

**No. 22-15862**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Marcia Stein and Rodolfo Bone, Relators,  
*Plaintiffs and Appellants,*

and

United States of America, ex rel.,  
*Plaintiff,*

vs.

Kaiser Foundation Health Plan, Inc., et al.,  
*Defendants and Appellees.*

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On Appeal from the United States District Court  
Northern District of California  
Case No. 3:16-cv-05337-EMC  
The Honorable Edward M. Chen

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**BRIEF OF APPELLANTS MARCIA STEIN AND RODOLFO BONE**

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I. STATEMENT OF JURISDICTION.

Pursuant to Ninth Circuit Rule 28-2.2, Appellants Marcia Stein and Rodolfo Bone (collectively, “Appellants” or “Stein”) submit the following statement of jurisdiction:

a. The United States District Court for the Northern District of California (the “District Court”) had subject matter jurisdiction over Appellants’ action against Appellees, Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Kaiser Foundation Health Plan of Colorado, Kaiser Foundation Health Plan of Georgia, Inc., Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Kaiser Foundation Health Plan of the Northwest, Kaiser Foundation Health Plan of Washington, The Permanente Medical Group, Inc., Southern California Permanente Medical Group, Colorado Permanente Medical Group, The Southeast Permanente Medical Group, Hawaii Permanente Medical Group, Mid-Atlantic Permanente Medical Group, Northwest Permanente, P.C., Group Health Permanente, and Kaiser Permanente, (collectively, “Appellees” or “Kaiser”) pursuant to 31 U.S.C. § 3732(a).

b. On May 5, 2022, the District Court entered its order (1-ER-3-48) dismissing without leave to amend all of Appellants’ claims for relief against the Appellees (1-ER-11, 41-43, 48) based upon Appellees’ Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of jurisdiction under the False Claims Act’s first-to-file rule, 31 U.S.C. § 3730(b)(5). (1-ER-48.) On November 15, 2022, the District Court entered

judgment in favor of Appellees against Appellants. (1-ER-2.) The District Court's order<sup>1</sup> and judgment are final under Fed.R.Civ.P. 54(a) and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

c. Appellants appeal from the District Court's order (1-ER-3-48) granting Appellees' Motion to Dismiss Appellant's complaints against the Appellees without leave to amend,<sup>2</sup> (1-ER-48), and subsequent judgment. (1-ER-2.) As Appellants' original action, *United States, ex rel. Stein, et al. v. Kaiser Foundation Health Plan, Inc., et al.*, Case No. 3:16-cv-05337-EMC, was consolidated with lead case *United States, ex rel. Osinek v. Permanente Medical Group, et al.*, Case No. 3:13-cv-03891-EMC, Appellants' Notices of Appeal were filed in both actions on June 3, 2022 (9-ER-1775-1826; 9-ER-1827-1878), and are timely pursuant to 28 U.S.C. § 2107(a) and Fed.R.App.P. 4(a)(1).

## II. ISSUES PRESENTED.

1. Did the District Court commit legal error when it held that the False Claims Act's first-to-file rule, 31 U.S.C. § 3730(b)(5), is a jurisdictional bar?

2. Should the Ninth Circuit's holdings in *United States ex rel. Hartpence*

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<sup>1</sup>A direct appeal lies from an order dismissing a complaint without leave to amend for lack of subject matter jurisdiction. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987).

<sup>2</sup>To the extent Appellants' appeal of the order was arguably premature, the District Court's recent judgment (1-ER-2) cured Appellants' appeal. *Cato v. Fresno City*, 220 F.3d 1073, 1074-1075 (9th Cir. 2000).

*v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en banc) and *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) that the False Claims Act’s first-to-file rule, 31 U.S.C. § 3730(b)(5), is jurisdictional be rejected and disapproved in light of the Supreme Court’s “clear-statement principle” in *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) and related decisions, and sister circuit decisions in *United States ex rel. Bryant v. Community Health Systems, Inc.*, 24 F.4th 1024 (6th Cir. 2021), *In re Plavix Marketing, Sales Practices and Products Liability litigation (No. II)*, 974 F.3d 228 (3rd Cir. 2020), *United States v. Millenium Labs., Inc.*, 923 F.3d 240 (1st Cir. 2019), *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80 (2nd Cir. 2017), and *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015)?

3. Did the District Court commit legal error when it granted Appellees’ motion to dismiss each of Appellants’ claims pursuant to False Claims Act’s first-to-file rule, 31 U.S.C. § 3730(b)(5)?

4. Did the District Court commit legal error when it refused to allow Appellants leave to file a further Amended Complaint?

### **III. CIRCUIT RULE 28-2.7 STATEMENT.**

Copies of pertinent statutes, regulations and rules are contained in the Addendum bound with this brief.

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#### IV. REVIEWABILITY AND STANDARD OF REVIEW.

Appellants contend that the District Court misapplied the correct legal standard in granting Appellees' Fed.R.Civ.P. 12(b)(1) Motion to Dismiss against Appellants' action based on the False Claims Act's first-to-file rule, 31 U.S.C. § 3730(b)(5).

The District Court's interpretation of statutes is reviewed by this Court *de novo*. *United States v. Middleton*, 231 F.3d 1207, 1209 (9<sup>th</sup> Cir. 2000). Likewise, the District Court's application and conclusions of law are reviewed by this Court *de novo*. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9<sup>th</sup> Cir. 1997).

The existence of subject matter jurisdiction is a question reviewed *de novo*. *Townsend v. University of Alaska*, 543 F.3d 478, 482 (9<sup>th</sup> Cir. 2008). A district court's legal conclusions relevant to dismissal for lack of subject matter jurisdiction are reviewed *de novo*, whereas reviews of a district court's factual findings relevant to its determination of subject matter jurisdiction are reviewed for clear error. *United Transp. Union v. Burlington Northern Santa Fe R.R. Co.*, 528 F.3d 674, 677 (9<sup>th</sup> Cir. 2008).

While the District Court's denial of leave to amend is reviewed by this Court for abuse of discretion, *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9<sup>th</sup> Cir. 2010), requests for leave to amend are to be granted with "extreme liberality." *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9<sup>th</sup> Cir. 2009) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9<sup>th</sup> Cir. 1990).) A denial of leave to

amend is “‘strictly’ reviewed in light of the strong policy permitting amendment.” *In re Rogstad*, 126 F.3d 1224, 1228 (9<sup>th</sup> Cir. 1997) (quoting *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9<sup>th</sup> Cir.1991).) Further, “[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.” *Sonoma County Association of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1118 (9<sup>th</sup> Cir. 2013) (quoting *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9<sup>th</sup> Cir. 1991).)

“We review the denial of leave to amend for an abuse of discretion, *see United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 995 (9<sup>th</sup> Cir. 2011), but we review the question of futility of amendment *de novo*, *see Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 893 (9<sup>th</sup> Cir. 2010).” *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172 (9<sup>th</sup> Cir. 2016).

“A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1063 (9<sup>th</sup> Cir. 2005).

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V. STATEMENT OF THE CASE.<sup>3</sup>

Under the Medicare Part C or Medicare Advantage (MA) program, the United States Government's (Government) Centers for Medicare & Medicaid Services (CMS) pays to MA organizations (MAOs), such as Appellees, a monthly risk adjusted capitated payment for each MA patient based upon the MA patients' prior year's Hierarchical Condition Category (HCC) diagnoses. *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1166 (9th Cir. 2016).

On August 23, 2013, Relator Ronda Osinek (Osinek) filed her *qui tam* complaint against Appellee MAO, Kaiser Permanente, under seal<sup>4</sup> (8-ER-1751-1773) for violating the False Claims Act, 31 U.S.C. §§ 3729, et seq. (FCA), fraudulently increasing its risk adjusted capitated payments by utilizing computer programs to identify prior years' HCC diagnoses that were missing from their MA patients' current year's diagnoses, and instructing Kaiser physicians to amend their patient files to reflect such identified HCC diagnoses long after the patient encounters ("Refresh

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<sup>3</sup>Pursuant to Fed.R.Evid. 201, Appellants Stein request the Court take judicial notice of the complaints, amended complaints, orders, judgment, and notices in the Arefi, Bryant, Bicocca, Taylor, and Osinek actions that are presented in Appellants' Excerpts of Record as they were considered by the District Court in connection with Appellees' Fed.R.Civ.P. 12(b)(1) motion to dismiss Appellants' action under the False Claims Act's first-to-file rule, 31 U.S.C. § 3730(b)(5).

<sup>4</sup>31 U.S.C. § 3730(b)(2) requires complaints for violations of 31 U.S.C. § 3729 filed on behalf of the United States by relators to be filed under seal. Such complaints cannot be served upon the defendants until ordered unsealed by the District Court.

fraud”). (8-ER-1757-1771.) The resulting HCC diagnoses submitted to CMS were not the result of a face-to-face encounters in violation of Medicare rules and regulations. (8-ER-1755.) Because the appeal arises from Appellees’ Fed.R.Civ.P. 12(b)(1) motion to dismiss based on the FCA’s “first-to-file rule,” 31 U.S.C. § 3730(b)(5), the following reviews all complaints filed up to and before Appellants’ final second amended complaint.

On October 22, 2014, Relator James Taylor, M.D. (Taylor) filed his *qui tam* FCA complaint under seal against a number of the Appellees (8-ER-1695-1749) for, as relevant here, (a) Refresh fraud (8-ER-1742-1744), and (b) improperly reporting to CMS malnutrition diagnoses based upon either (i) the patient simply having a prior history malnutrition, or (ii) Kaiser coders or computer systems improperly adding a malnutrition diagnosis because the physician used a variation of the term “cachexia” (a wasting syndrome) in the medical charts. (8-ER-1732.)

On November 3, 2014, Taylor filed his first amended *qui tam* complaint (8-ER-1640-1693) under seal for, as relevant here, (a) Refresh fraud (8-ER-1686-1688), and (b) improperly reporting to CMS malnutrition diagnoses based upon either (i) the patient simply having a prior history malnutrition, or (ii) Kaiser coders or computer systems improperly adding a malnutrition diagnosis because the physician used a variation of the term “cachexia” in the medical charts. (8-ER-1676.)

On September 4, 2015, Relators Naser Arefi, Ajith Kumar and Prime

Healthcare Services, Inc. (collectively, “Arefi”) filed their *qui tam* FCA complaint under seal against most of the Appellees (8-ER-1548-1638) for, as relevant here, fraudulently increasing their risk adjusted capitated payments by (a) utilizing computer programs to identify HCC diagnoses that were missing from their MA patients’ current year’s diagnoses, and conducting Refresh fraud (8-ER-1566), and (b) utilizing computer programs “to identify patients who may have clinical evidence of Cachexia but do not already have a Cachexia diagnosis or Protein Calorie Malnutrition diagnosis . . . ,” (bottom of 8-ER-1583),

On May 16, 2016, Appellants Stein filed their *qui tam* FCA complaint under seal against the Appellees Kaiser (7-ER-1497-1545) for fraudulently increasing their risk adjusted capitated payments by (a) submitting to CMS Sepsis diagnoses based upon improper medical diagnostic criteria (Sepsis fraud) (7-ER-1507-1524, 1536-1539), (b) submitting to CMS malnutrition diagnoses only supported by a dietician’s rubber stamp in the patients’ paper medical charts countersigned by the physician without documented clinical findings (Malnutrition fraud) (7-ER-1524-1527, 1539-1541), and (c) Refresh fraud. (7-ER-1527-1536.)

Next, on November 3, 2016, Appellees Stein filed their first amended *qui tam* FCA complaint under seal against Appellees Kaiser (7-ER-1440-1495) for Sepsis fraud, Malnutrition fraud, and Refresh fraud, and added a claim for improperly submitting to CMS diagnoses for aortic atherosclerosis (Atherosclerosis) “based

simply upon the physician's notation of Atherosclerosis in the medical record, without the medical record reflecting that the patient was treated for his/her Atherosclerosis condition." ("Atherosclerosis fraud") (7-ER-1470-1473, 1488-1490.)

On March 1, 2018, Relators Gloryanne Bryant and Victoria Hernandez (collectively, "Bryant") filed their *qui tam* FCA complaint under seal against many of the Appellees (7-ER-1361-1428) for fraudulently increasing their risk adjusted capitated payments by, in relevant part, (a) Sepsis fraud (7-ER-1393-1399), (b) Malnutrition fraud (7-ER-1401-1403), (c) Atherosclerosis fraud (7-ER-1378-1387), and (d) Refresh fraud. (7-ER-1416-1419.)

On February 10, 2020, Relator Michael Bicocca (Bicocca) filed his *qui tam* FCA complaint under seal against some of the Kaiser Appellees (7-ER-1318-1359) for fraudulently increasing their risk adjusted capitated payments by, in relevant part, committing Refresh fraud. (7-ER-1337-1351.) On October 9, 2020, Bicocca filed his first amended *qui tam* FCA complaint under seal (6-ER-1267-1315) for, in relevant part, (a) a type of Atherosclerosis fraud (6-ER-1291), and (b) Refresh fraud. (6-ER-1287-1305.)

On June 25, 2021, the District Court issued its order consolidating the six (6) above-mentioned cases with instructions that all future pleadings be filed in the low numbered case, *United States, ex rel. Osinek v. Permanente Medical Group, et al.*,

Case No. 3:13-CV-03891-EMC (the “*Osinek* action”). (6-ER-1265.)

On July 29, 2021, the District Court issued its order unsealing the complaints and amended complaints, certain other pleadings, and all future pleadings in the consolidated actions. (6-ER-1253-1254.)

On October 25, 2021, the Government filed its complaint-in-intervention against Appellees (6-ER-1124-1219) alleging, in relevant part (a) Atherosclerosis fraud (6-ER-1176-1208), and (b) Refresh fraud. (6-ER-1131, 1160-1181.)

On November 12, 2021, Stein filed a second amended *qui tam* FCA complaint alleging her Sepsis fraud (6-ER-1076-1094, 1110-1113), Malnutrition fraud (6-ER-1094-1097, 1113-1116), Atherosclerosis fraud (6-ER-1097-1100, 1116-1119), and Refresh fraud claims. (6-ER-1100-1110, 1119-1121.)

On January 18, 2022, Appellees filed their Fed.R.Civ.P. 12(b)(1) motion to dismiss the complaints filed by Relators Taylor, Arefi, and Stein, and portions of the complaint filed by Bryant and Bicocca, contending that the subject complaints (or portions thereof) are jurisdictionally barred by 31 U.S.C. § 3730(b)(5), known as the “first-to-file rule.” (3-ER-325-329.)

Stein opposed the motion on the grounds that (a) the Fed.R.Civ.P. 12(b)(1) motion is improper because (although the Ninth Circuit *en banc* stated, “We treat the first-to-file bar as jurisdictional,” *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 112, 1123, fn.1 (9<sup>th</sup> Cir 2015) (en banc)), the first-to-file rule is not

jurisdictional under the Supreme Court’s declaration that “A rule is jurisdictional ‘[i]f the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional. [Citation.] But if ‘Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional’” *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012), (2-ER-156-157); and (b) Stein’s Sepsis fraud, Malnutrition fraud, and Atherosclerosis fraud claims were not barred by the first-to-file rule because they involved materially different fraudulent schemes.<sup>5</sup> (2-ER-144-161.) Alternatively, Appellants Stein requested leave to amend their complaint. (2-ER-161.)

After oral argument, on May 5, 2022 the District Court issued its order granting Appellees’ motion to dismiss the *Stein* action, among others, (1-ER-3-48), holding, in relevant part, that (a) the first-to-file rule is jurisdictional (1-ER-11), (b) the *Stein* action is jurisdictionally barred by the first-to-file rule (1-ER-41-43 and 48), and (c) the *Stein* action is dismissed without leave to amend. (1-ER-43, 48.)

On June 3, 2022, Appellants Stein filed their Notices of Appeal in the *Stein* action and *Osinek* action. (9-ER-1776-1826, 1828-1878.) On November 14, 2022, the District Court entered Judgment against Appellants based on the May 5, 2022 Order dismissing the *Stein* action. (1-ER-2.)

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<sup>5</sup>Appellants Stein conceded that their Refresh fraud claim be dismissed. (2-ER-159).

## VI. SUMMARY OF ARGUMENT.

The District Court improperly granted the Kaiser Appellees' Fed.R.Civ.P. 12(b)(1) first-to-file motion to dismiss the *Stein* action because (a) the first-to-file rule is not jurisdictional and therefore not the subject matter of a Fed.R.Civ.P. 12(b)(1) motion to dismiss, (b) Stein's FCA claims (other than their Refresh fraud claim) are not barred by the first-to-file rule, and (c) Appellants Stein should have been granted leave to further amend their complaint to the extent any of their claims (other than their Refresh fraud claim) is barred by the first-to-file rule.

## VII. ARGUMENT.<sup>6</sup>

### A. THE DISTRICT COURT ERRED IN HOLDING THAT THE FIRST-TO-FILE RULE IS JURISDICTIONAL AND GRANTING THE KAISER APPELLEES' FED.R.CIV.P. 12(b)(1) MOTION TO DISMISS.

The District Court erred by holding that the FCA's first-to-file rule, 31 U.S.C. § 3730(b)(5), is jurisdictional, and granting Appellees' Fed.R.Civ.P. 12(b)(1) motion to dismiss based on lack of jurisdiction. The Ninth Circuit *en banc* should reject and disapprove of its prior holdings that the first-to-file rule is jurisdictional because they conflict with the Supreme Court's "clear-statement principle" and sister circuits' decisions determining that the first-to-file rule is NOT jurisdictional after applying

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<sup>6</sup>Arguments not raised in the District Court can be raised before this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992); *Weissberg v. Lancaster School Dist.*, 591 F.3d 1255, 1260, n. 3 (9th Cir. 2010).

the Supreme Court’s clear-statement principle to the first-to-file rule.

1. The First-To-File Rule Is Not Jurisdictional.

The FCA’s first-to-file rule, 31 U.S.C. § 3730(b)(5), states:

“When a person brings an action under this [*qui tam*] subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”

Over the past decade, the Supreme Court repeatedly stated,

“To ward off profligate use of the term ‘jurisdiction,’ we have adopted a readily administrable bright line for determining whether to classify a statutory limitation as jurisdictional. [Citation.] We inquire whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement, we have cautioned, courts should treat the restriction as nonjurisdictional in character.”

*Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 824, 184 L.Ed.2d 627 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)); see also *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435–36, 131 S.Ct. 1197, 1203, 179 L.Ed.2d 159 (2011); *United States v. Wong*, 575 U.S. 402, 409–10, 135 S.Ct. 1625, 1632, 191 L.Ed.2d 533 (2015); *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012).

In *Gonzalez*, the Supreme Court set forth the following “clear-statement principle” to determine if a statute is jurisdictional or not:

“A rule is jurisdictional ‘[i]f the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional.’ [Citation.] But if ‘Congress does not

rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.’ [Citation.]” *Gonzalez*, 565 U.S. at 141-142.

Utilizing the Supreme Court’s clear-statement principle, last year the Ninth Circuit stated in *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1024 (9th Cir. 2021):

“It does not follow that simply because a statute uses mandatory language, it limits the subject-matter jurisdiction of a district court. The Supreme Court has ‘rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.’ *V.L. v. E.L.*, 577 U.S. 404, 409, 136 S.Ct. 1017, 194 L.Ed.2d 92 (2016) (per curiam) (quoting *Gonzalez*, 565 U.S. at 146, 132 S.Ct. 641). Instead, the Court has cautioned that only when Congress ‘clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional’ should it be treated as such. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). Conversely, ‘when Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character.’ *Id.* at 516, 126 S.Ct. 1235; see also *Garcia v. Salvation Army*, 918 F.3d 997, 1006 (9th Cir. 2019).” *Al-Qarqani*, 8 F.4th at 1024.

Other circuits that have evaluated the first-to-file rule under the Supreme Court’s clear-statement principle have determined that the first-to-file rule is NOT jurisdictional.

In *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015), the District of Columbia Circuit held that the first-to-file rule “‘does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.’ [Citations.] [But] . . . speaks only to who may bring a private action and when; it says

nothing about the court’s ‘power’ to consider claims. [Citation.]” *Id.* at 120. The *Heath* court noted that when Congress wanted to impose limitations on the FCA to be jurisdictional, it said so explicitly, *Id.* at 120,<sup>7</sup> but did not do so with the first-to-file rule. *Id.* at 121. Applying the clear-statement principle, the *Heath* court held that the first-to-file rule was NOT jurisdictional “[b]ecause nothing in the text or structure of the first-to-file rule suggests, let alone ‘clearly state[s],’ that the bar is jurisdictional.” *Id.* at 121.

In *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80 (2nd Cir. 2017), the Second Circuit concurred in *Heath*’s analysis and concluded that the first-to-file rule was not jurisdictional. *Id.* at 87. In light of other FCA provisions that spoke in

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<sup>7</sup>For instance, 31 U.S.C. § 3730(e)(1) states,

**“No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.” (Bold added.)**

Further, 31 U.S.C. § 3730(e)(2)(A) states,

**“No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.” (Bold added.)**

jurisdictional terms,<sup>8</sup> whereas the first-to-file rule does not, the *Hayes* court stated:

“‘Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ *Kucana v. Holder*, 558 U.S. 233, 249, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010) (brackets omitted). Because the FCA ‘clearly state[s]’ that other limitations on qui tam actions are jurisdictional, but does not ‘clearly state[ ]’ that the first-to-file rule is jurisdictional, we must treat the first-to-file rule ‘as nonjurisdictional in character.’ *Auburn Reg’l Med. Ctr.*, 133 S.Ct. at 824 (quoting *Arbaugh*, 546 U.S. at 515–16, 126 S.Ct. 1235).” *Hayes*, 853 F.3d at 86.

In *United States v. Millenium Labs., Inc.*, 923 F.3d 240 (1st Cir. 2019), the First Circuit followed the analyses of *Heath* and *Hayes* and held that the first-to-file rule was nonjurisdictional because (a) the rule’s language did not speak in jurisdictional terms nor refer in any way to jurisdiction of district courts, and (b) Congress did not make any clear statement that rule was jurisdictional. *Millenium Labs.*, 923 F.3d at 249-251.

Next, in *In re Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)*, 974 F.3d 228 (3rd Cir. 2020), the Third Circuit concurred with *Heath*, *Hayes*, and *Millenium Labs.*, noted that contrary circuit opinions predominantly predate the Supreme Court’s clear-statement principle in determining whether a rule is jurisdictional, and held that the first-to-file rule is not jurisdictional

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<sup>8</sup>See, prior footnote.

because “[a]s the Supreme Court has recently instructed, unless Congress states clearly that a rule is jurisdictional, we will treat it as nonjurisdictional.” *Plavix*, 974 F.3d at 232.

Last year, in *United States ex rel. Bryant v. Community Health Systems, Inc.*, 24 F.4th 1024 (6th Cir. 2021), the Sixth Circuit applied the Supreme Court’s clear-statement principle to the first-to-file rule, and held that the first-to-file rule is not jurisdictional. *Id.* at 1036.

The District Court in the instant matter felt compelled to follow this Circuit’s *en banc* decision in *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (*en banc*) in holding that the first-to-file rule is jurisdictional and the proper subject of a Fed.R.Civ.P. 12(b)(1) motion to dismiss. (1-ER-11.) However, *Hartpence* did not apply the Supreme Court’s clear-statement principle analysis to the first-to-file rule, but simply stated “We treat the first-to-file bar as jurisdictional. *Lujan*, 243 F.3d at 1186–87.” *Hartpence*, 792 F.3d at 1130. In turn, in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), the Ninth Circuit did not apply the Supreme Court’s clear-statement principle (which principle had not yet been promulgated when *Lujan* was decided) to the first-to-file rule, and appears to have assumed that the first-to-file rule was jurisdictional. *Id.* at 1186-1187.

Applying the Supreme Court’s clear-statement principle, it is clear that the

first-to-file rule in NOT jurisdictional.

First, Congress did not clearly state that the FCA's first-to-file rule is jurisdictional, as it clearly did with 31 U.S.C. §§ 3730(e)(1) and (e)(2)(A).<sup>9</sup> *Gonzalez*, 565 U.S. at 141; *Bryant*, 24 F.4th at 1036; *Plavix*, 974 F.3d at 232; *Millenium Labs.*, 923 F.3d at 250; *Hayes*, 853 F.3d at 86; *Heath*, 79 F.3d at 120. Because Congress clearly stated in other portions of the FCA, 31 U.S.C. §§ 3730(e)(1) and (e)(2)(A), that “[n]o court shall have jurisdiction” over certain types of *qui tam* actions, but omitted such language from the FCA's first-to-file rule, 31 U.S.C. § 3730(b)(5), “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” of such language. *Kucana v. Holder*, 558 U.S. 233, 249, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010); *Barajas-Romero v. Lynch*, 846 F.3d 351, 359 (9th Cir. 2017).

Second, because Congress did not state that the first-to-file rule was jurisdictional, “courts should treat the restriction as nonjurisdictional.” *Gonzalez*, 565 U.S. at 142; *Al-Qarqani*, 8 F.4th at 1024; *Bryant*, 24 F.4th at 1036; *Plavix*, 974 F.3d at 232; *Millenium Labs.*, 923 F.3d at 250-251; *Hayes*, 853 F.3d at 86; *Heath*, 79 F.3d at 120. Accordingly, the first-to-file rule is not jurisdictional and Appellees' Fed.R.Civ.P. 12(b)(1) motion to dismiss based on lack of jurisdiction should have been denied.

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<sup>9</sup>See, footnote 7, ante.

2. The Ninth Circuit *En Banc* Should Reject and Disapprove the Ninth Circuit’s Prior Holdings That the First-To-File Rule Is Jurisdictional.

In light of the discussion in Section VII.A.1, above, the Ninth Circuit’s holdings in *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015) (en banc) and *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183, 1186-1187 (9th Cir. 2001) that the FCA’s first-to-file rule is jurisdictional should be rejected and disapproved in light of the Supreme Court’s “clear-statement principle” in *Gonzalez*, 565 U.S. at 141-142, and sister circuit opinions applying the clear-statement principle analysis to the first-to-file rule in *Bryant*, 24 F.4th at 1036, *Plavix*, 974 F.3d at 232, *Millenium Labs.*, 923 F.3d at 250-251, *Hayes*, 853 F.3d at 86, and *Heath*, 79 F.3d at 120. This Circuit has acknowledged that the Supreme Court’s “clear-statement principle” is to be used to determine if a statute is jurisdictional, both before *Hartpence* was decided (*La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 874 (9th Cir. 2014); *Merritt v. Countrywide Financial Corp.*, 759 F.3d 1023, 1036-1037 (9th Cir. 2014); *United States v. Trujillo*, 713 F.3d 1003, 1006-1007 (9th Cir. 2013); *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 976 (9th Cir. 2012)), and after (*Martz v. Horazdivsky*, 33 F.4th 1157, 1163 (9th Cir. 2022); *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1024 (9th Cir. 2021); *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 894-895 (9th Cir. 2021); *Tijerino v. Stetson Desert Project, LLC*, 934 F.3d 968, 972 (9th

Cir. 2019); *Yagman v. Pompeo*, 868 F.3d 1075, 1082 (9th Cir. 2017); *Okafor v. United States*, 846 F.3d 337, 340 (9th Cir. 2017).)

Because in 2015 the Ninth Circuit *en banc* held in *Hartpence* that the first-to-file rule is jurisdictional, well after the Supreme Court enunciated *Gonzalez*'s clear-statement principle in 2012, *Gonzalez* is not an “intervening higher authority” and this appeal should be reviewed and decided by the Ninth Circuit *en banc*. *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021);<sup>10</sup> *United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (*en banc*) (*per curiam*) [“we do not agree that the three-judge panel had authority to overrule cases decided after the 1993 amendment to the Guidelines.”]; *Espinosa v. United Student Aid Funds, Inc.*, 530 F.3d 895, 898 (9th Cir. 2008) [when a three-judge panel is persuaded that prior circuit decision is now erroneous, it has “the right, and perhaps even the duty, to bring the matter to the attention of our colleagues and suggest that an *en banc* court be convened to reconsider the matter afresh.”]; *In re Gruntz*, 202 F.3d 1074, 1085, fn. 11 (9th Cir.

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<sup>10</sup>In *Silva*, a three-justice Ninth Circuit panel recently stated:

“‘[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.’ [Citation.] In our circuit, a three-judge panel must apply binding precedent even when it is clearly wrong because (for example) it failed to recognize an intervening change in law. [Citation.] Only an *en banc* court has the power to fix these errors. [Citation.]” *Silva*, 993 F.3d at 717.

2000) (en banc); *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1479-1480 (9th Cir. 1987) (en banc). Accordingly, Appellants Stein respectfully request that this appeal be reviewed and decided by the Ninth Circuit *en banc*.<sup>11</sup>

B. STEIN’S SEPSIS FRAUD CLAIM, MALNUTRITION FRAUD CLAIM, AND AORTIC ATHEROSCLEROSIS FRAUD CLAIM ARE NOT BARRED BY THE FIRST-TO-FILE RULE.

After ruling that the first-to-file rule is jurisdictional, the District Court held that Stein’s sepsis fraud claims and malnutrition fraud claims were barred by the first-to-file rule because they purportedly overlapped with the earlier filed *Osinek* and *Taylor* complaints. (1-ER-11, 41-43, 48.)

The first-to-file rule, added to the FCA in 1986 at 31 U.S.C. § 3730(b)(5), states:

“When a person brings an action under this subsection, no

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<sup>11</sup>Whether or not the first-to-file rule is jurisdictional is of great importance to *qui tam* relators. Because the first-to-file rule is not jurisdictional, Appellants’ pending amended complaint is the subject of a first-to-file analysis. *Plavix*, 974 F.3d at 236 [the first-to-file rule “does not bar the parties from amending a complaint to add, remove, or swap relators.”] *See also, Hartpence*, 792 F.3d at 1125 and fn. 2 [first-to-file analysis looked at pending amended complaints.].

Further, Appellants Stein do not have the burden of showing on a non-jurisdictional first-to-file analysis. While the plaintiff bears the burden of persuasion when the complaint is subjected to a jurisdictional attack, *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013) [“The burden of establishing subject matter jurisdiction rests on the party asserting that the court has jurisdiction.”], the defendant bears the burden of persuasion when the complaint is subjected to a nonjurisdictional attack. *Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016).

Last, Appellants Stein should be afforded an opportunity to further amend their complaint to the extent any of their pending claims (other than Refresh fraud) is barred by the first-to-file rule. Fed.R.Civ.P. 15(a)(2), (d).

person other than the Government may intervene or bring a related action **based on the facts underlying the pending action.**” (Emphasis added.)

As the District Court stated, the Ninth Circuit adopted the “material elements test” to “[b]ar actions **alleging the same material elements of the fraud** described in an earlier suit, regardless of whether the allegations incorporate somewhat different details.” (1-ER-19, quoting *Lujan*, 243 F.3d at 1188-89.) (Emphasis added.) The District Court further quoted *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011), stating “[s]ection 3730(b) is designed to allow recovery when a qui tam relator puts the government on notice of potential fraud being worked against the government, **but to bar copycat actions that provide no material information.**” *See also, Hartpence*, 792 F.3d at 1131 [“disagree[ing] that [the later-filed] action provided no additional benefit to the government,” the plaintiff in the later-filed suit “provided information about a different form of fraud, and without that information the government might not have investigated beyond defendant’s] fraudulent coding practices.”] (Emphasis added.) (1-ER-19-20.)

With regards to applying the first-to file rule, the District Court stated, “[t]he **first-to-file bar is designed to be quickly and easily determinable, simply requiring a side-by-side comparison of the complaints,**” (emphasis added), quoting

*In re Natural Gas Royalties*, 562 F.3d 1023, 1031 (10th Cir. 2009)<sup>12</sup> and *Batiste*, 659 F.3d at 1209 [making a “side-by-side comparison” of the complaints in the first-filed and later-filed suits.] (1-ER-33.)

The District Court summarized case law governing the first-to-file rule thusly, “As a practical matter, the material facts test often has a court consider ‘whether the [later-filed] Complaint alleges a fraudulent scheme the government already would be equipped to investigate based on the [first-filed] Complaint.’” *Batiste*, 659 F.3d at 1209 [noting, for example, “[i]f the government investigated the facts alleged in [first-filed] complaint on a nationwide basis, it would discover continuing fraud in the New Jersey offices (which was the focus of the later-filed complaint.)”]

The Ninth Circuit has long advocated against an overly broad application of the first-to-file rule. *Hartpence* noted that the dual purposes of the first-to-file rule is “[t]o promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs.” *Hartpence*, 792 F.3d at 1131, quoting *Lujan*, 243 F.3d at 1187. “First, although it is true that increasing the class of potential *qui tam* claimants reduces the potential incentive for any *individual* plaintiff to bring suit, [citation], allowing claims for related but distinct fraud claims encourages broader investigation and increases the total potential for recovery.” *Hartpence*, 792 F.3d at

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<sup>12</sup>*In re Natural Gas Royalties*, 562 F.3d 1023 (10th Cir. 2009) was amended and superseded by *In re Natural Gas Royalties Qui Tam Litigation*, 566 F.3d 956 (10th Cir. 2009).

1131. Similarly, in *Campbell v. Redding Medical Center*, 421 F.3d 817, (9<sup>th</sup> Cir. 2005), the Court declared “Congress sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, allowing even sham complaints to preclude subsequent meritorious complaints in a public disclosure case, would contravene this intention.” *Id.* at 821.

The Ninth Circuit came to similar conclusions when analyzing the public disclosure bar stating “But in the last few years, we have indicated on more than one occasion that viewing FCA claims ‘at the highest level of generality . . . in order to wipe out qui tam suits that rest on genuinely new and material information is not sound.’” *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565 , 576 (9<sup>th</sup> Cir. 2016), quoting *United States ex rel. Goldberg v. Rush University Medical Center*, 680 F.3d 933, 936 (7<sup>th</sup> Cir. 2012), There is no reason that this rationale should not apply with equal force to first-to-file cases.

1. *Osinek, Taylor, and Arefi* Fraud Claims.

- a. Refresh Frauds - Material Facts.

The earlier filed Refresh fraud claims in the *Osinek, Taylor* and *Arefi* complaints involved a comprehensive program to optimize Kaisers’ MA capitation revenue by ensuring that all prior years’ HCC related diagnoses were re-diagnosed (i.e., “Refreshed”) during the current year. (8-ER-1570, 1742, 1765.) To accomplish

this, Kaiser conducted large scale computerized data-mining to identify each MA patient's prior year's HCC related diagnoses and to identify which of these diagnoses were "missing" (i.e., remained undocumented for the current year.) (8-ER-1570, 1743, 1765.)

Once the data-mining was completed, Kaiser medical groups' physicians were tasked with Refreshing the MA patients' missing HCC related diagnoses. (8-ER-1570, 1743, 1765.) This could occur one of two ways, during an upcoming face-to-face patient encounter or by adding an addendum to the patient's medical record relating back to a prior face-to-face patient encounter. (8-ER-1576, 1686-1688, 1764-1765.)

Getting the Appellees' physicians to Refresh the missing HCC diagnoses on a large scale was problematic. (8-ER-1574, 1686-1688, 1764-1765.) To address this problem, Appellees engaged in the following practices:

1. Kaiser's certified coders used leading coding queries that improperly instructed physicians to Refresh missing diagnoses and diagnosis codes during the physician's next appointment with a specific MA patient (6-ER-1103; 7-ER-1475, 1578);
2. Kaiser's certified coders used leading coding queries that improperly instructed physicians to Refresh missing diagnoses and diagnosis codes via a medical record addendum (6-ER-1105-1107; 7-ER-1475, 1529-

1531; 8-ER-1764-1765, 1556);

3. Appellee SCPMG's staff contacted several thousand MA patients and deceitfully instructed those MA patients that a follow-up medical appointment must be scheduled when the true reason was to create and opportunity for the physicians to Refresh missing HCC diagnoses (6-ER-1109; 7-ER-1480-1481, 1535-1536);
4. Kaiser physicians that did not comply with the Refresh program were subjected to increased escalation tactics including meetings with their supervisors (6-ER-1103; 7-ER-1577; 8-ER-1757, 1570); and
5. Kaiser established physician incentive compensation program that paid additional compensation based on the physician meeting certain Refresh targets. (8-ER-1768-1769.)

The foregoing policies caused many of the Refreshed diagnosis codes to be invalid for submission to CMS as risk adjustment data for the following reasons:

1. Using leading coding queries violate CMS's ethical coding practices because leading coding queries are used to facilitate illegal upcoding<sup>13</sup> (6-ER-1104-1105; 7-ER-1476-1477, 1500-1531) ;

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<sup>13</sup>“Upcoding” is a term referring to using a higher value but invalid diagnosis code to increase the remuneration of a Medicare claim or MA HCC data. Since upcoding always involves submitting an invalid diagnosis code, it triggers FCA liability.

2. The Refresh addenda were frequently executed six to nine months after the last patient encounter in violation of CMS's rule that requires medical record addenda to be done timely and as soon as practical following the physician's patient encounter (6-ER-1104; 7-ER-1477, 1531);
3. The diagnoses that were Refreshed via addenda frequently were not the result of a physician and patient face-to-face encounter as required by CMS<sup>14</sup> (1-ER-7; 6-ER-1104; 7-ER-1476, 1530-1531; 8-ER-1561, 1566-1567);
4. Many of the Refreshed diagnoses did not involve any patient treatment, management nor affected patient care as required (see footnote, ante)
5. CMS regulations prohibit Kaiser from deceiving its MA patients to schedule a medical appointment and incur a co-pay charge (6-ER-1109; 7-ER-1479, 1536), 42 C.F.R. § 422.752(a)(5)(ii); and

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<sup>14</sup>All diagnosis codes that Kaiser submits to CMS for Medicare Advantage risk-adjustment purposes must be:

1. established by a qualified physician;
2. based on a face-to-face medical visit between the patient and physician;
3. documented in the medical record; and
4. coded in compliance with the ICD [Official Guidelines for Coding and Reporting], including the limitation that the condition must have required or affected patient care, treatment, or management for the visit. (1-ER-7; 6-ER-1103-1104; 7-ER-1475, 1529-1530; 8-ER-11561.)

6. Kaiser is required to certify that the HCC data submitted is accurate, complete and truthful. 42 C.F.R. § 422.504(l)(1) (1-ER-7; 6-ER-1073-1074; 7-ER-1447-1448, 1504-1505; 8-ER-1711-1712, 1656-1657.)

b. *Taylor* and *Arefi* Other Frauds - Material Facts.

In addition to the Refresh fraud claims, *Taylor's* complaint and first amended complaint allege overpayment frauds resulting from various regional probe audits of Kaiser's regional healthplans and national pre-Risk Adjustment Validation (pre-RADV) audit of Kaiser's healthplans. (8-ER-1658-1683, 1713-1738.) Additionally Taylor alleges overpayment frauds arising from regional probe audits of contracted hospitals in Colorado, Hawaii and Georgia. (8-ER-1662-1666, 1715-1720.). The audits typically identified the submission of invalid HCC diagnosis codes resulting in FCA liability; however, Kaiser declined to report the overpayments to CMS as required. (8-ER-1658-1660, 1713-1715.)

In addition to the Refresh fraud claims, *Arefi's* complaint alleges an electronic medical record fraud scheme, referred to as Convergent Medical Terminology (CMT), where the ICD-9 diagnosis codes were mapped to a large library of additional terms designed to secretly (i.e., without the users' knowledge) upcode the user's inputs to higher HCC value diagnosis codes. (8-ER-1565-1566.) *Arefi* also alleges that Kaiser's electronic record system utilizes several "bogus algorithms" which likewise cause the user to unknowingly upcode their medical record documentation to higher

HCC value diagnoses. (8-ER-1567)

2. Appellants Stein's Material Facts of Sepsis Fraud Claim, Malnutrition Fraud Claim, and Aortic Atherosclerosis Fraud Claim.

- a. Stein's Sepsis Fraud Claim - Material Facts.

Beginning in 2010 and continuing to the present, Kaiser's hospitals implemented early treatment sepsis protocols. (6-ER-1084; 7-ER-1516, 1461.) These treatment protocols were to be administered to all emergency room patients and hospital inpatients at risk of developing sepsis. (6-ER-1085; 7-ER-1462, 1517.) Kaiser's early treatment sepsis protocols were developed and implemented as nationwide effort to reduce Kaiser hospitals' sepsis mortality rates and were intentionally over-broad so they would include every potential sepsis episode. (6-ER-1089-1090; 7-ER-1521-1522, 1464-1465.) Despite knowing that using over-broad early sepsis treatment protocols would result in some MA patients initially being incorrectly diagnosed with sepsis, Kaiser made no efforts to correct any initial but incorrect sepsis diagnoses. (6-ER-1089-1090; 7-ER-1521-1522, 1464-1465.)

Shortly after the sepsis early treatment protocols were implemented, Kaiser's medical group physicians began making fraudulent sepsis<sup>15</sup> diagnoses of patients that presented at Kaiser's emergency rooms when sepsis was not present. (6-ER-1089-

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<sup>15</sup>The term "sepsis" includes sepsis, severe sepsis, and sepsis with organ dysfunction.

1090; 7-ER-1460-1461, 1518-1519.) This practice continued at least through 2016. (6-ER-1071, 1085; 7-ER-1518, 1460.) *Stein* alleged that Kaiser's Southern California Permanente Medical Group (SCPMG) decided to make false sepsis diagnoses to increase their MA capitation revenues. (6-ER-1087; 7-ER-1460, 1516-1517.) In furtherance of their sepsis fraud scheme, Appellees KFH, The Permanente Medical Group (TPMG), SCPMG and their physicians engaged in the following practices:

1. Refused to document clinical findings supporting sepsis diagnoses in patient's medical records as required by ICD-9 and later ICD-10 coding requirements (6-ER-1086-1088; 7-ER-1459-1461, 1516-1518);
2. Refused to comply with or respond to queries from Kaiser's certified coders requesting additional information to support valid sepsis diagnoses as required by ICD-9 and later ICD-10 coding requirements (6-ER-1086-1088; 7-ER-1459-1461, 1516-1518);
3. Adopted policies requiring Kaiser's certified coders to code sepsis diagnoses without the required supporting clinical documentation for valid sepsis diagnoses (6-ER-1086-1088; 7-ER-1459-1461, 1516-1518);  
and
4. Refused to withdraw initial sepsis diagnoses of patients who were incorrectly over-diagnosed with sepsis due to Kaiser hospitals early treatment sepsis protocols. (6-ER-1-86-1088; 7-ER-1459-1461, 1516-

1518.)

These practices intentionally prevented corrections to the patient's medical records in cases where patients were initially incorrectly diagnosed with sepsis due to the overly broad, early treatment sepsis protocols and Kaiser's fraudulent sepsis coding policies. (6-ER-1086-1088; 7-ER-1459-1461, 1516-1518.) Further these practices resulted in overpayments in the form of increased capitation payments for which none of the Appellees have made any efforts to notify CMS and make a refund as required. (6-ER-1092-1093; 7-ER-1465-1466, 1523-1524.)

MA patients who were falsely diagnosed with sepsis were never admitted to the intensive care unit (ICU), where physicians admit patients suffering from life-threatening conditions, such as sepsis, nor admitted to the hospital. (6-ER-1090; 7-ER-1531, 1463-1464.) Instead, these MA patients were observed for several hours in the emergency room and then sent home. (6-ER-1090; 7-ER-1521, 1463-1464.)

Although Kaiser's early treatment sepsis protocols may have prevented some at-risk MA patients from developing sepsis, Kaiser never required that the initial sepsis diagnosis be corrected to accurately reflect the patient's true non-sepsis condition. (6-ER-1092-1093; 7-ER-1465-1466, 1523-1524.) This practice was fraudulent because such MA patients either never had sepsis or the earlier intervention prevented the patients from having developed sepsis in the first place. (6-ER-1092-1093; 7-ER-1465-1466, 1523-1524.) Appellee TPMG, which covers all of Northern California,

adopted similar sepsis coding practices as Appellee SCPMG. (6-ER-1088, 1093-1094; 7-ER-1459, 1466-1467, 1516, 1524.)

b. Stein's Malnutrition Fraud Claim - Material Facts.

Appellants Stein allege that during and between 2010 and 2014, Kaiser allowed its hospitals' dieticians to diagnose malnutrition of its MA inpatients by using a rubber stamp on the inpatients' paper medical record. (6-ER-1094; 7-ER-1525, 1467.) This rubber stamp was then countersigned by the attending physician without making any of the required diagnostic entries to properly document malnutrition. (6-ER-1094; 7-ER-1525, 1467-1468.)

The foregoing was an invalid method of diagnosing and documenting malnutrition diagnoses for MA risk adjustment purposes because (a) CMS regulations prohibit dieticians from making medical diagnoses on Medicare claims and HCC data, and (b) the attending physician failed to document any clinical findings in the MA inpatients' medical record as required by ICD-9 and later ICD-10 coding guidelines. (6-ER-1094-1095; 7-ER-1525-1526, 1467-1468.) The countersigning of the dietician's rubber stamp is not an acceptable medical record documentation practice. (6-ER-1095; 7-ER-1526, 1468.)

During on or about mid-2014, Kaiser notified all of its hospitals and staff that henceforth, dieticians were prohibited from making malnutrition diagnoses and also prohibited the use of the rubber stamp. (6-ER-1096; 7-ER-1528, 1469.) As a result,

the MA inpatient's treating physician was required to personally document any clinical findings supporting a malnutrition diagnosis in the patient's hospital chart. (6-ER-1096; 7-ER-1528, 1469.) Despite full knowledge that several years' worth of invalid malnutrition diagnoses claims had been previously submitted to CMS, Kaiser made no effort to notify CMS of the overpayment as required by statute. (6-ER-1096-1097; 7-ER-1528-1529, 1468-1470.)

c. Stein's Aortic Atherosclerosis Fraud Claim - Material Facts

On Nov 11, 2016, Stein filed a First Amended Complaint (FAC) that added an FCA claim against Kaiser for submitting invalid Aortic Atherosclerosis (Atherosclerosis) diagnoses of Kaiser hospital inpatients. (7-ER-1440-1495.)

Atherosclerosis is a chronic condition that results in the build up of arterial plaque or fatty deposits in the patient's aorta and can be detected from a typical chest x-ray. (6-ER-1097; 7-ER-1470.) ICD-9 and subsequent ICD-10 coding guidelines require that the patient's medical record must show treatment for Atherosclerosis in order to validly code and submit HCC claim data to CMS for Atherosclerosis. (6-ER-1098; 7-ER-1471.)

Stein's FAC alleges that during and between 2007 and 2016, in violation of the express ICD-9 and ICD-10 coding requirements, Kaiser hospital coders were instructed to "always code" Atherosclerosis anytime the physician noted the presence of Atherosclerosis, and anytime Atherosclerosis was listed in the patient's medical

record from an X-Ray report, or otherwise, but without any documentation of contemporaneous medical treatment for the patient's Atherosclerosis. (6-ER-1098; 7-ER-1471.) Kaiser hospital coders continued to improperly code Atherosclerosis for MA patients admitted to Kaiser hospitals pursuant to the "always code" instructions until April 2016. (6-ER-1098; 7-ER-1471-1472.)

In April 2016, Kaiser issued detailed written instructions to all its hospitals informing its coders that henceforth Atherosclerosis could only be coded when the medical record contained documentation of the patient's contemporaneous medical treatment for Atherosclerosis. (6-ER-1099; 7-ER-1470-1472.) Despite being aware that false and invalid Atherosclerosis claims had been submitted to CMS for over eight years, Kaiser made no effort to notify CMS of the Atherosclerosis overpayments. (6-ER-1100; 7-ER-1472-1473.)

3. Comparison of Stein's Sepsis Fraud Claims to Earlier Filed *Osenik, Taylor, and Arefi* Complaints.

Comparing Stein's sepsis fraud scheme allegations to the *Osinek, Taylor, and Arefi* fraud schemes reveals that the alleged frauds exist separately from each other and do not share the same material facts. First, neither the *Osinek* or *Taylor* complaints (including *Taylor's* FAC) mentions sepsis. (7-ER-1495-1545; 8-ER-1638-1775.) By comparison, Stein's sepsis fraud allegations span 24 pages, of which 9 address Kaiser's sepsis fraud conduct. (7-ER-1515-1527, 1449-1473; 6-ER-1076-

1094.) The *Arefi* complaint briefly mentions sepsis three times but none of the references directly relate to his Refresh fraud allegations nor share any material elements in common with Stein’s sepsis fraud scheme.<sup>16</sup> (8-ER-1573, 1577.)

*Arefi* alleged three types of fraud schemes: (a) Refresh fraud (8-ER-1552); (b) an electronic medical record fraud scheme, referred to as Convergent Medical Terminology (CMT), where the ICD-9 diagnosis codes were mapped to a large library of terms designed to secretly (i.e., without the users’ knowledge) upcode the inputs to higher HCC value diagnosis codes (8-ER-1565-1566); and (c) a “bogus algorithm” fraud scheme which also caused the user to unknowingly upcode to higher HCC diagnoses. (8-ER-1567-1570.) Sepsis was not mentioned as being a diagnosis of any of those fraud schemes

*Arefi* also alleged that Kaiser’s California hospitals diagnosed some HCC related diagnoses and conditions at a much higher frequency for its MA patients as compared to traditional Medicare patients. (8-ER-1572-1573.) The higher frequency of HCC conditions were presumably the result of the fraud schemes alleged in *Arefi*’s complaint. Sepsis was twice referenced in a laundry list of seven other medical conditions that *Arefi* alleged were diagnosed at this higher frequency. (8-ER-1572-1573.) Sepsis was mentioned in a related list that presumably calculated the

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<sup>16</sup>Appellees are collaterally estopped from arguing that *Arefi* can be a first-to-file bar because there was judicial determination that *Arefi* was jurisdictionally defective. *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004)

increased frequency of diagnoses as overpayments. (8-ER-1577.) None of *Arefi's* laundry lists identified a particular fraud scheme nor attempted to apportion the results between the fraud schemes alleged in *Arefi's* complaint. (8-ER-1572-1577.)

According to the District Court's order, the first step to determine suitability of the first-to-file rule is to perform a side-by-side comparison of the earlier filed complaints and Stein's complaint. (1-ER-33.) This would allow a quick and easily determinable answer as to whether the complaints allege the same material elements of the frauds, (but not taking into consideration Stein's detailed Refresh fraud allegations which Stein had previously acknowledged were subject to the first-to-file rule (1-ER-33.)

Had the District Court undertaken the foregoing comparison, it should have dispositively resolved the first -to-file issue in Stein's favor because neither *Osinek's* nor *Taylor's* complaint mention sepsis. This makes it very unlikely that *Stein's* detailed sepsis fraud claims share the same or similar material elements as the earlier filed Refresh fraud claims. Nor can it reasonably be said that Stein's sepsis fraud claim is "opportunistic piggyback claims which would have no additional benefit for the Government." (1-ER-33; quoting *Hartpence*, 792 F.3d at 1131.) The result is not changed by *Arefi's* brief reference to sepsis that was not in context of the Refresh fraud claim nor any articulable fraud claim involving sepsis. Further, *Stein's* alleged sepsis fraud scheme is materially different from *Arefi's* alleged fraud scheme in that

Stein's sepsis fraud claim is a single medical condition that is being intentionally exploited by Kaiser's medical groups against patients that present to the emergency room. *Arefi's* fraud claims involve many different medical diagnoses that are being falsely upcoded by a purposefully designed computer program and algorithm. Arefi's alleged frauds have been automated so they can be performed by a machine but without the end users knowledge or consent.

The District Court's ruling that *Stein's* sepsis fraud is barred under first-to-file because it is a "lesser included upcoding fraud" to *Osinek* is an extremely generalized and overly broad application of the first-to-file rule. (1-ER-42-43.) Ninth Circuit precedent clearly disfavors the District Court's analysis. *See, Hartpence* 792 F.3d at 1131 ["[a]llowing claims for related but distinct fraud claims encourages broader investigation and increases the total potential for recovery."]; *Campbell*, 421 F.3d at 821 ["Congress sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, . . . would contravene this intention."]

There are only a few ways that HCC related diagnoses are invalid:

1. The diagnosis is not the result of a valid face -to-face physician encounter;
2. The medical record documentation does not comply with required ICD-9 and now ICD-10 guidelines and requirements; and,

3. The patient did not received treatment or care for the diagnosis and the diagnoses did not impact patient care. (1-ER-7)

However, there are an unlimited ways that fraud schemes can be carried out to create invalid and potentially fraudulent medical diagnosis. Barring *Stein's* claims because they also involve invalid diagnosis codes flies in the face of the Material Elements test and well-reasoned Ninth Circuit precedent.

*Stein's* sepsis fraud claim exists separately from the earlier filed Refresh fraud claims and “should be viewed as providing information about a different form of fraud, and without that information the government might not have investigated beyond [defendant’s] fraudulent coding practices.” *Hartpence*, 792 F.3d at 1131-1132. (1-ER-19-20.) The Refresh frauds rely on computerized data-mining to identify all prior year’s HCC diagnosis that had not been captured during the current year. These “missing” HCCs are then “Refreshed” in the current year, however the process relies upon improper leading coding queries and improper late addenda at physician medical offices, both of which typically result in invalid coding and medical record documentation.

In contrast, *Stein's* sepsis fraud claim alleges contemporaneous frauds conducted in a hospital setting where patients are being intentionally over-diagnosed with sepsis and left uncorrected. There are no prior year’s diagnosis to Refresh and no leading coding queries nor medical record addenda available to create a road map

of such sepsis frauds.

Based on the foregoing, this Court should reverse the District Court's ruling and hold that *Stein's* sepsis fraud claim is based on different material facts and NOT barred by the prior filed *Osinek*, *Taylor*, and *Arefi* actions under the first-to-file rule.

4. Comparison of Stein's Malnutrition Fraud Claim to the Earlier Filed *Osenik*, *Taylor*, and *Arefi* Complaints.

*Osinek* mentions the term Cachex/Protein Calorie Malnutrition once and the term Protein Calorie Malnutrition twice. (8-ER-1758, 1769, 1771.) The first reference was part of laundry list of diagnoses which Appellees actively data mined, while the second and third references were from examples of slides showing how defendants monitored their physicians success in adding prior diagnoses to current years' medical records under the fraudulent Refresh program. None of these references to malnutrition legitimately overlap with *Stein's* unique and factually distinct malnutrition claim. (6-ER-1094-1097; 7-ER-1467-1470, 1524-1527.)

Malnutrition is mentioned three times in the *Taylor* complaint. (8-ER-1731-1732.) *Taylor's* allegations are (a) that probe audits during 2009-2011 identified instances where a "history of" malnutrition was incorrectly coded as a current diagnosis, and (b) the probe audits identified instances were the physician's use of the term "cachexia" caused coders or computers to improperly add a malnutrition diagnosis without sufficient clinical documentation supporting the coding of "cachexia," a specific and rare type of malnutrition in the United States. (8-ER-1731-

1732.)

Last, malnutrition is mentioned five times in the *Arefi* complaint. Once in the introduction as part of laundry list of diagnosis codes that *Arefi* alleges are coded at a higher frequency at Kaiser’s California hospitals of its MA patients. (8-ER-1550.) Once as part of list of diagnoses that are subjected to “bogus algorithms” which upcode the inputs to higher value HCCs without the users knowledge. (8-ER-1567.) The remaining three malnutrition references are the same ones discussed above in Section VII.B.3 regarding sepsis. These are laundry list of diagnoses that are coded at higher frequencies for MA as compared to traditional Medicare. (8-ER-1550, 1573, 1576-1577.) In a related list of diagnosis code, *Arefi* attempts to express the higher frequency diagnoses as an overpayment. (8-ER-1577.) None of *Arefi*’s laundry lists identify a particular fraud scheme nor attempt to apportion the results between the fraud schemes alleged in *Arefi*’s complaint. (8-ER-1572-1577.) In contrast, *Stein*’s complaints each mention the term “malnutrition” 54 times, and specifically allege that the subject malnutrition diagnoses are improper because they are documented using the dieticians’ rubber stamp. (6-ER-1094-1097; 7-ER-1524-1533, 1467-1470.)

According to the District Court’s order, the first step to determine suitability of the first-to-file rule is to perform a side-by-side comparison of the earlier filed complaints and *Stein*’s complaint. (1-ER-33.) This allows a quick and easily

determinable answer as to whether the complaints allege the same material elements of the fraud (but not taking into consideration *Stein's* detailed Refresh fraud allegations which *Stein* had previously acknowledged were subject to the first-to-file rule. (1-ER-33.)

Had the District Court undertaken the foregoing comparison, it should have dispositively resolved the first-to-file issue in *Stein's* favor because none of the malnutrition references are related to the material elements of *Stein's* malnutrition claim. *Osinek* simply mentions that malnutrition is a diagnosis code that is computer data-mined as part of the Refresh program. *Taylor's* malnutrition references describe occasional coding errors. (8-ER-1676.) This makes it very unlikely that *Stein's* malnutrition fraud claims share the same or similar material elements as the earlier filed Refresh frauds. Nor can it reasonably be said that *Stein's* malnutrition fraud claims are “opportunistic piggyback claims which would have no additional benefit for the Government.” (1-ER-33); quoting *Hartpence*, 792 F.3d at 1131.) The result is not changed by *Arefi's* brief reference to malnutrition that was not made in context of the Refresh fraud claim nor any articulable fraud claim involving malnutrition.

The District Court's ruling that *Stein's* malnutrition fraud claim is barred under the first-to-file rule because it is a “lesser included upcoding fraud” to *Osinek* is an extremely generalized and overly broad application of the first-to-file rule. (1-ER-42-43.) Ninth Circuit precedent clearly disfavors the District Court's analysis. *See*,

*Hartpence*, 792 F.3d at 1131 [“[a]llowing claims for related but distinct fraud claims encourages broader investigation and increases the total potential for recovery.”]; *Campbell*, 421 F.3d at 821 [“Congress sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, . . . . would contravene this intention.”]

An investigation into the earlier filed Refresh frauds claims would not logically alert the Government to discovery *Stein’s* malnutrition claims. This is because *Stein’s* malnutrition fraud scheme occurs contemporaneously with the MA patient’s hospital admission. (6-ER-1094-1095; 7-ER-1524-1525, 1466-1467.) As a current year’s HCC diagnosis, there is no missing HCC to Refresh. Even if there were instances where the hospital malnutrition diagnoses were subsequently Refreshed, there is no reason to believe that the hospital malnutrition diagnoses would be discovered to have been be invalid because there are no illegal leading coding queries nor late medical record addenda to invalidate the original hospital malnutrition diagnoses.

Based on the foregoing and the prior sepsis fraud scheme analysis, this Court should hold that *Stein’s* malnutrition fraud claim is an independent fraud claim that are is based upon different material elements and facts. This Court should reverse the District Court’s ruling and find that *Stein’s* malnutrition fraud claim is not barred by the first-to-file rule.

5. Comparison of Stein's Aortic Atherosclerosis Fraud Claim to Earlier Filed *Osenik*, *Taylor*, and *Arefi* Complaints.

On Nov 11, 2016, Stein filed a First Amended Complaint (FAC) which added a FCA claim against Kaiser for submitting invalid Aortic Atherosclerosis (Atherosclerosis) diagnoses of Kaiser hospital inpatients and for not returning overpayments obtained therefrom. (7-ER-1440-1495.)

Similarly to Stein's above sepsis fraud and malnutrition fraud claims, Stein's Atherosclerosis fraud claim is based upon different material elements and are a different form of fraud not legitimately precluded by the earlier filed complaints.

The *Osiniek* complaint mentions Atherosclerosis just once. (8-ER-1771.) The reference is found on a slide from a presentation explaining Kaiser physician incentive compensation program which is based on physicians successfully Refreshing a high percentage of the missing HCCs that Kaiser data-mined for the physicians' MA patients. (8-ER-1771.) The term Atherosclerosis is not present in either of prior filed *Taylor* complaints nor the *Arefi* complaint.

Stein's Atherosclerosis claim does not overlap with the earlier filed Refresh frauds because it does not utilize computer data mining of prior year's diagnoses, and does not rely upon improper leading queries requesting that physicians add prior period HCC diagnoses to the current year's medical records. As previously discussed with regards Stein's sepsis fraud claim, an investigation into the Refresh frauds and

other prior filed claims would not logically alert the Government to discovery of Stein's Atherosclerosis claims and is unlikely to be detected during an investigation of Refresh frauds because the Atherosclerosis fraud occurred contemporaneously during the MA patients' hospital admission. As a current year's HCC diagnosis, there are no missing Atherosclerosis HCCs to Refresh.

The District Court's ruling mistakenly conflates the submission of invalid diagnosis codes with the material elements of *Stein's* Atherosclerosis fraud claim. (1-ER-42-43.) To hold that the submission of invalid HCC diagnosis codes is a material element that describes the contours of the fraud is the broadest possible application of the first-to-file bar and conflicts with Ninth Circuit precedent. See, *Lujan*, 243 F.3d at 1187; *Hartpence* 792 F.3d at 1131-1132; *Campbell*, 421 F.3d at 821; see also, *Mateski*, 816 F.3d at 577. There are a few ways that HCC diagnoses are invalid for submission as risk adjustment data but an unlimited number of fraud schemes that can achieve that result. (1-ER-7; 6-ER-1073-1074; 7-ER-1447, 1505.) The first-to-file provision is intended to encourage new claims and only bar piggyback claims, that provide no useful information to the Government. *Hartpence*, 792 F.3d at 1131 (1-ER-17-20.)

Based on the foregoing and the prior sepsis fraud scheme analysis, this Court should hold that Stein's Atherosclerosis fraud is based upon different material elements and facts and is not barred under the first-to-file rule.

C. IN THE EVENT THAT APPELLANTS STEIN’S SEPSIS FRAUD, MALNUTRITION FRAUD, OR AORTIC ATHEROSCLEROSIS FRAUD CLAIMS ARE BARRED BY THE FIRST-TO-FILE RULE, THE DISTRICT COURT ERRED BY REFUSING TO ALLOW APPELLANTS STEIN TO FURTHER AMEND THEIR COMPLAINT.

Appellants Stein should have been granted leave to further amend their complaint to the extent any of their claims (other than their Refresh fraud claim) is barred by the first-to-file rule. Fed.R.Civ.P. 15(a)(2), (d). Kaiser’s Fed.R.Civ.P. 12(b)(1) motion to dismiss was the first attack against the *Stein* action.

Leave to amend a complaint “shall be freely given when justice so requires.” Fed.R.Civ.P. 15(a). “The standard for granting leave to amend is generous.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990). “The court considers five factors in assessing the propriety of leave to amend—bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint.” *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

Here, there is no evidence of bad faith, undue delay, prejudice to the opposing parties, nor futility of amendment. Although Stein filed first and second amended complaints, they were filed to clarify or add allegations. Those amended complaints were NOT filed in response to pleading motions. Leave to amend should be denied only if the Court determines that “allegation(s) of other facts consistent with the

challenged pleading could not possibly cure the deficiency.” *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In the event the Court upholds the dismissal of Stein’s Sepsis, Malnutrition or Atherosclerosis claims, Stein should be permitted to file a further amended complaint to correct any deficiency in her second amended complaint.

### **VIII. CONCLUSION AND SUMMARY OF REQUESTED RELIEF.**

The District Court erred in granting Kaiser’s Fed.R.Civ.P. 12(b)(1) motion to dismiss and (a) holding that the first-to-file rule is jurisdictional, and (b) dismissing Steins’ Sepsis fraud, Malnutrition fraud, and Atherosclerosis fraud claims under the first-to-file rule, requiring that said rulings be reversed.

The Ninth Circuit’s holdings in *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en banc) and *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) that the False Claims Act’s first-to-file rule, 31 U.S.C. § 3730(b)(5), is jurisdictional should be rejected and disapproved in light of the Supreme Court’s “clear-statement principle” in *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) and related decisions, and sister circuit decisions. Accordingly, this appeal should be reviewed and decided by the Ninth Circuit *en banc*.

Alternatively, the District Court abused its discretion by denying Appellants Stein leave to file a further amended complaint to allege their Sepsis fraud,

Malnutrition fraud, and Atherosclerosis fraud claims because a further amendment would not result in futility for lack of merit, would not cause undue delay in the litigation, would not prejudice Appellees, and is not sought in bad faith.

Accordingly, Appellants Stein respectfully request the Court reverse the District Court's May 5, 2022 Order and November 15, 2022 Judgment.

VI. STATEMENT OF RELATED CASES.

Appellants are not aware of any cases pending before this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

Respectfully Submitted,

THE ZINBERG LAW FIRM  
A Professional Corporation

HANAGAMI LAW  
A Professional Corporation

Dated: November 21, 2022

By: /s/William K. Hanagami  
William K. Hanagami  
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Marcia Stein and Rodolfo Bone

# ADDENDUM

United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; Pub. L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97-164, title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Jan. 28, 1915, ch. 22, § 2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, § 412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs “First”, “Second”, and “Third” of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term “district courts of the United States.” (See definitive section 451 of this title.)

Paragraph “Fourth” of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words “Fifth. In the United States Court for China, in all cases” in said section 225(a) were omitted. (See reviser’s note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President’s approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

**§ 1291. Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

### Editorial Notes

#### AMENDMENTS

1982—Pub. L. 97-164, §124, inserted “(other than the United States Court of Appeals for the Federal Circuit)” after “The court of appeals” and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

1958—Pub. L. 85-508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

#### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

#### TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the “transition period”, being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96-70,

title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

**§ 2107. Time for appeal to court of appeals**

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is—

- (1) the United States;
- (2) a United States agency;
- (3) a United States officer or employee sued in an official capacity; or
- (4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
- (2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

(June 25, 1948, ch. 646, 62 Stat. 963; May 24, 1949, ch. 139, §§107, 108, 63 Stat. 104; Pub. L. 95-598, title II, §248, Nov. 6, 1978, 92 Stat. 2672; Pub. L. 102-198, §12, Dec. 9, 1991, 105 Stat. 1627; Pub. L. 111-16, §6(3), May 7, 2009, 123 Stat. 1608; Pub. L. 112-62, §3, Nov. 29, 2011, 125 Stat. 757.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§227a, 230, and section 1142 of title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1891, ch. 517, §11, 26 Stat. 829; Mar. 3, 1911, ch. 231, §129, 36 Stat. 1134; Feb. 13, 1925, ch. 229, §8(c), 43 Stat. 940; Feb. 28, 1927, ch. 228, 44 Stat. 1261; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54; Feb. 10, 1939, ch. 2, §1142, 53 Stat. 165; Oct. 21, 1942, ch. 619, title V, §504(a), (c), 56 Stat. 957).

Section consolidates sections 227a and 230 of title 28, U.S.C., 1940 ed., with section 1142 of title 26, U.S.C., 1940 ed., Internal Revenue Code. Other provisions of such section 227a are incorporated in section 1292 of this title.

Section 227a of title 28, U.S.C., 1940 ed., provided a time limit of 30 days for appeals from patent-infringe-

ment decisions, and section 230 of title 28, U.S.C., 1940 ed., permitted 3 months for appeals generally. The revised section adopts the 30-day limit in conformity with recommendations of members of the Judicial Conference of the United States and proposed amendment to Rule 73 of the Federal Rules of Civil Procedure.

Section 1142 of title 26, U.S.C., 1940 ed., provided for 3 months within which to petition for appeal from a decision of The Tax Court. The second paragraph of the revised section reduces this to 60 days for reasons explained above. Other provisions of said section 1142 making a distinction between decisions before and after June 6, 1932, were omitted as executed.

Words “in an action, suit, or proceeding of a civil nature” were added in view of Rule 37 of the Federal Rules of Criminal Procedure prescribing a different limitation for criminal appeals.

Words “notice of appeal is filed” were substituted for provisions of sections 230 of title 28, U.S.C., 1940 ed., and 1142 of title 26, U.S.C., 1940 ed., for petition and allowance of appeal in order to eliminate the useless paper work involved in a pro forma application for appeal and perfunctory allowance of the same. The effect of the section is to require appeals to the courts of appeals in all cases to be taken by filing notice of appeal. See Rule 73(b) of Federal Rules of Civil Procedure.

The case of *Mosier v. Federal Reserve Bank of New York*, C.C.A. 1942, 132 F.2d 710, holds that the Federal Rules of Civil Procedure changing the method of “taking” an appeal, do not affect the time limitation prescribed by section 230 of title 28, U.S.C., 1940 ed.

Word “order” was added, in two places, after “judgment” so as to make the section cover all appeals of which the courts of appeals have jurisdiction, as set forth in section 1291 et seq. of this title.

The last paragraph was added in conformity with section 48 of title 11, U.S.C., 1940 ed., Bankruptcy, and other sections of that title regulating appellate procedure in bankruptcy matters.

The third paragraph was inserted to conform to the existing practice in Admiralty upon the recommendation of the Committee on the Federal Courts of the New York County Lawyers Association.

The time for appeal to the Court of Customs and Patent Appeals in patent and trade-mark cases is governed by section 89 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 60 of title 35, U.S.C., 1940 ed., Patents, and Rule 25 of the Rules of such court, and, in customs cases, by section 2601 of this title.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

By Senate amendment, all provisions relating to the Tax Court were eliminated. Therefore, section 1142 of title 26, U.S.C., Internal Revenue Code, was not one of the sources of this section as finally enacted. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

1949 ACT

This amendment to section 2107 of title 28, U.S.C., restores the former 15-day limitation of time within which to appeal from an interlocutory order in admiralty.

This amendment eliminates as surplusage the words “in any such action, suit or proceeding,” from the fourth paragraph of section 2107 of title 28, U.S.C., and corrects a typographical error in the same paragraph.

AMENDMENTS

2011—Subsec. (b). Pub. L. 112-62 added subsec. (b) and struck out former subsec. (b) which read as follows: “In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.”

2009—Subsec. (c). Pub. L. 111-16 substituted “within 14 days” for “within 7 days” in concluding provisions.

1991—Pub. L. 102-198 designated first and second pars. as subsecs. (a) and (b), respectively, added subsec. (c),

designated fifth par. as subsec. (d), and struck out third and fourth pars. which read as follows:

“In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

“The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.”

1978—Pub. L. 95-598 directed the amendment of section by inserting “or the bankruptcy court” after “district court” and by striking out the final par., which amendment did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1949—Act May 24, 1949, restored, in third par., the 15-day limitation of time within which to appeal from an interlocutory order in admiralty, and in fourth par., substituted “The district court may” for “The district court, in any such action, suit, or proceeding, may” and corrected spelling of “excusable”.

#### EFFECTIVE DATE OF 2011 AMENDMENT

Pub. L. 112-62, § 4, Nov. 29, 2011, 125 Stat. 757, provided that: “The amendment made by this Act [amending this section] shall take effect on December 1, 2011.”

#### EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-16 effective Dec. 1, 2009, see section 7 of Pub. L. 111-16, set out as a note under section 109 of Title 11, Bankruptcy.

#### FINDINGS

Pub. L. 112-62, § 2, Nov. 29, 2011, 125 Stat. 756, provided that: “Congress finds that—

“(1) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure provide that the time to appeal for most civil actions is 30 days, but that the appeal time for all parties is 60 days when the parties in the civil action include the United States, a United States officer, or a United States agency;

“(2) the 60-day period should apply if one of the parties is—

“(A) the United States;

“(B) a United States agency;

“(C) a United States officer or employee sued in an official capacity; or

“(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States;

“(3) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure (as amended to take effect on December 1, 2011, in accordance with section 2074 of that title) should uniformly apply the 60-day period to those civil actions relating to a Federal officer or employee sued in an individual capacity for an act or omission occurring in connection with Federal duties;

“(4) the civil actions to which the 60-day periods should apply include all civil actions in which a legal officer of the United States represents the relevant officer or employee when the judgment or order is entered or in which the United States files the appeal for that officer or employee; and

“(5) the application of the 60-day period in section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure—

“(A) is not limited to civil actions in which representation of the United States is provided by the Department of Justice; and

“(B) includes all civil actions in which the representation of the United States is provided by a Federal legal officer acting in an official capacity,

such as civil actions in which a Member, officer, or employee of the Senate or the House of Representatives is represented by the Office of Senate Legal Counsel or the Office of General Counsel of the House of Representatives.”

**§ 3729. False claims**

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410<sup>1</sup>), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information

<sup>1</sup> So in original. Probably should be “101-410”.

known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms “knowing” and “knowingly”—  
(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term “claim”—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property;

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub. L. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3729 .....	31:231.	R.S. § 3490.

In the section, before clause (1), the words “a member of an armed force of the United States” are substituted for “in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States” and “military or naval service” for consistency with title 10. The words “is liable” are substituted for “shall forfeit and pay” for consistency. The words “civil action” are substituted for “suit” for consistency in the revised title and with other titles of the United States Code. The words “and such forfeiture and damages shall be sued for in the same suit” are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure (28 App. U.S.C.). In clauses (1)–(3), the words “false or fraudulent” are substituted for “false, fictitious, or fraudulent” and “Fraudulent or fictitious” to eliminate unnecessary words and for consistency. In clause (1), the words “presents, or causes to be presented” are substituted for “shall make or cause to be made, or present or cause to be presented” for clarity and consistency and to eliminate unnecessary words. The words “officer or employee of the Government or a member of an armed force” are substituted for “officer in the civil, military, or naval service of the United States” for consistency in the revised title and with other titles of the Code. The words “upon or against the Government of the United States, or any department of the United States, or any department or officer thereof” are omitted as surplus. In clause (2), the word “knowingly” is substituted for “knowing the same to contain any fraudulent or fictitious statement or entry” to eliminate unnecessary words. The words “record or statement” are substituted for “bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition” for consistency in the revised title and with other titles of the Code. In clause (3), the words “conspires to” are substituted for “enters into any agreement, combination, or conspiracy” to eliminate unnecessary words. The words “of the United States, or any department or officer thereof” are omitted as surplus. In clause (4), the words “charge”, “or other”, and “to any other person having authority to receive the same” are omitted as surplus. In clause (5), the words “document certifying receipt” are substituted for “certificate, voucher, receipt, or other paper certifying the receipt” to eliminate unnecessary words. The words “arms, ammunition, provisions, clothing, or other”, “to any other person”, and “the truth of” are omitted as surplus. In clause (6), the words “arms, equipments, ammunition, clothes, military stores, or other” are omitted as surplus. The words “member of an armed force” are substituted for “soldier, officer, sailor, or other person called into or employed in the military or naval service” for consistency with title 10. The words “such soldier, sailor, officer, or other person” are omitted as surplus.

**Editorial Notes**

## REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsection (d), is classified generally to Title 26, Internal Revenue Code.

## AMENDMENTS

2009—Subsecs. (a), (b). Pub. L. 111-21, §4(a)(1), (2), added subsecs. (a) and (b) and struck out former subsecs. (a) and (b) which related to liability for certain acts and defined “knowing” and “knowingly”, respectively.

Subsec. (c). Pub. L. 111-21, §4(a)(4), substituted “subsection (a)(2)” for “subparagraphs (A) through (C) of subsection (a)”.

Pub. L. 111-21, §4(a)(2), (3), redesignated subsec. (d) as (c) and struck out heading and text of former subsec. (c). Prior to amendment, text read as follows: “For purposes of this section, ‘claim’ includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.”

Subsecs. (d), (e). Pub. L. 111-21, §4(a)(3), redesignated subsecs. (d) and (e) as (c) and (d), respectively.

1994—Subsec. (e). Pub. L. 103-272 substituted “1986” for “1954”.

1986—Subsec. (a). Pub. L. 99-562, §2(1), designated existing provisions as subsec. (a), inserted subsec. heading, and substituted “Any person who” for “A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of \$2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person” in introductory provisions.

Subsec. (a)(1). Pub. L. 99-562, §2(2), substituted “United States Government or a member of the Armed Forces of the United States” for “Government or a member of an armed force”.

Subsec. (a)(2). Pub. L. 99-562, §2(3), inserted “by the Government” after “approved”.

Subsec. (a)(4). Pub. L. 99-562, §2(4), substituted “control of property” for “control of public property” and “by the Government” for “in an armed force”.

Subsec. (a)(5). Pub. L. 99-562, §2(5), substituted “by the Government” for “in an armed force” and “true;” for “true; or”.

Subsec. (a)(6). Pub. L. 99-562, §2(6), substituted “an officer or employee of the Government, or a member of the Armed Forces,” for “a member of an armed force” and “property; or” for “property.”

Subsec. (a)(7). Pub. L. 99-562, §2(7), added par. (7).

Subsecs. (b) to (e). Pub. L. 99-562, §2(7), added subsecs. (b) to (e).

**Statutory Notes and Related Subsidiaries**

## EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111-21, §4(f), May 20, 2009, 123 Stat. 1625, provided that: “The amendments made by this section [amending this section and sections 3730 to 3733 of this title] shall take effect on the date of enactment of this Act [May 20, 2009] and shall apply to conduct on or after the date of enactment, except that—

“(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

“(2) section 3731(b) [probably should be section 3731] of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section

3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.”

## INCREASED PENALTIES FOR FALSE CLAIMS IN DEFENSE PROCUREMENT

Pub. L. 99-145, title IX, §931(b), Nov. 8, 1985, 99 Stat. 699, provided that: “Notwithstanding section 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of \$2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action.”

[Section 931(c) of Pub. L. 99-145 provided that section 931(b) is applicable to claims made or presented on or after Nov. 8, 1985.]

**§ 3730. Civil actions for false claims**

(a) **RESPONSIBILITIES OF THE ATTORNEY GENERAL.**—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **ACTIONS BY PRIVATE PERSONS.**—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4)<sup>1</sup> of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action

<sup>1</sup> So in original. Probably should be a reference to Rule 4(i).

based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) 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.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

- (i) limiting the number of witnesses the person may call;
- (ii) limiting the length of the testimony of such witnesses;
- (iii) limiting the person's cross-examination of witnesses; or
- (iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has

pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government<sup>2</sup> Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

<sup>2</sup>So in original. Probably should be "General".

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a),

has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has<sup>3</sup> knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub. L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub. L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub. L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub. L. 111-21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub. L. 111-148, title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub. L. 111-203, title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

#### HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3730(a) ..... 3730(b)(1)	31:233. 31:232(A), (B)(less words between 3d and 4th commas).	R.S. § 3492. R.S. § 3491(A)–(E); restated Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608; June 11, 1960, Pub. L. 86-507, § 1(28), (29), 74 Stat. 202.
3730(b)(2)	31:232(C)(1st–3d sentences, 5th sentence proviso).	
3730(b)(3)	31:232(C)(4th sentence, 5th sentence less proviso).	
3730(b)(4)	31:232(C)(last sentence), (D).	

<sup>3</sup> So in original. Probably should be "or (ii) has".

## HISTORICAL AND REVISION NOTES—CONTINUED

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3730(c)(1)	31:232(E)(1).	
3730(c)(2)	31:232(E)(2)(less proviso).	
3730(d) . . . .	31:232(B)(words between 3d and 4th commas), (E)(2)(proviso).	

In the section, the words “civil action” are substituted for “suit” for consistency in the revised title and with other titles of the United States Code.

In subsection (a), the words “Attorney General” are substituted for “several district attorneys of the United States [subsequently changed to ‘United States attorneys’ because of section 1 of the Act of June 25, 1948 (ch. 646, 62 Stat. 909)] for the respective districts, for the District of Columbia, and for the several Territories” because of 28:509. The words “by persons liable to such suit” are omitted as surplus. The words “and found within their respective districts or Territories” are omitted because of the restatement. The words “If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person” are substituted for “and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages” for clarity and consistency. The words “as the district judge may order” are omitted as surplus. The words “of the Attorney General” are substituted for “the person bringing the suit” for consistency in the section.

In subsection (b)(1), the words “Except as hereinafter provided” are omitted as unnecessary. The words “for a violation of section 3729 of this title” are added because of the restatement. The words “and carried on”, “several” and “full power and” are omitted as surplus. The words “of the action” are substituted for “to hear, try, and determine such suit” to eliminate unnecessary words. The words “Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs” are substituted for “within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed” for consistency in the revised title and with other titles of the Code. The words “withdrawn or” and “judge of the” are omitted as surplus. The words “Attorney General” are substituted for “district attorney [subsequently changed to ‘United States attorneys’ because of section 1 of the Act of June 25, 1948 (ch. 646, 62 Stat. 909)], first filed in the case” because of 28:509.

In subsection (b)(2), before clause (A), the words “bill of”, “Whenever any such suit shall be brought by any person under clause (B) of this section” and “to the effective prosecution of such suit or” are omitted as surplus. The words “served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.)” are substituted for “notice . . . shall be given to the United States by serving upon the United States Attorney for the district in which such suit shall have been brought . . . and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia” because of 28:509 and to eliminate unnecessary words. The words “proceed with the action” are added for clarity. Clause (A) is substituted for “shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit” for clarity and consistency. In clause (B), the words “a period of” and “therein” are omitted as surplus.

In subsection (b)(3), the words “within said period” are omitted as surplus. The words “proceeds with the action” are substituted for “shall enter appearance in such suit” for consistency. The words “In carrying on such suit” and “and may proceed in all respects as if it were instituting the suit” are omitted as surplus.

In subsection (b)(4), the words “Unless the Government proceeds with the action” are added because of

the restatement. The words “shall dismiss an action brought by the person on discovering” are substituted for “shall have no jurisdiction to proceed with any such suit . . . or pending suit . . . whenever it shall be made to appear that” to eliminate unnecessary words. The words “or any agency, officer, or employee thereof” are omitted as unnecessary. The text of 31:232(C)(last sentence proviso) and (D) is omitted as executed.

In subsection (c), the words “herein provided”, “fair and . . . compensation to such person”, and “involved therein, which shall be collected” are omitted as surplus.

In subsection (c)(2), the words “whether heretofore or hereafter brought” are omitted as unnecessary. The words “bringing the action or settling the claim” are substituted for “who brought such suit and prosecuted it to final judgment, or to settlement” for clarity and consistency. The words “as provided in clause (B) of this section” are omitted as unnecessary. The words “the civil penalty” are substituted for “forfeiture” for clarity and consistency. The words “to his own use”, “the court may”, and “to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court” are omitted as surplus.

Subsection (d) is substituted for 31:232(B)(words between 3d and 4th commas) and (E)(2)(proviso) to eliminate unnecessary words.

## Editorial Notes

## REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b)(2), (3), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Section 101(f) of the Ethics in Government Act of 1978, referred to in subsec. (e)(2)(B), is section 101(f) of Pub. L. 95-521, title I, Oct. 26, 1978, 92 Stat. 1824, which is set out in the Appendix to Title 5, Government Organization and Employees.

## AMENDMENTS

2010—Subsec. (e)(4). Pub. L. 111-148 added par. (4) and struck out former par. (4) which read as follows:

“(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

“(B) For purposes of this paragraph, ‘original source’ means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.”

Subsec. (h)(1). Pub. L. 111-203, §1079A(c)(1), substituted “agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter” for “or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter”.

Subsec. (h)(3). Pub. L. 111-203, §1079A(c)(2), added par. (3).

2009—Subsec. (h). Pub. L. 111-21 amended subsec. (h) generally. Prior to amendment, subsec. (h) read as follows: “Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to

make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection."

1994—Subsec. (e)(2)(B). Pub. L. 103-272 substituted "paragraphs (1) through (8)" for "section paragraphs (1) through (8)".

1990—Subsec. (e)(2)(B). Pub. L. 101-280 substituted "paragraphs (1) through (8) of section 101(f)" for "201(f)".

1988—Subsec. (c)(4). Pub. L. 100-700, §9(b)(1), which directed amendment of section 3730 of title 28 by substituting "with the action" for "with action" in subsec. (c)(4), was executed to subsec. (c)(4) of this section as the probable intent of Congress.

Subsec. (d)(3). Pub. L. 100-700, §9(a)(1), (2), added par. (3). Former par. (3) redesignated (4).

Subsec. (d)(4). Pub. L. 100-700, §9(b)(2), which directed amendment of section 3730 of title 28 by substituting "claim of the person bringing the action" for "claim of the person bringing the actions" in subsec. (d)(4), was executed to subsec. (d)(4) of this section as the probable intent of Congress.

Pub. L. 100-700, §9(a)(1), redesignated former par. (3) as (4).

1986—Pub. L. 99-562, §3, amended section generally, revising and expanding provisions of subssecs. (a) to (c), adding subssecs. (d) and (e), redesignating former subsec. (d) as (f), and adding subsec. (g).

Subsec. (h). Pub. L. 99-562, §4, added subsec. (h).

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF 2010 AMENDMENT**

Amendment by Pub. L. 111-203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

**EFFECTIVE DATE OF 2009 AMENDMENT**

Amendment by Pub. L. 111-21 effective May 20, 2009, and applicable to conduct on or after May 20, 2009, see section 4(f) of Pub. L. 111-21, set out as a note under section 3729 of this title.

**EFFECTIVE DATE OF 1990 AMENDMENT**

Pub. L. 101-280, §10(c), May 4, 1990, 104 Stat. 162, provided that: "The amendments made by subsections (a) and (b) [amending this section and section 2397a of Title 10, Armed Forces] shall take effect on January 1, 1991."

**§ 3731. False claims procedure**

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),<sup>1</sup> the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 979; Pub. L. 99-562, §5, Oct. 27, 1986, 100 Stat. 3158; Pub. L. 111-21, §4(b), May 20, 2009, 123 Stat. 1623.)

**HISTORICAL AND REVISION NOTES**

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3731(a) .....	31:232(F).	R.S. §3491(F); added Nov. 2, 1978, Pub. L. 95-582, §1, 92 Stat. 2479.
3731(b) .....	31:235.	R.S. §3494.

In subsection (b), the words "A civil action under section 3730 of this title" are substituted for "Every such suit" for clarity.

**Editorial Notes**

**REFERENCES IN TEXT**

The Federal Rules of Criminal Procedure, referred to in subsec. (e), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

The Federal Rules of Evidence, referred to in subsec. (e), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

**AMENDMENTS**

2009—Subsecs. (c) to (e). Pub. L. 111-21, which directed amendment of section "3731(b)" of this title by adding subsec. (c) and redesignating former subssecs. (c) and (d) as (d) and (e), respectively, was executed by making the amendment to this section, to reflect the probable intent of Congress.

1986—Subsecs. (b) to (d). Pub. L. 99-562 added subssecs. (b) to (d) and struck out former subsec. (b) which read as follows: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed."

<sup>1</sup> So in original. Probably should be preceded by "section".

**Statutory Notes and Related Subsidiaries**

## EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-21 effective May 20, 2009, and applicable to conduct on or after May 20, 2009, except that this section, as amended by Pub. L. 111-21, applicable to cases pending on May 20, 2009, see section 4(f) of Pub. L. 111-21, set out as a note under section 3729 of this title.

**§ 3732. False claims jurisdiction**

(a) **ACTIONS UNDER SECTION 3730.**—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) **CLAIMS UNDER STATE LAW.**—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) **SERVICE ON STATE OR LOCAL AUTHORITIES.**—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

(Added Pub. L. 99-562, §6(a), Oct. 21, 1986, 100 Stat. 3158; amended Pub. L. 111-21, §4(e), May 20, 2009, 123 Stat. 1625.)

**Editorial Notes**

## REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

## AMENDMENTS

2009—Subsec. (c). Pub. L. 111-21 added subsec. (c).

**Statutory Notes and Related Subsidiaries**

## EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-21 effective May 20, 2009, and applicable to conduct on or after May 20, 2009, except that this section, as amended by Pub. L. 111-21, applicable to cases pending on May 20, 2009, see section 4(f) of Pub. L. 111-21, set out as a note under section 3729 of this title.

**Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing**

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

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(b) **HOW TO PRESENT DEFENSES.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted;

and

- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) **MOTION FOR JUDGMENT ON THE PLEADINGS.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) **RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) **MOTION FOR A MORE DEFINITE STATEMENT.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) **MOTION TO STRIKE.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

- (1) on its own; or
- (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **JOINING MOTIONS.**

- (1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.
- (2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **WAIVING AND PRESERVING CERTAIN DEFENSES.**

- (1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

[United States Code Annotated](#)

[Federal Rules of Civil Procedure for the United States District Courts](#) (Refs & Annos)

[Title III. Pleadings and Motions](#)

Federal Rules of Civil Procedure Rule 15

Rule 15. Amended and Supplemental Pleadings

[Currentness](#)

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under [Rule 12\(b\)](#), [\(e\)](#), or [\(f\)](#), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in

presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by [Rule 4\(m\)](#) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense.

The court may order that the opposing party plead to the supplemental pleading within a specified time.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; amended by [Pub.L. 102-198](#), § 11, December 9, 1991, 105 Stat. 1626; amended April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

[United States Code Annotated](#)  
[Federal Rules of Evidence](#) (Refs & Annos)  
[Article II. Judicial Notice](#)

Federal Rules of Evidence Rule 201, 28 U.S.C.A.

Rule 201. Judicial Notice of Adjudicative Facts  
[Currentness](#)

- (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
- (1) is generally known within the trial court's territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- (c) Taking Notice. The court:
- (1) may take judicial notice on its own; or
  - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (d) Timing. The court may take judicial notice at any stage of the proceeding.
- (e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
- (f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

CREDIT(S)

[\(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930; Apr. 26, 2011, eff. Dec. 1, 2011.\)](#)

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This content is from the eCFR and is authoritative but unofficial.

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## Title 42 - Public Health

### Chapter IV - Centers for Medicare & Medicaid Services, Department of Health and Human Services

#### Subchapter B - Medicare Program

#### Part 422 - Medicare Advantage Program

#### Subpart K - Application Procedures and Contracts for Medicare Advantage Organizations

**Source:** 63 FR 35099, June 26, 1998, unless otherwise noted.

**Authority:** 42 U.S.C. 1302 and 1395hh.

**Source:** 63 FR 18134, Apr. 14, 1998, unless otherwise noted.

**Editorial Note:** Nomenclature changes to part 422 appear at 70 FR 4741, Jan. 28, 2005.

#### § 422.504 Contract provisions.

The contract between the MA organization and CMS must contain the following provisions:

- (a) **Agreement to comply with regulations and instructions.** The MA organization agrees to comply with all the applicable requirements and conditions set forth in this part and in general instructions. Compliance with the terms of this paragraph (a) is material to the performance of the MA contract. The MA organization agrees -
  - (1) To accept new enrollments, make enrollments effective, process voluntary disenrollments, and limit involuntary disenrollments, as provided in subpart B of this part.
  - (2) That it will comply with the prohibition in § 422.110 on discrimination in beneficiary enrollment.
  - (3) To provide -
    - (i) The basic benefits as required under § 422.101 and, to the extent applicable, supplemental benefits under § 422.102; and
    - (ii) Access to benefits as required under subpart C of this part;
    - (iii) In a manner consistent with professionally recognized standards of health care, all benefits covered by Medicare.
  - (4) To disclose information to beneficiaries in the manner and the form prescribed by CMS as required under § 422.111;
  - (5) To operate a quality assurance and performance improvement program and have an agreement for external quality review as required under subpart D of this part;
  - (6) To comply with all applicable provider and supplier requirements in subpart E of this part, including provider certification requirements, anti-discrimination requirements, provider participation and consultation requirements, the prohibition on interference with provider advice, limits on provider indemnification, rules governing payments to providers, limits on physician incentive plans, and the preclusion list requirements in §§ 422.222 and 422.224.

- (7) To comply with all requirements in subpart M of this part governing coverage determinations, grievances, and appeals;
  - (8) To comply with the reporting requirements in § 422.516 and the requirements in § 422.310 for submitting data to CMS;
  - (9) That it will be paid under the contract in accordance with the payment rules in subpart G of this part;
  - (10) To develop its annual bid, and submit all required information on premiums, benefits, and cost-sharing by not later than the first Monday in June, as provided in subpart F of this part;
  - (11) That its contract may not be renewed or may be terminated in accordance with this subpart and subpart N of this part.
  - (12) To comply with all requirements that are specific to a particular type of MA plan, such as the special rules for private fee-for-service plans in §§ 422.114 and 422.216 and the MSA requirements in §§ 422.56, 422.103, and 422.262; and
  - (13) To comply with the confidentiality and enrollee record accuracy requirements in § 422.118.
  - (14) Maintain a fiscally sound operation by at least maintaining a positive net worth (total assets exceed total liabilities).
  - (15) Through the CMS complaint tracking system, to address and resolve complaints received by CMS against the MA organization.
  - (16) To maintain administrative and management capabilities sufficient for the organization to organize, implement, and control the financial, marketing, benefit administration, and quality improvement activities related to the delivery of Part C services.
  - (17) To maintain a Part C summary plan rating score of at least 3 stars under the 5-star rating system specified in subpart D of this part. A Part C summary plan rating is calculated as provided in § 422.166.
  - (18) To comply with the requirements for access to health data and plan information under §§ 422.119 and 422.120 of this chapter.
- (b) **Communication with CMS.** The MA organization must have the capacity to communicate with CMS electronically.
- (c) **Prompt payment.** The MA organization must comply with the prompt payment provisions of § 422.520 and with instructions issued by CMS, as they apply to each type of plan included in the contract.
- (d) **Maintenance of records.** The MA organization agrees to maintain for 10 years books, records, documents, and other evidence of accounting procedures and practices that -
- (1) Are sufficient to do the following:
    - (i) Accommodate periodic auditing of the financial records (including data related to Medicare utilization, costs, and computation of the bid) of MA organizations.
    - (ii) Enable CMS to inspect or otherwise evaluate the quality, appropriateness and timeliness of services performed under the contract, and the facilities of the organization.

- (iii) Enable CMS to audit and inspect any books and records of the MA organization that pertain to the ability of the organization to bear the risk of potential financial losses, or to services performed or determinations of amounts payable under the contract.
- (iv) Properly reflect all direct and indirect costs claimed to have been incurred and used in the preparation of the bid proposal.
- (v) Establish component rates of the bid for determining additional and supplementary benefits.
- (vi) Determine the rates utilized in setting premiums for State insurance agency purposes and for other government and private purchasers; and

(2) Include at least records of the following:

- (i) Ownership and operation of the MA organization's financial, medical, and other record keeping systems.
- (ii) Financial statements for the current contract period and 10 prior periods.
- (iii) Federal income tax or informational returns for the current contract period and 10 prior periods.
- (iv) Asset acquisition, lease, sale, or other action.
- (v) Agreements, contracts, and subcontracts.
- (vi) Franchise, marketing, and management agreements.
- (vii) Schedules of charges for the MA organization's fee-for-service patients.
- (viii) Matters pertaining to costs of operations.
- (ix) Amounts of income received by source and payment.
- (x) Cash flow statements.
- (xi) Any financial reports filed with other Federal programs or State authorities.

(e) **Access to facilities and records.** The MA organization agrees to the following:

- (1) HHS, the Comptroller General, or their designee may evaluate, through inspection, audit, or other means -
  - (i) The quality, appropriateness, and timeliness of services furnished to Medicare enrollees under the contract;
  - (ii) Compliance with CMS requirements for maintaining the privacy and security of protected health information and other personally identifiable information of Medicare enrollees;
  - (iii) The facilities of the MA organization to include computer and other electronic systems; and
  - (iv) The enrollment and disenrollment records for the current contract period and 10 prior periods.
- (2) HHS, the Comptroller General, or their designees may audit, evaluate, or inspect any books, contracts, medical records, patient care documentation, and other records of the MA organization, related entity, contractor, subcontractor, or its transferee that pertain to any aspect of services performed, reconciliation of benefit liabilities, and determination of amounts payable under the contract, or as the Secretary may deem necessary to enforce the contract.

- (3) The MA organization agrees to make available, for the purposes specified in paragraph (d) of this section, its premises, physical facilities and equipment, records relating to its Medicare enrollees, and any additional relevant information that CMS may require.
- (4) HHS, the Comptroller General, or their designee's right to inspect, evaluate, and audit extends through 10 years from the end of the final contract period or completion of audit, whichever is later unless -
  - (i) CMS determines there is a special need to retain a particular record or group of records for a longer period and notifies the MA organization at least 30 days before the normal disposition date;
  - (ii) There has been a termination, dispute, or allegation of fraud or similar fault by the MA organization, in which case the retention may be extended to 6 years from the date of any resulting final resolution of the termination, dispute, fraud, or similar fault; or
  - (iii) CMS determines that there is a reasonable possibility of fraud or similar fault, in which case CMS may inspect, evaluate, and audit the MA organization at any time.
- (f) **Disclosure of information.** The MA organization agrees to submit -
  - (1) To CMS, certified financial information that must include the following:
    - (i) Such information as CMS may require demonstrating that the organization has a fiscally sound operation.
    - (ii) Such information as CMS may require pertaining to the disclosure of ownership and control of the MA organization.
  - (2) To CMS, all information that is necessary for CMS to administer and evaluate the program and to simultaneously establish and facilitate a process for current and prospective beneficiaries to exercise choice in obtaining Medicare services. This information includes, but is not limited to:
    - (i) The benefits covered under an MA plan;
    - (ii) The MA monthly basic beneficiary premium and MA monthly supplemental beneficiary premium, if any, for the plan or in the case of an MSA plan, the MA monthly MSA premium.
    - (iii) The service area and continuation area, if any, of each plan and the enrollment capacity of each plan;
    - (iv) Plan quality and performance indicators for the benefits under the plan including -
      - (A) Disenrollment rates for Medicare enrollees electing to receive benefits through the plan for the previous 2 years;
      - (B) Information on Medicare enrollee satisfaction;
      - (C) Information on health outcomes;
      - (D) The recent record regarding compliance of the plan with requirements of this part, as determined by CMS; and
      - (E) Other information determined by CMS to be necessary to assist beneficiaries in making an informed choice among MA plans and traditional Medicare;
    - (v) Information about beneficiary appeals and their disposition;

- (vi) Information regarding all formal actions, reviews, findings, or other similar actions by States, other regulatory bodies, or any other certifying or accrediting organization;
  - (vii) To CMS, any other information deemed necessary by CMS for the administration or evaluation of the Medicare program.
- (3) To its enrollees all informational requirements under § 422.64 and, upon an enrollee's, request the financial disclosure information required under § 422.516.

(g) **Beneficiary financial protections.** The MA organization agrees to comply with the following requirements:

- (1) Effective January 1, 2010, each MA organization must adopt and maintain arrangements satisfactory to CMS to protect its enrollees from incurring liability (for example, as a result of an organization's insolvency or other financial difficulties) for payment of any fees that are the legal obligation of the MA organization. To meet this requirement, the MA organization must -
- (i) Ensure that all contractual or other written arrangements with providers prohibit the organization's providers from holding any enrollee liable for payment of any such fees;
  - (ii) Indemnify the enrollee for payment of any fees that are the legal obligation of the MA organization for services furnished by providers that do not contract, or that have not otherwise entered into an agreement with the MA organization, to provide services to the organization's enrollees; and
  - (iii) For all MA organizations with enrollees eligible for both Medicare and Medicaid, specify in contracts with providers that such enrollees will not be held liable for Medicare Part A and B cost sharing when the State is responsible for paying such amounts, and inform providers of Medicare and Medicaid benefits, and rules for enrollees eligible for Medicare and Medicaid. The MA plans may not impose cost-sharing that exceeds the amount of cost-sharing that would be permitted with respect to the individual under title XIX if the individual were not enrolled in such a plan. The contracts must state that providers will -
    - (A) Accept the MA plan payment as payment in full, or
    - (B) Bill the appropriate State source.
  - (iv) Ensure that the enrollee does not have any financial liability for services, items, or drugs furnished, ordered, or prescribed to the enrollee by an MA contracted individual or entity on the preclusion list, as defined in § 422.2 and as described in § 422.222.
  - (v) Ensure that the plan's provider agreement contains a provision stating that after the expiration of the 60-day period specified in § 422.222:
    - (A) The provider will no longer be eligible for payment from the plan and will be prohibited from pursuing payment from the beneficiary as stipulated by the terms of the contract between CMS and the plan per § 422.504(g)(1)(iv); and
    - (B) The provider will hold financial liability for services, items, and drugs that are furnished, ordered, or prescribed after this 60-day period, at which point the provider and the beneficiary will have already received notification of the preclusion.
- (2) The MA organization must provide for continuation of enrollee health care benefits -
- (i) For all enrollees, for the duration of the contract period for which CMS payments have been made; and

- (ii) For enrollees who are hospitalized on the date its contract with CMS terminates, or, in the event of an insolvency, through discharge.
- (3) In meeting the requirements of this paragraph, other than the provider contract requirements specified in paragraph (g)(1)(i) of this section, the MA organization may use -
  - (i) Contractual arrangements;
  - (ii) Insurance acceptable to CMS;
  - (iii) Financial reserves acceptable to CMS; or
  - (iv) Any other arrangement acceptable to CMS.
- (h) **Requirements of other laws and regulations.** The MA organization agrees to comply with-
  - (1) Federal laws and regulations designed to prevent or ameliorate fraud, waste, and abuse, including, but not limited to, applicable provisions of Federal criminal law, the False Claims Act (31 U.S.C. 3729 et. seq.), and the anti-kickback statute (section 1128B(b)) of the Act); and
  - (2) HIPAA administrative simplification rules at 45 CFR parts 160, 162, and 164.
- (i) **MA organization relationship with first tier, downstream, and related entities.**
  - (1) Notwithstanding any relationship(s) that the MA organization may have with first tier, downstream, and related entities, the MA organization maintains ultimate responsibility for adhering to and otherwise fully complying with all terms and conditions of its contract with CMS.
  - (2) The MA organization agrees to require all first tier, downstream, and related entities to agree that -
    - (i) HHS, the Comptroller General, or their designees have the right to audit, evaluate, collect, and inspect any books, contracts, computer or other electronic systems, including medical records and documentation of the first tier, downstream, and entities related to CMS' contract with the MA organization.
    - (ii) HHS, the Comptroller General, or their designees have the right to audit, evaluate, collect, and inspect any records under paragraph (i)(2)(i) of this section directly from any first tier, downstream, or related entity.
    - (iii) For records subject to review under paragraph (i)(2)(ii) of this section, except in exceptional circumstances, CMS will provide notification to the MA organization that a direct request for information has been initiated.
    - (iv) HHS', the Comptroller General's, or their designee's right to inspect, evaluate, and audit any pertinent information for any particular contract period will exist through 10 years from the final date of the contract period or from the date of completion of any audit, whichever is later.
    - (v) They will ensure that payments are not made to individuals and entities included on the preclusion list, defined in § 422.2.
  - (3) All contracts or written arrangements between MA organizations and first tier, downstream, and related entities must contain the following:
    - (i) Enrollee protection provisions that provide, consistent with paragraph (g)(1) of this section, arrangements that prohibit providers from holding an enrollee liable for payment of any fees that are the obligation of the MA organization.

- (ii) Accountability provisions that indicate that the MA organization may only delegate activities or functions to a first tier, downstream, or related entity, in a manner consistent with the requirements set forth at paragraph (i)(4) of this section.
- (iii) A provision requiring that any services or other activity performed by a first tier, downstream, and related entity in accordance with a contract are consistent and comply with the MA organization's contractual obligations.
- (4) If any of the MA organizations' activities or responsibilities under its contract with CMS are delegated to other parties, the following requirements apply to any first tier, downstream and related entity:
  - (i) Each and every contract must specify delegated activities and reporting responsibilities.
  - (ii) Each and every contract must either provide for revocation of the delegation activities and reporting requirements or specify other remedies in instances where CMS or the MA organization determine that such parties have not performed satisfactorily.
  - (iii) Each and every contract must specify that the performance of the parties is monitored by the MA organization on an ongoing basis.
  - (iv) Each and every contract must specify that either -
    - (A) The credentials of medical professionals affiliated with the party or parties will be either reviewed by the MA organization; or
    - (B) The credentialing process will be reviewed and approved by the MA organization and the MA organization must audit the credentialing process on an ongoing basis.
  - (v) All contracts or written arrangements must specify that the related entity, contractor, or subcontractor must comply with all applicable Medicare laws, regulations, and CMS instructions.
- (5) If the MA organization delegates selection of the providers, contractors, or subcontractor to another organization, the MA organization's contract with that organization must state that the CMS-contracting MA organization retains the right to approve, suspend, or terminate any such arrangement.
- (j) **Additional contract terms.** The MA organization agrees to include in the contract such other terms and conditions as CMS may find necessary and appropriate in order to implement requirements in this part.
- (k) **Severability of contracts.** The contract must provide that, upon CMS's request -
  - (1) The contract will be amended to exclude any MA plan or State-licensed entity specified by CMS; and
  - (2) A separate contract for any such excluded plan or entity will be deemed to be in place when such a request is made.
- (l) **Certification of data that determine payment.** As a condition for receiving a monthly payment under subpart G of this part, the MA organization agrees that its chief executive officer (CEO), chief financial officer (CFO), or an individual delegated the authority to sign on behalf of one of these officers, and who reports directly to such officer, must request payment under the contract on a document that certifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data that CMS requests. Such data include specified enrollment information, encounter data, and other information that CMS may specify.

- (1) The CEO, CFO, or an individual delegated the authority to sign on behalf of one of these officers, and who reports directly to such officer, must certify that each enrollee for whom the organization is requesting payment is validly enrolled in an MA plan offered by the organization and the information relied upon by CMS in determining payment (based on best knowledge, information, and belief) is accurate, complete, and truthful.
  - (2) The CEO, CFO, or an individual delegated with the authority to sign on behalf of one of these officers, and who reports directly to such officer, must certify (based on best knowledge, information, and belief) that the data it submits under § 422.310 are accurate, complete, and truthful.
  - (3) If such data are generated by a related entity, contractor, or subcontractor of an MA organization, such entity, contractor, or subcontractor must similarly certify (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of the data.
  - (4) The CEO, CFO, or an individual delegated the authority to sign on behalf of one of these officers, and who reports directly to such officer, must certify (based on best knowledge, information, and belief) that the information in its bid submission is accurate, complete, and truthful and fully conforms to the requirements in § 422.254.
  - (5) **Certification of accuracy of data for overpayments.** The CEO, CFO, or COO must certify (based on best knowledge, information, and belief) that the information provided for purposes of reporting and returning of overpayments under § 422.326 is accurate, complete, and truthful.
- (m) **Issuance of compliance actions for failure to comply with the terms of the contract.** The MA organization acknowledges that CMS may take compliance actions as described in this section or intermediate sanctions as defined in subpart O of this part.
- (1) CMS may take compliance actions as described in paragraph (m)(3) of this section if it determines that the MA organization has not complied with the terms of a current or prior Part C contract with CMS.
    - (i) CMS may determine that an MA organization is out of compliance with a Part C requirement when the organization fails to meet performance standards articulated in the Part C statutes, regulations in this chapter, or guidance.
    - (ii) If CMS has not already articulated a measure for determining noncompliance, CMS may determine that an MA organization is out of compliance when its performance in fulfilling Part C requirements represents an outlier relative to the performance of other MA organizations.
  - (2) CMS bases its decision on whether to issue a compliance action and what level of compliance action to take on an assessment of the circumstances surrounding the noncompliance, including all of the following:
    - (i) The nature of the conduct.
    - (ii) The degree of culpability of the MA organization.
    - (iii) The adverse effect to beneficiaries which resulted or could have resulted from the conduct of the MA organization.
    - (iv) The history of prior offenses by the MA organization or its related entities.
    - (v) Whether the noncompliance was self-reported.

- (vi) Other factors which relate to the impact of the underlying noncompliance or the lack of the MA organization's oversight of its operations that contributed to the noncompliance.
- (3) CMS may take one of three types of compliance actions based on the nature of the noncompliance.
  - (i) **Notice of noncompliance.** A notice of noncompliance may be issued for any failure to comply with the requirements of the MA organization's current or prior Part C contract with CMS, as described in paragraph (m)(1) of this section.
  - (ii) **Warning letter.** A warning letter may be issued for serious and/or continued noncompliance with the requirements of the MA organization's current or prior Part C contract with CMS, as described in paragraph (m)(1) of this section and as assessed in accordance with paragraph (m)(2) of this section.
  - (iii) **Corrective action plan.**
    - (A) Corrective action plans are requested for particularly serious or continued noncompliance with the requirements of the MA organization's current or prior Part C contract with CMS, as described in paragraph (m)(1) of this section and as assessed in accordance with paragraph (m)(2) of this section.
    - (B) CMS issues a corrective action plan if CMS determines that the MA organization has repeated or not corrected noncompliance identified in prior compliance actions, has substantially impacted beneficiaries or the program with its noncompliance, or must implement a detailed plan to correct the underlying causes of the noncompliance.
- (n) **Acknowledgements of CMS release of data -**
  - (1) **Summary CMS payment data.** The contract must provide that the MA organization acknowledges that CMS releases to the public summary reconciled CMS payment data after the reconciliation of Part C and Part D payments for the contract year as follows:
    - (i) For Part C, the following data -
      - (A) Average per member per month CMS payment amount for A/B (original Medicare) benefits for each MA plan offered, standardized to the 1.0 (average risk score) beneficiary.
      - (B) Average per member per month CMS rebate payment amount for each MA plan offered (or, in the case of MSA plans, the monthly MSA deposit amount).
      - (C) Average Part C risk score for each MA plan offered.
      - (D) County level average per member per month CMS payment amount for each plan type in that county, weighted by enrollment and standardized to the 1.0 (average risk score) beneficiary in that county.
    - (ii) For Part D plan sponsors, plan payment data in accordance with § 423.505(o) of this subchapter.
  - (2) **MA bid pricing data and Part C MLR data.** The contract must provide that the MA organization acknowledges that CMS releases to the public data as described at §§ 422.272 and 422.2490.
- (o) **Business continuity.**

- (1) The MA organization agrees to develop, maintain, and implement a business continuity plan containing policies and procedures to ensure the restoration of business operations following disruptions to business operations which would include natural or man-made disasters, system failures, emergencies, and other similar circumstances and the threat of such occurrences. To meet the requirement, the business continuity plan must, at a minimum, include the following:
  - (i) **Risk assessment.** Identify threats and vulnerabilities that might affect business operations.
  - (ii) **Mitigation strategy.** Design strategies to mitigate hazards. Identify essential functions in addition to those specified in paragraph (o)(2) of this section and prioritize the order in which to restore all other functions to normal operations. At a minimum, each MA organization must do the following:
    - (A) Identify specific events that will activate the business continuity plan.
    - (B) Develop a contingency plan to maintain, during any business disruption, the availability and, as applicable, confidentiality of communication systems and essential records in all forms (including electronic and paper copies). The contingency plan must do the following:
      - (1) Ensure that during any business disruption the following systems will operate continuously or, should they fail, be restored to operational capacity on a timely basis:
        - (i) Information technology (IT) systems including those supporting claims processing at point of service.
        - (ii) Provider and enrollee communication systems including telephone, Web site, and email.
      - (2) With respect to electronic protected health information, comply with the contingency plan requirements of the Health Insurance Portability and Accountability Act of 1996 Security Regulations at 45 CFR parts 160 and 164, subparts A and C.
    - (C) Establish a chain of command.
    - (D) Establish a business communication plan that includes emergency capabilities and procedures to contact and communicate with the following:
      - (1) Employees.
      - (2) First tier, downstream, and related entities.
      - (3) Other third parties (including pharmacies, providers, suppliers, and government and emergency management officials).
    - (E) Establish employee and facility management plans to ensure that essential operations and job responsibilities can be assumed by other employees or moved to alternate sites as necessary.
    - (F) Establish a restoration plan including procedures to transition to normal operations.
    - (G) Comply with all applicable Federal, State, and local laws.
  - (iii) **Testing and revision.** On at least an annual basis, test and update the business operations continuity plan to ensure the following:

- (A) That it can be implemented in emergency situations.
- (B) That employees understand how it is to be executed.
- (iv) **Training.** On at least an annual basis, educate appropriate employees about the business continuity plan and their own respective roles.
- (v) **Records.**
  - (A) Develop and maintain records documenting the elements of the business continuity plan described in paragraphs (o)(1)(i) through (iv) of this section.
  - (B) Make the information specified in paragraph (o)(1)(v)(A) of this section available to CMS upon request.
- (2) **Restoration of essential functions.** Every MA organization must plan to restore essential functions within 72 hours after any of the essential functions fail or otherwise stop functioning as usual. In addition to any essential functions that the MA organization identifies under paragraph (o)(1)(ii) of this section, for purposes of this paragraph (o)(2) of the section essential functions include, at a minimum, the following:
  - (i) Benefit authorization (if not waived) for services to be immediately furnished at a hospital, clinic, provider office, or other place of service.
  - (ii) Operation of call center customer services.

[63 FR 35099, June 26, 1998]

**Editorial Note:** For FEDERAL REGISTER citations affecting § 422.504, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.govinfo.gov](http://www.govinfo.gov).

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## Title 42 - Public Health

### Chapter IV - Centers for Medicare & Medicaid Services, Department of Health and Human Services

#### Subchapter B - Medicare Program

#### Part 422 - Medicare Advantage Program

#### Subpart O - Intermediate Sanctions

**Source:** 63 FR 35115, June 26, 1998, unless otherwise noted.

**Authority:** 42 U.S.C. 1302 and 1395hh.

**Source:** 63 FR 18134, Apr. 14, 1998, unless otherwise noted.

**Editorial Note:** Nomenclature changes to part 422 appear at 70 FR 4741, Jan. 28, 2005.

#### § 422.752 Basis for imposing intermediate sanctions and civil money penalties.

- (a) **All intermediate sanctions.** For the violations listed in this paragraph, CMS may impose one or more of the sanctions specified in § 422.750(a) of this subpart on any MA organization with a contract. The MA organization may also be subject to other remedies authorized under law.
- (1) Fails substantially to provide medically necessary items and services that are required (under law or under the contract) to be provided to an individual covered under the contract, if the failure has adversely affected (or has the substantial likelihood of adversely affecting) the individual.
  - (2) Imposes on MA enrollees premiums in excess of the monthly basic and supplemental beneficiary premiums permitted under section 1854 of the Act and subpart F of this part.
  - (3) Acts to expel or refuses to re-enroll a beneficiary in violation of the provisions of this part.
  - (4) Engages in any practice that would reasonably be expected to have the effect of denying or discouraging enrollment (except as permitted by this part) by eligible individuals with the organization whose medical condition or history indicates a need for substantial future medical services.
  - (5) Misrepresents or falsifies information that it furnishes -
    - (i) To CMS; or
    - (ii) To an individual or to any other entity.
  - (6) Fails to comply with the requirements of § 422.206, which prohibits interference with practitioners' advice to enrollees.
  - (7) Fails to comply with § 422.216, which requires the organization to enforce the limit on balance billing under a private fee-for service plan.
  - (8) Employs or contracts with an individual or entity who is excluded from participation in Medicare under section 1128 or 1128A of the Act (or with an entity that employs or contracts with such an excluded individual or entity) for the provision of any of the following:
    - (i) Health care.

## Basis for imposing intermediate sanctions and civil money pen...

- (ii) Utilization review.
  - (iii) Medical social work.
  - (iv) Administrative services.
  - (9) Except as provided under § 423.34 of this chapter, enrolls an individual in any plan under this part without the prior consent of the individual or the designee of the individual.
  - (10) Transfers an individual enrolled under this part from one plan to another without the prior consent of the individual or the designee of the individual or solely for the purpose of earning a commission.
  - (11) Fails to comply with communication restrictions described in subpart V of this part or applicable implementing guidance.
  - (12) Employs or contracts with any individual, agent, provider, supplier or entity who engages in the conduct described in paragraphs (a)(1) through (11) of this section.
  - (13) Fails to comply with §§ 422.222 and 422.224, that requires the MA organization not to make payment to excluded individuals and entities, nor to individuals and entities on the preclusion list, defined in § 422.2.
- (b) **Suspension of enrollment and communications.** If CMS makes a determination that could lead to a contract termination under § 422.510(a), CMS may impose the intermediate sanctions at § 422.750(a)(1) and (3).
- (c) **Civil Money Penalties.**
- (1) **CMS.** In addition to, or in place of, any intermediate sanctions, CMS may impose civil money penalties in the amounts specified in the following:
    - (i) Section 422.760(b) for any of the determinations at § 422.510(a), except § 422.510(a)(4)(i).
    - (ii) Section 422.760(c) for any of the determinations at § 422.752(a) except § 422.752(a)(5).
  - (2) **OIG.** In addition to, or in place of any intermediate sanctions imposed by CMS, the OIG, in accordance with part 1003 of Chapter V of this title, may impose civil money penalties for the following:
    - (i) Violations listed at 422.752(a).
    - (ii) Determinations made under § 422.510(a)(4)(i).
- (d) **Special rule for non-compliant dual eligible special needs plans.** Notwithstanding any other provision of this section, CMS must impose during plan years 2021 through 2025 intermediate sanctions specified at § 422.750(a) on an MA organization with a contract to operate a dual eligible special needs plan if CMS determines that the dual eligible special needs plan fails to comply with at least one of the criteria for the integration of Medicare and Medicaid benefits provided in the definition of a dual eligible special needs plan at § 422.2. If CMS imposes such an intermediate sanction, the MA organization must submit to CMS a corrective action plan in a form, manner, and timeframe established by CMS. The procedures outlined in § 422.756 apply to the imposition of the intermediate sanction under this provision.

[63 FR 35115, June 26, 1998; 63 FR 52614, Oct. 1, 1998, as amended at 69 FR 78338, Dec. 30, 2004; 70 FR 4741, Jan. 28, 2005; 70 FR 52027, Sept. 1, 2005; 72 FR 68725, Dec. 5, 2007; 75 FR 19814, Apr. 15, 2010; 79 FR 29959, May 23, 2014; 81 FR 80557, Nov. 15, 2016; 83 FR 16734, Apr. 16, 2018; 84 FR 15839, April 16, 2019]

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