



# Year in Review: Federal Contracts Case Law Update

## *Speakers:*

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# **U.S. Supreme Court**

# Key SCOTUS Cases

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024); and
- *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)
- What will the effect be of these two decisions on agency rulemaking?
  - Tsunami of litigation, or
  - No change (same stuff, different day)?

# *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)

- *Loper* overturned *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and the doctrine that originated with it, **Chevron Deference**.
- **Chevron** stood for the proposition that courts should defer to a federal agency's interpretation of a silent or ambiguous statute so long as the interpretation is reasonable.
- In *Loper*, the Court held in a 6 to 3 decision that: "The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled."

## *Loper – The Facts*

- Challenge to regulation of the National Marine Fisheries Service (The Agency) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which incorporates the Administrative Procedure Act (APA).
- Regulation required Atlantic herring fisherman to contract and pay for government-certified third-party observers on fishing trips.
- The Court granted certiorari on two cases involving multiple owners of Atlantic, family-owned commercial herring fisheries or fishing vessels who challenged the agency's rule.

# Loper – The Statute at Issue

Relevant here, a plan may also require that “one or more observers be carried on board” domestic vessels “for the purpose of collecting data necessary for the conservation and management of the fishery.” ... ***The MSA specifies three groups that must cover costs associated with observers:***

- (1) foreign fishing vessels ... (which *must* carry observers) ...;
- (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch ...; and
- (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate ....

In the latter two cases, the MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels. And in general, it authorizes the Secretary to impose “sanctions” when “any payment required for observer services provided to or contracted by an owner or operator ... has not been paid.” [All internal citations omitted].

***The MSA does not contain similar terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate.***

# *The Test for Chevron Deference*

- (1) The reviewing court must first determine “whether Congress has directly spoken to the precise question at issue. If, and only if, congressional intent is ‘clear’ that is the end of the matter.”
- (2) “But if the court determines that ‘the statute is silent or ambiguous with respect to the specific issue’ at hand, the court must ... defer to the agency’s interpretation if it ‘is based on a permissible construction of the statute.’” *Loper* at 2254.

## *Loper – The Majority Opinion (C.J. Roberts)*

- Overrules *Chevron* saying that the presumption is incompatible with the APA, which requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority
- “Neither *Chevron*, nor any subsequent decision of the Court attempted to reconcile its framework with the APA. *Chevron* defines the command of the APA that ‘the reviewing court’ – not the agency whose action it reviews—is to ‘decided **all** relevant questions of law’ and ‘interpret statutory provisions.’”
- “*Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”
- “The Court, for its part, has not deferred an agency interpretation under *Chevron* since 2016.”

## *Loper – The Concurrence (J. Thomas)*

- “I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution’s separation of powers, as I have previously explained at length.”
- “*Chevron* compels judges to abdicate their **Article III** ‘judicial Power.’ § 1. ‘[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.’”

## *Loper – The Dissent (J. Kagan)*

- Accuses the majority of turning the Court into the country's administrative czar, citing examples involving the Food & Drug Administration and the Public Health Services Act, Fish & Wildlife Services and the Endangered Species Act, and Health and Human Service and Medicare
- Chides the majority for defending its "move as one (suddenly) required by (the nearly 80-year-old Administrative Procedure Act)," enacted in 1946
- Notes that Congress nearly never provides an explicit instruction for dealing with gaps or ambiguities and that Congress could have refuted **Chevron Deference**, but has not done so in *Chevron's* 40-year existence. Instead, Congress has authorized or reauthorized hundreds of statutes knowing full well of *Chevron*

## *Loper – The Dissent (J. Kagan) - Continued*

- Criticizes the majority for relying on Section 706 of the APA, which provides for judicial review of agency action, and claiming that it does not contain a deferential standard of review. The dissent points out that Section 706 also does not include a *de novo* standard of review and, in fact, contains no standard of review at all
- “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706
- Also notes that *Chevron* previously upheld in 70 Supreme Court cases and thousands of lower court cases

## *Loper – The Potential Effect*

- **But the Majority Opinion also states that** “[b]y overruling *Chevron*, though, the Court does not call into question prior cases that relied upon the *Chevron* framework. Those holdings of those cases that specific agency actions are lawful—including the Clean Water Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite the Court’s change in interpretative methodology.”
- **So what about *Brownlee v. DynCorp.*, 349 F.3d 1343, 1354-55 (Fed. Cir. 2003)?**
  - “The FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference. Not only has Congress specifically authorized the FAR, see 41 U.S.C. § 405a (2000), but, in the 1985 Act, it expressly authorized regulations adopting definitions of the statutory terms, such as ‘contractor.’ § 911(a), 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(e)(2)) ... Not surprisingly, we have specifically held that the provisions of FAR are entitled to *Chevron* deference.”

# *Loper – The Potential Effect*

- *Loper Bright* will likely encourage contractors to make new challenges to agency rulingmaking and agency's drag out and heavily paper its rulemaking.
  - See *Radiance Technologies, Inc.*, B-422615, 2024 CPD ¶ 210, Aug 30, 2024 ("Additionally, we find that the protester's references to, and reliance on, *Loper* are fundamentally misplaced. *Loper* involved an agency's interpretation of ambiguous provisions of a statute, as opposed to agency regulations. ... Further, even if the SBA's regulations were ambiguous, the agency's interpretation of its own ambiguous regulations would be entitled to deference under *Auer*, see *Kisor*, *supra*, which was not overturned by *Loper*").
  - **Auer Deference:** *Auer v. Robbins*, 117 S.Ct. 905, 137 L.E.2d 79 (1997)(J. Scalia), involving whether the U.S. Department of Labor's salary-basis test for determining an employee's exempt status reflects a permissible reading of the Fair Labor Standards Act as it applies to public employees.
  - St. Louis police sergeants sued the Board of Commissioners, who found the sergeants to be "exempt" employees" under the FLSA, and therefore not entitled to overtime.

# *Percipient.ai, Inc. v. United States*, 104 F.4th 839, 851 (Fed. Cir. 2024)

- Just three weeks before the U.S. Supreme Court's decision in *Loper*, the Federal Circuit expanded who has standing to file a bid protest.
- The Court ruled that a prospective bidder (candidly, a non-bidder that wanted to be a supplier to the presumptive awardee) could protest the National Geospatial Intelligence Agency's failure to consider the protester's commercial solution in violation of a statutory preference to use commercial products and services.
- The Court ruled for protester based on the expansive language of the Tucker Act permitting protests of "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." Previously, only interested parties could file a protest and even interested parties could not file a protest on a task order award (the Task Order Protest Bar).

# *Percipient.ai, Inc. v. United States*, 104 F.4th 839, 851 (Fed. Cir. 2024)

- “[T]he *Percipient* decision, like *Loper Bright*, emphasized the courts’ primacy in interpreting the law, and so *Percipient* may turn out to have been one of the first decisions which follows *Loper Bright*’s trajectory and opens new lines of challenges to agency procurement decisions, grounded in the courts’ Prerogative to define what the law is.”
- Yukins, *Feature Comment: Assessing Percipient.ai After Loper Bright Enterprises—Potentially a New Trajectory in Government Procurement Law*, 66 The Government Contractor 31, ¶ 331 (August 21, 2024)

# ***Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)***

- Widens the window to challenge federal regulations under the Administrative Procedure Act by ruling that an APA claim first accrues when a rule first adversely affects a plaintiff, not when the agency issues the rule
- Issue was whether someone can bring claims challenging regulations decades after rules are issued. The Court framed the question & answer as follows:
  - “We must decide when a claim brought under the Administrative Procedure Act ‘accrues’ for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.”

# *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)

- The applicable statute of limitations, 28 U.S.C. § 2401(a): “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*.” (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it.”
- **Majority (6-3)(J. Barrett):** “Held: An APAP claim does not accrue for purposes of § 2401(a)’s 6-year statute of limitation until the plaintiff is injured by final agency action.”
- **Dissent (J. Jackson):** “Today’s ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress’s unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.”



# **Federal Circuit Courts of Appeal**

# Key Federal Circuit Courts of Appeal Cases

- *Oak Grove Techs., LLC v. United States*, No. 2022-1556, 2024 WL 4138392 (Fed. Cir. Sept. 16, 2024)
- *United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, 113 F.4th 1294 (11th Cir. 2024)
- *Yorktown Sys. Grp. Inc. v. Threat Tec LLC*, 108 F.4th 1287 (11th Cir. 2024)

# *Oak Grove Techs., LLC v. United States*, No. 2022-1556, 2024 WL 4138392 (Fed. Cir. Sept. 16, 2024)

- The Federal Circuit reversed the Court of Federal Claims that had sustained a protest and overturned an Army procurement based on DFARS 215.306 (Exchanges with Offers After the Receipt of Proposals), which provides that “[f]or acquisitions with an estimated value of \$100 million or more, contracting officers should conduct discussions.”
- According to Judge Solomson at COFC, DFARS 215.306 stands for the proposition that an agency should engage in discussions on acquisitions over \$100 million and must justify **not** engaging in discussions where the provision applies, “an interpretation that appeared to be supported by the Army's (successful) argument to the Federal Circuit in *Dell Federal Systems, L.P. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018), which recognized that “discussions normally are to take place in these types of acquisitions.”

# ***Oak Grove Techs., LLC v. United States, No. 2022-1556, 2024 WL 4138392 (Fed. Cir. Sept. 16, 2024)***

- The Federal Circuit reversed concluding Oak Grove waived the issue by not filing a pre-award protest. “[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.”
- For every DOD procurement valued at \$100 million or more where the solicitation contains the standard FAR clause (without the Alternate), every offeror will have to weigh whether to file a pre-award protest of the terms of the solicitation to preserve its rights to challenge the agency's hypothetical refusal to open discussions in the future.

# False Claims Act Recoveries

Some of the largest FCA recoveries occurred after the government stimulated the economy following the financial crisis of 2008

- More than \$2.68 billion in settlements and judgments for FY 2023
- More than \$70 billion in recoveries since 1986 with more than \$39 billion occurring in the last 10 years
- More than 712 New Relator (*Qui Tam*) suits (cases brought by whistleblowers) filed in FY 2023 – averaging 13 new cases a week
- More than \$349 million paid to whistleblowers in FY 2023

# Required Compliance Framework

## **FAR 52.203-13 (Contractor Code of Business Ethics & Conduct)**

- (1) Implement a written code of business ethics. FAR 52.203-13(b)
- (2) Establish an ongoing business ethics awareness and compliance program and
- (3) Establish an Internal control system. FAR 52.230-13(c); and
- (4) Report violations of “federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code” or the “civil False Claims Act.” FAR 52.203-13(b)(3)(i). [The so-called Mandatory Disclosure Rule]

## **Who is covered?**

- Contractors who have contracts expected to exceed \$6 million and which will last 120 days or more. FAR 3.1004(a)
- Subcontractors who have contracts that exceed \$6 million and which will last more than 120 days. FAR 52.203-13(d). Exceptions for small businesses and commercial items.

# False Claims Act Framework

## Essential Elements of an FCA Violation:

(1) Falsity of the claim submitted to the federal government	(2) Scienter ( <i>i.e.</i> , knowledge of the claim's falsity)
(3) Materiality to payment	(4) Causing the government to make a payment

## Penalties:

(1) Civil penalties (after 2/12/2024: \$13,964 to \$27,894 for each false claim)	(2) Three times the amount of damages sustained by the government
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## Who Can Bring an FCA Action?

(1) The US Attorney General	(2) A private party, known as a <i>qui tam</i> relator, in the name of the United States
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## Liability Extends to Anyone Who:

(1) Knowingly presents, or causes to be presented, a false or fraudulent <b><u>claim</u></b> for payment or approval	(2) Knowingly makes, or causes to be made, a false <b><u>statement</u></b> or <b><u>record</u></b> material to a false claim
(3) Knowingly conceals or decreases an obligation to pay money to the government	(4) Participates in a conspiracy to commit (1), (2), or (3)

# ***United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A., 113 F.4th 1294 (11th Cir. 2024)***

- First case to rule that blog posts are considered to be news media and trigger the public disclosure bar that prohibits *qui tam* cases when “substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed ... from the news media [unless opposed by DOJ].” 31 U.S.C. 3730(E)(4)(A)
- *Cf.* the case discussed at last year’s Symposium, *Piacentile v. U.S. Oncology, Inc.*, 2023 WL 2661579 (2<sup>nd</sup> Cir. 2023), which ruled that the FCA’s public disclosure bar required dismissal because the kickback scheme relators alleged had already been revealed in prior suits and relators were not “original sources.”
- Shows that the Circuit Courts will continue to apply a muscular public disclosure bar to dismiss “parasitic” suits.

# *Piacentile v. U.S. Oncology, Inc.*, 2023 WL 2661579 (2d Cir. 2023)

## Original Sources:

(1) Prior to a public disclosure, has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based OR

(2) Has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions

AND

(3) Who has voluntarily provided the information to the Government before filing an action under this section.

- Public disclosure bar: Dismissal of False Claims actions that are based "in **any part** upon publicly disclosed allegations or transactions"
- **Applies to relator even if prior disclosure does not identify defendant by name**
- Balance between promoting relator suits and avoiding parasitic claims
- Public disclosure bar does **not** apply if relator is an "original source"
- Research publicly available information when pursuing or defending an FCA claim



# **U.S. Federal District Courts**

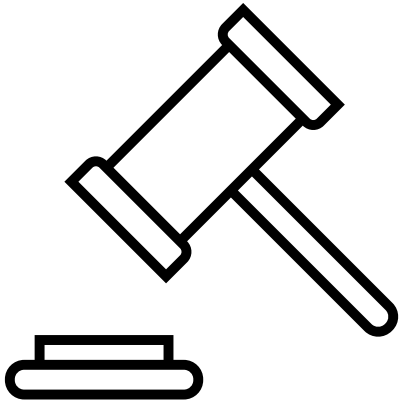
# 2024 Key U.S. Federal District Cases

- *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024)
- *United States ex rel. Sheldon v. Forest Labs, LLC*, No. CV ELH-14-2535, 2024 WL 3555116 (D. Md. July 23, 2024)(appeal filed)

# ***U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024)**

- Federal judge appointed by President Trump strikes down as unconstitutional the *qui tam* clause of the civil False Claims Act based on the Appointment Clause of the Constitution because relators are essentially acting as “officers of the United States,” and the relator was not approved by the President, a court, or an agency head.
- Leans heavily on Justice Thomas’s dissent in *U.S. ex. rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (June 2023), which we discussed at last year's Symposium.
- Really limits whistleblower suits, but likely an aberration.

# *United States ex. rel. Polansky v. Executive Health Resources, Inc., 599 U.S. 419 (2023).*



- If the government initially declines to intervene in an FCA action, it may still intervene and move to dismiss an action at a later point in time, even over a relator's objection
- Motions to dismiss are assessed under the rule governing voluntary dismissal of suits: Fed. R. Civ. Pro. 41(a)
- The government can intervene and dismiss an FCA action (long after the 60-day seal period) if the action will not vindicate the Government's interests

“Today, we hold that the Government may seek dismissal of an FCA action over a relator’s objection so long as it intervened sometime in the litigation, whether at the outset or afterward.”

## ***United States ex rel. Sheldon v. Forest Labs, LLC, No. CV ELH-14-2535, 2024 WL 3555116 (D. Md. July 23, 2024)***

- Dismissing a *qui tam* case based on failure to prove scienter.
- Progeny of *U.S. ex. rel. Schutte v. SuperValu*, 589 U.S. 739 (2023), which we discussed at last year's Symposium and stands for the proposition that subjective beliefs of the defendant determine civil False Claims Act actions, not objectively reasonable beliefs.

# False Claims Act Framework - *United States ex. rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023)

- Subjective beliefs determine the outcome of FCA actions – **not** “objectively reasonable” beliefs
- Focus on what the defendant **actually thought when** submitting a claim, not what the defendant may have **thought after** submitting a claim
- If there is evidence of actual knowledge of an FCA violation, an “objective, reasonable person” defense will be unsuccessful



“What matters for an FCA case is whether the defendant knew the claim was false.”

# *Yorktown Sys. Grp. Inc. v. Threat Tec LLC, 108 F.4th 1287 (11th Cir. 2024)*

- Ruling that a small business protégé under an approved SBA mentor-protégé team and a joint venture agreement breached its fiduciary duty by terminating the mentor's subcontract with the JV and trying to exclude the mentor from the government contract.



# **U.S. Court of Federal Claims**

# Key U.S. Court of Federal Claims Case

- *Indep. Rough Terrain Ctr., LLC v. United States*, 172 Fed. Cl. 250 (2024)
- *Ekagra Partners, LLC v. United States*, 163 Fed. Cl. 189 (2024)

# *Indep. Rough Terrain Ctr., LLC v. United States*, 172 Fed. Cl. 250 (2024)

- Pre-award protest in which COFC rules that the court has jurisdiction to hear contract disputes flowing from production contracts issued after the initial Other Transaction Authority (OTA).
  - “[N]othing in the OT statutes expressly removes OT follow-on contracts from the purview of this Court’s jurisdiction. The Court holds that it has jurisdiction to review a follow-on production contract that seeks to acquire property or services for the Government, whether the agency issued the follow-on solicitation under OT authority or under FAR authority.”
- Novel because it is the first case to indicate when contracts relating to OTAs can be protested.

# *Ekagra Partners, LLC v. United States*, 163 Fed. Cl. 189 (2024)

- Multi-party post-award protest challenging both tracks of U.S. Customs and Border Protection's procurement related to supporting CBP's data-related endeavors – including leveraging AI and machine learning.
- COFC held that one protester lacked Article III standing because it did not show evidence of an “injury in fact that is concrete, particularized, and actual or imminent.”
  - “As applied to bid protests before this court, the Article III injury in fact inquiry focuses on whether plaintiff has ‘allege[d] facts demonstrating that the government committed prejudicial error.’”
- Protester arguing that an awardee should have been deemed ineligible did not do enough to establish its own injury/entitlement to an award.

**Thank you!**



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