

Friday, July 8, 2022

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For Immediate Release

Office of Public Affairs

Aerojet Rocketdyne Inc., headquartered in El Segundo, California, has agreed to pay $9 million to resolve allegations that it violated the False Claims Act by misrepresenting its compliance with cybersecurity requirements in certain federal government contracts, the Justice Department announced today. Aerojet provides propulsion and power systems for launch vehicles, missiles and satellites and other space vehicles to the Department of Defense, NASA and other federal agencies.

The settlement resolves a lawsuit filed and litigated by former Aerojet employee Brian Markus against Aerojet under the *qui tam* or whistleblower provisions of the False Claims Act, which permit a private party (known as a relator) to file a lawsuit on behalf of the United States and receive a portion of any recovery. Mr. Markus and Aerojet reached a settlement of the case on the second day of trial. Mr. Markus will receive $2.61 million as his share of the False Claims Act recovery.

VORYS

Are we overusing the FCA?

United States v. ManPow, LLC, No. 221CV05418VAPADSX, 2024 WL 305699, at *1 (C.D. Cal. Jan. 3, 2024)

- FCA is not an all-purpose anti-fraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations.

Defendant next challenges the materiality of Relators' claims. A false statement or claim is material under the FCA if it "ha[s] a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). "[M]ateriality [further] look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar I*, 579 U.S. at 192 (citation omitted). "No 'single fact or occurrence' determines materiality ...." *Winter*, 953 F.3d at 1121 (quoting *Escobar I*, 579 U.S. at 191). Instead, multiple factors inform materiality analysis, such as whether the government expressly identifies a provision as a condition of payment, whether compliance is minor or insubstantial, whether the alleged violation goes to the essence of the bargain, and how the government responds to claims when it has knowledge of violations. *Escobar I*, 579 U.S. at 193 n.5, 194-95.

*12 "The materiality standard is demanding." *Id.* at 194. Indeed, "[t]he **False Claims Act** is not 'an all-purpose antifraud statute,' ... or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* "By enforcing [the materiality] requirement rigorously, courts ... ensure that government contractors [do] not face 'onerous and unforeseen FCA liability' as the result of noncompliance with any of 'potentially hundreds of legal requirements' ...." *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 333 (9th Cir. 2017) (citation omitted).

FCA Priorities Under Trump

Trump and tariffs

Tariffs and Customs Fraud

Former DAAG Granston and Director Yavelberg each spoke on February 20 at the Federal Bar Association's Annual Qui Tam Conference. Notably, both committed that DOJ would aggressively use the FCA to pursue tariffs and customs avoidance. Given the second Trump administration's high-profile use of tariffs in formulating trade policy, we expect to see DOJ focus far more on tariff and customs enforcement than it has historically.

Tariff and customs enforcement causes of action would presumably include misreporting countries of origin and/or undervaluing, misclassifying or undercounting goods. Relatedly, we anticipate that DOJ will continue to investigate and pursue FCA cases involving compliance with the Trade Agreements Act and the Buy American Act in the area of alleged procurement fraud.

According to DOJ, since 2012, the Civil Fraud Section has recovered more than $115 million in unpaid customs duties under the FCA. That is a fraction of what it has recovered in cases premised on alleged healthcare fraud over that time. However, as the second Trump administration pursues its trade agenda, we anticipate that the FCA will be a key tool to

Trump and tariffs

Alert / False Claims Act

Trump's trade policy and enforcement implications under the False Claims Act

April 16, 2025

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By Jonah Retzinger, Christopher Grigg, Zachary Cunha, Adam Tarosky, Joseph Maher, Brian Hill and Mambwe Mutanuka

Current trade policy heightens FCA risks for international businesses and underscores the need for strict compliance.

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Trump's trade policy and enforcement implications under the False Claims Act

WHAT'S THE IMPACT?

- Companies engaged in international trade must stay alert to shifting tariff requirements.
- Evasion of tariff requirements, including via false representation of countries of origin and undervaluation or misclassification of goods, creates the risk of substantial liability under the False Claims Act.
- Those involved in the healthcare supply chain should anticipate and prepare for forthcoming pharma-specific tariffs.

Trump and tariffs

- On March 25, the DOJ announced that San Francisco company Evolutions Flooring Inc. and its owners agreed to pay $8.1 million to settle an FCA case for allegedly evading customs duties on imports of multilayered wood flooring from China.
- The DOJ's complaint alleged that the defendants caused false information regarding the manufacturers and country of origin to be submitted to U.S. Customs and Border Protection.

Trump and tariffs

- On April 18, the DOJ filed a civil FCA complaint against uniform manufacturer Barco Uniforms and three of its executives, alleging that they violated the FCA by knowingly and improperly avoiding customs duties owed on imported apparel.
- The government alleges that the defendants knowingly undervalued garments purchased from foreign suppliers, including through a double-invoicing scheme featuring false entry summaries presented to CBP.

Trump and DEI

DOJ Launches Initiative Leveraging the False Claims Act to Target DEI Programs

MAY 20, 2025

CONSTITUTIONALITY, ENFORCEMENT

Read Time: 3 mins

In a May 19, 2025 memorandum, Deputy Attorney General Todd Blanche announced the Civil Rights Fraud Initiative, which aims to use the False Claims Act (FCA) to investigate and "pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws" via "racist preferences, mandates, . . . and activities"—including diversity, equity, and inclusion (DEI) programs. The Initiative's launch follows two Trump Administration executive orders, which we previously addressed here and here, that expressly tether assertedly unlawful DEI programs to potential treble damages and statutory penalties under the FCA for companies that do business with the federal government. It also comes just two days before May 21, 2025, the deadline specified in Executive Order 14173 for the Attorney General to

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Trump and DEI


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PRESS RELEASE

Justice Department Establishes Civil Rights Fraud Initiative

Monday, May 19, 2025

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For Immediate Release
Office of Public Affairs

Today, the Department of Justice announced the establishment of the Civil Rights Fraud Initiative, which will utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws. Violations of the False Claims Act can result in treble damages and significant penalties.

"Institutions that take federal money only to allow anti-Semitism and promote divisive DEI policies are putting their access to federal funds at risk," said Attorney General Pamela Bondi. "This Department of Justice will not tolerate these violations of civil rights – inaction is not an option."

Trump and DEI

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 19, 2025

MEMORANDUM FOR: OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
CIVIL DIVISION
CIVIL RIGHTS DIVISION
CRIMINAL DIVISION
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Todd Blanche

SUBJECT: Civil Rights Fraud Initiative

Under Attorney General Bondi's leadership, "[t]he Department of Justice is committed to enforcing federal civil rights laws and ensuring equal protection under the law." Attorney General Memorandum, *Ending Illegal DEI and DEIA Discrimination and Preferences* (Feb. 5, 2025). One of the most effective ways to accomplish this objective is through vigorous enforcement of the False Claims Act, 31 U.S.C. § 3729 et seq., against those who defraud the United States by taking its money while knowingly violating civil rights laws.

Trump and DEI

Under Attorney General Bondi's leadership, "[t]he Department of Justice is committed to enforcing federal civil rights laws and ensuring equal protection under the law." Attorney General Memorandum, *Ending Illegal DEI and DEIA Discrimination and Preferences* (Feb. 5, 2025). One of the most effective ways to accomplish this objective is through vigorous enforcement of the False Claims Act, 31 U.S.C. § 3729 et seq., against those who defraud the United States by taking its money while knowingly violating civil rights laws.

The False Claims Act is the Justice Department's primary weapon against government fraud, waste, and abuse. Liability results in treble damages and significant penalties. It is implicated when a federal contractor or recipient of federal funds knowingly violates civil rights laws—including but not limited to Title IV, Title VI, and Title IX, of the Civil Rights Act of 1964—and falsely certifies compliance with such laws. Accordingly, a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms, or requires women to compete against men in athletic competitions. Colleges and universities cannot accept federal funds while discriminating against their students.

The False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin. While racial discrimination has always been illegal, the prohibition on such policies became clear after the Supreme Court stated that "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 205 (2023).

Constitutionality

Constitutionality

- Last year, Middle District of Florida issued a first-of-its-kind ruled that the FCA's qui tam provisions are unconstitutional. *See United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 2024 WL 4349242, at *1, *4 (M.D. Fla. Sept. 30, 2024).
- The court found that relators act as "Officers of the United States" and must therefore be appointed under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

Constitutionality

- In 11th Circuit brief **defending the act**, DOJ made four primary arguments.

  1. Relators do not exercise executive power but instead pursue a private interest in a share of the government's recovery, as recognized in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), where the Supreme Court held that relators have Article III standing as partial assignees of the government's claim, not as agents of the executive branch.

  2. DOJ emphasized that the FCA preserves executive control over *qui tam* lawsuits. Even in declined cases, the government retains authority to—among other things—veto settlements, intervene at a later stage, or dismiss the case under 31 U.S.C. § 3730(c)(2)(A). *Id.* at 17–18, 29–30.

  3. DOJ argued that relators do not hold a "continuing position"-- their role is limited to a single case and is personal in nature, and they receive no salary, have no access to government files, and cannot be replaced by others if they withdraw.

  4. DOJ invoked historical practice, noting that early Congresses enacted numerous *qui tam* statutes.

Constitutionality

- The Fifth Circuit Court of Appeals recently vacated a $28.7 million verdict in a declined FCA qui tam because the district court improperly relied on the relators' post-trial expert declarations to calculate damages.
- Writing separately in a concurrence, Judge Duncan also condemned the "constitutional flaws in the FCA's qui tam device," citing the logic of United States ex rel. Zafirov (discussed here), and adding to the number of judges voicing concerns over the constitutionality of the FCA's qui tam provision.

Constitutionality

- This challenge is being asserted in all circuits and may end up before the Supreme Court.
- Justices Thomas, Kavanaugh, and Barrett have all expressed at least some level of doubt about the constitutionality of the act.

Scienter

Scienter

- In some circuits, Defendants escaped liability by arguing their conduct was based on an “objectively reasonable” interpretation of an ambiguous rule (even if they actually thought differently at the time).
- In *United States ex rel. Schutte v. SuperValu Inc*., 598 U.S. 739 (2023), the court unanimously said FCA scienter (knowledge) looks at **the defendant’s mindset**: if you actually believed you were violating the law or had strong reasons to suspect it and just came up with a post-hoc excuse, that doesn’t protect you.

VORYS

Scienter

- In *United States ex rel. Patzer v. Sikorsky Aircraft Corp*., 722 F.Supp. 3d 839 (E.D. Wis. 2024), the court noted that *SuperValu* made an expert's opinion on industry standards relevant to the defendants' subjective state of mind.
- The court in *Sikorsky* declined to exclude defense expert witness Patrick McGeehin's testimony because if, "as McGeehin opines, a typical participant in the government-contracting industry would not have thought that the arrangement was CPPC, then it is more probable that defendants' witnesses are telling the truth when they testify that they did not think that they had entered into such an arrangement."

Scienter

- In *United States ex rel. Sheldon v. Forest Labs., LLC*, 2024 U.S. Dist. LEXIS 129331, at *73 (July 23, 2024), the court determined that Forest Laboratories did not act with deliberate ignorance or reckless disregard when it hired an attorney "to ask [the Centers for Medicare and Medicaid Services (CMS)] to change its regulations because [Forest Laboratories] knew that" CMS' interpretation of "Best Price" differed from Forest Laboratories'.

- The court stated that to the extent the letter sent by Forest Laboratories' attorney to CMS "discloses Forest's subjective beliefs regarding the meaning of 'Best Price,' it indicates that Forest believed its practice … was consistent with the prevailing understanding of 'Best Price.'"

- The court stated that "it would be perverse to attribute deliberate ignorance or reckless disregard to Forest on the basis of a statement it made to CMS in an effort to clarify its obligations regarding the reporting of 'Best Price.'"

Government Dismissal Power

Government Dismissal Power

- Section 3730(c)(2)(A) provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator]," so long as the relator received notice and an opportunity for a hearing.

Government Dismissal Power

U.S. Department of Justice

Civil Division

Washington, DC 20530

January 10, 2018

PRIVILEGED AND CONFIDENTIAL; FOR INTERNAL GOVERNMENT USE ONLY

<u>MEMORANDUM</u>

TO: Attorneys
Commercial Litigation Branch, Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases
Offices of the U.S. Attorneys

FROM: Michael D. Granston MDG
Director
Commercial Litigation Branch, Fraud Section

SUBJECT: <u>Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)</u>

Government Dismissal Power

<u>**Introduction**</u>

Over the last several years, the Department has seen record increases in *qui tam* actions filed under the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., with annual totals approaching or exceeding 600 new matters. Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).

Historically, the Department has utilized section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain *qui tam* actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources.

Government Dismissal Power

1. *Curbing Meritless Qui Tams*

The Department should consider moving to dismiss where a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous. Examples of inherent legal defects include *qui tam* actions where the relator failed to allege an actionable obligation to support a reverse false claim violation, *see, e.g.*, *United States ex rel. Hoyte v. American National Red Cross*, 518 F.3d 61 (D.C. Cir. 2008); *United States ex rel. Wright*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), or to allege a non-federal defendant that is not covered by sovereign immunity. *See, e.g.*, *United States ex rel. Carter v. Board of Governors of the Federal Reserve, et al.*, No. 12-0129-cv-W-HFS (W.D. Mo. May 1, 2013); *United States ex rel. Casey v. Blevins*, No. 4:02-CV-60 (E.D. Ark. July 5, 2002); *Braswell v. Unger*, No. 4:14-cv-02574-JAB (D. Az. August 11, 2015). Factually frivolous cases can take a number of forms. *See, e.g.*, *United States ex rel. Roach v. Obama*, No. 14-0470 (D.D.C. December 18, 2014); *United States ex rel. May v. City of Dallas*, 2014 WL 5454819, at *5 (N.D. Tex. Oct. 27, 2014); *United States ex rel. Berg v. Obama*, 383 F. App'x 7 (D.C. Cir. 2010) (per curiam); *United States ex rel. Lachkovich v. Ashcroft, et al.*, No. 08-cv-00066-WYD-BNB (D. Colo. March 13, 2008).

In certain cases, even if the relator's allegations are not facially deficient, the government may conclude after completing its investigation of the relator's allegations that the case lacks merit. In such a case, the Department should consider dismissing the matter. *See United States ex rel. Nasuti v. Savage Farms, Inc.*, 2014 WL 1327015, at *11 (D. Mass. Mar. 27, 2014), aff'd, 2015

Government Dismissal Power

2. *Preventing Parasitic or Opportunistic Qui Tam Actions*

The Department should consider moving to dismiss a *qui tam* action that duplicates a pre-existing government investigation and adds no useful information to the investigation. In these cases, the government should consider whether the relator would receive an unwarranted windfall at the expense of the public fisc because Congress intended for the relator share to incentivize and award the provision of meaningful information and assistance instead of merely providing duplicative information already known to the government. *See* 132 Cong. Rec. 29, 322 (1986) (citing S. Rep. No. 99-345, at 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293) (discussing factors relevant to awarding a relator share, including "the significance of the information provided" and whether the government was already aware of the information prior to relator providing it). For example, in *United States ex rel. Amico, et al. v. Citi Group, Inc.*, *et al.*, No. 14-cv-4370 (CS) (S.D.N.Y. August 7, 2015), relators filed a *qui tam* action against Citi Group and its subsidiaries alleging fraud in connection with the marketing and sale of residential mortgage backed securities; however, the Department of Justice had been investigating the same conduct for several years prior to the filing and had engaged in extensive settlement negotiations before relators filed their complaint. The government successfully moved to dismiss the action under section 3730(c)(2)(A) because, among other factors, relators' belated complaint provided no assistance to the government in its pre-existing investigation. *See also United States ex rel. Piacentile v. Amgen Inc.*, No. 04-cv-3983-SJ-RML, 2013 WL 5460640, at *4 (E.D.N.Y. Sept. 30, 2013) (granting government's motion to dismiss *qui tam* complaint filed by serial relator who filed one of ten *qui tams* alleging similar wrongdoing by the same defendant).

Government Dismissal Power

3. *Preventing Interference with Agency Policies and Programs*

Dismissal should be considered where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid these effects. For example, in *United States ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925 (10th Cir. 2005), relator alleged that a security contractor submitted false claims to the Department of Energy for deficient security services at Rocky Flats, a

radiologically-contaminated nuclear weapons manufacturing facility that was slated to undergo decontamination and closure. The government successfully moved to dismiss the action because, among other things, litigation would delay the clean-up and closure of the facility by diverting agency personnel and resources away from the project. 397 F.3d at 937; *see also* *United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1146 (concluding that valid government interests supporting dismissal included the Department of Agriculture's desire to "end the divisiveness in the citrus industry" by promulgating new citrus marketing regulations to replace invalidated regulations upon which the relator based its claims); *United States ex rel. Toomer v.*

Government Dismissal Power

4. *Controlling Litigation Brought on Behalf of the United States*

Relatedly, the Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives. For example, in *In Re Natural Gas Royalties Qui Tam Litigation*, MDL Docket No. 1293 (D. Wyo. October 9, 2002), relator filed separate *qui tam* actions in various districts against more than 300 defendants accused of underpaying royalties owed to the United States in connection with natural gas produced from federal lands. After intervening as to a limited number of defendants, the government sought to dismiss certain declined claims to, among other things, avoid interference with the government's ability to litigate the intervened claims. The court agreed, finding that the interest in avoiding interference with ongoing litigation warranted dismissal of the declined claims. *See also Lion Raisins v. Kagawa, et al.*, No. CV-F-02-5665-REC-LJO (E.D. Cal. Nov. 3, 2003) (granting government's motion to dismiss, concluding that government's desire to avoid interference with pending Federal Torts Claims Act action involving the same parties was a valid government purpose that was rationally related to dismissal). In addition, in *United States ex rel. Wright v. Agip Petroleum Co.*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), the government moved to dismiss, in part, to avoid the risk of unfavorable precedent. *See id.* Finally, in *United States ex rel. Piacentile*, 2013 WL 5460640, the government moved to dismiss a declined claim that was serving as an obstacle to the settlement of the government's intervened claims. *But cf. United States ex rel. Schweizer v. Oce*, 677 F.3d 1228 (D.C. Cir. 2012) (once the government reaches a settlement with defendant of relator's claims, the dismissal of those claims is governed by section 3730(c)(2)(B), requiring a showing that the settlement is fair, adequate, and reasonable, rather than by section 3730(c)(2)(A)).[3]

Government Dismissal Power

5. *Safeguarding Classified Information and National Security Interests*

In certain cases, particularly those involving intelligence agencies or military procurement contracts, we should seek dismissal to safeguard classified information. For example, in *United States ex rel. Fay v. Northrup Grumman Corp.*, No. 06-cv-00581-EWN-MJW, 2008 WL 877180 (D. Colo. Mar. 27, 2008), the relator alleged that a defense contractor defrauded the United States in connection with work performed on a classified contract. After declining to intervene, the Department moved to dismiss the action under section 3730(c)(2)(A), asserting that continued litigation would pose "an unacceptable risk to national security" due to the potential for disclosure of classified information. Applying the *Sequoia Orange* standard, the Court agreed, concluding that the claims and defenses were inextricably tied to classified information and dismissal was rationally related to the valid government interest of preventing the disclosure of such information. *Id.* at * 6-7. *See also United States ex rel. Matseki v. Raytheon Co.*, 634 F. App'x 192 (9th Cir. 2015) (per curiam) (holding that government interest in avoiding disclosure of classified information was sufficient basis for dismissal); *United States ex rel. Schwartz v. Raytheon Co.*,150 F. App'x 627 (9th Cir. 2005) (holding that "federal interest in protecting military and state secrets" was valid basis for dismissal); *United States ex rel. Ridenour*, 397 F.3d at 936-37 ("The Government demonstrated that classified documents required in the litigation would present a risk of inadvertent disclosure, implicating national security."). Finally, it should be noted that the government need not demonstrate that continued litigation *will* result in the disclosure of classified information. In jurisdictions that apply the "rational basis" basis test, the government has a strong argument that the *risk of disclosure*, alone, justifies dismissal. *See United States ex rel. Ridenour,* 397 F.3d at 937 (finding risk of inadvertent disclosure of classified information, "even if theoretically minimal," sufficed to justify dismissal). (In jurisdictions that apply the "unfettered right" standard, no showing by the government is required.)

Government Dismissal Power

6. *Preserving Government Resources*

The Department should also consider dismissal under section 3730(c)(2)(A) when the government's expected costs are likely to exceed any expected gain.[4] *See, e.g.*, *Swift v. United States,* 318 F.3d 250, 251 (D.C. Cir. 2003) (the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven); *United States ex rel. Nicholson v. Spigelman, et al.*, No. 1:10-cv-03361, 2011 WL 2683161, at *2 (N.D. Ill. July 8, 2011) (explaining that the estimated government losses, even with statutory penalties and damages multiplier, were less than the costs of monitoring the litigation and responding to discovery requests) Examples of potential costs may include, among other things, the need to monitor or participate in ongoing litigation, including responding to discovery requests. *See, e.g.*, *United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1146 (holding that district court "properly noted that the government can legitimately consider the burden imposed on taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs"); *United States ex rel. Levine v. Avnet, Inc.*, No. 2:14-cv-17-WOB-CJS, 2015 WL 42359 (E.D. Ky.

Government Dismissal Power

7. *Addressing Egregious Procedural Errors*

The Department may also seek dismissal of a *qui tam* action pursuant to section 3730(c)(2)(A) based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation. For example, in *United States ex rel. Surdovel v. Digirad Imaging Solutions*, No. 07–cv-0458, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013), the relator ignored repeated requests from the Office of the U.S. Attorney to serve the *qui tam* complaint and disclose material facts as required by 31 U.S.C. § 3730(b). The Court granted the government's motion to dismiss the action because the "egregious procedural errors completely frustrated the government's ability to investigate the relator's claims." *Id.* at *4. *But cf. State Farm Fire and Cas. Co. v. United States ex rel. Rigsby*, – U.S. –, 137 S.Ct. 436, 440 (2016) (holding that relators' violation of FCA's seal requirement did not mandate automatic dismissal of relators' complaint).

Effect of Granston memo

- The DOJ has sought dismissal of at least 50 actions since the Granston Memo was issued (compared with just 45 identified in the 30 years prior to the issuance of the memo).

Government Dismissal Power

- In *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023), the Court held that the government maintains authority to dismiss a qui tam False Claims Act (FCA) action after initially declining to intervene so long as the government intervenes before moving to dismiss.
- The Court said such dismissal was subject to Federal Rule 41(a) standard; government does not have "essentially unfettered discretion to dismiss."
- Noted that the government's motion to dismiss “will satisfy Rule 41 in all but the most exceptional cases” and that the government's position is “entitled to substantial deference.”
- "If the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion. And that is so even if the relator presents a credible assessment to the contrary."

Government Dismissal Power

- In *Vanderlan v. United States*, the Fifth Circuit held that the government may voluntarily dismiss a relator's FCA action over the relator's objections and without an *evidentiary* hearing. 135 F.4th 257, 262, 265–67 (5th Cir. 2025).
- This decision is consistent with all three of the other circuit courts (the Second, Fourth, and Sixth) that have considered this question.

VORYS

Questions?

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