NOTE

THE DOCTOR KNOWS BEST?: RECONSIDERING THE ROLE OF EXPERT DISCRETION IN THE FALSE CLAIMS ACT

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In 2021, the Supreme Court denied certiorari in Care Alternatives v. United States*, leaving open a circuit split regarding the intersection of expert testimony and the falsity element of the False Claims Act. This uncertainty could lead to significant civil liability not only for Medicare/Medicaid service providers, but also for any private parties that receive money from the federal government. This Note outlines three potential solutions that can resolve this circuit split to balance between the interests of the federal government in countering fraud from the contracting process, and the interests of private-sector firms in facilitating ease of doing business with the public sector.*

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I. INTRODUCTION

The False Claims Act ("FCA") is an instrumental piece of legislation that allows the federal government to combat fraud resulting from its engagements with the private sector. Federal government spending spans across nearly every field and industry, such as military contracting, scientific research grants, agricultural subsidies, and Medicare/Medicaid funding.[1] The FCA allows either individual informants or the federal government to bring claims against potentially fraudulent parties and to enforce the statutory penalty of treble damages.[2] Accordingly, any significant uncertainty regarding a party's FCA liability has the potential to complicate billions of dollars in government spending and contracting.

In the current context of considerable COVID-19 relief, stimulus, and pending infrastructure spending bills, such uncertainties can ultimately lead to confusion, hesitancy, and increased costs of doing business for parties seeking government funds.[3] One such uncertainty is a circuit split regarding whether expert testimony can be allowed to satisfy the falsity element of the FCA. Falsity is one of the four elements that must be proven in a successful FCA claim, with

[1] *A Snapshot of Government-Wide Contracting for FY 2020 (infographic)*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (June 21, 2022), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic, [https://perma.cc/UR7H-JLQE].

[2] 31 U.S.C. § 3729(a).

[3] Gavin A. Bell & W. Stacy Miller, II, *Fraud in the Pandemic: How Covid-19 Affects* Qui Tam *Whistleblowers and the False Claims Act*, 43 CAMPBELL L. REV. 273, 298–305 (2021) (describing the potential *qui tam* ramifications of PPP loans).

the other elements being scienter, materiality, and causation.[4] While the appellate cases regarding this circuit split address expert testimony in a medical context,[5] the intersection of expert judgment and the falsity standard could easily be applied to any other private business where expert discretion is required to certify a claim for government compensation.

This Note argues that the current circuit split regarding whether expert judgment can be used to prove the element of falsity should be resolved to incorporate elements of the various circuits' approaches in order to protect the validity of expert discretion while maintaining the existing distinctions between the elements of falsity and scienter. A careful balance must be sought in resolving this circuit split; an excessively loose falsity standard or uncertain overlap with the scienter element would invite frivolous and opportunistic litigation, while an overly protective falsity standard could shield numerous valid claims of fraud from FCA liability through contested expert testimony. Accordingly, this Note proposes a hybrid solution that would find this balance of interests between private businesses, with their respective experts, and the federal government.

II. OVERVIEW OF THE FALSE CLAIMS ACT

A. The Historical Development of the False Claims Act

The False Claims Act ("FCA") was first enacted in 1863 to combat rampant fraud in government contracting for military

4 31 U.S.C. § 3729(a)(1).

5 *See* United States v. Care Alternatives, 952 F.3d 89, 91 (3d Cir. 2020) (concerning improper hospice care reimbursement requests submitted to Medicare); Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1118 (9th Cir. 2020) (concerning excessive inpatient treatment reimbursement requests submitted to Medicare); United States v. AseraCare, Inc., 938 F.3d 1278, 1278 (11th Cir. 2019) (concerning improper hospice care reimbursements request submitted to Medicare).

supplies during the Civil War.[6] The FCA authorized self-interested litigants who bring cases on behalf of the government, referred to as relators, to reveal instances of fraudulent requests for payment against the federal government in exchange for a portion of the funds that were ultimately recovered.[7] This initial version of the FCA provided for the recovery of a fixed amount and double damages, while also allowing successful relators to collect half of the funds recovered.[8]

However, in 1943, Congress amended the FCA to significantly restrict the statute's use due to abuse of the loose *qui tam* provisions by opportunistic relators during World War II.[9] These restrictions reduced the maximum percentage of the sum recoverable by successful relators and introduced critical elements of the *qui tam* provision in its current form, such as the government's discretionary ability to intervene in a *qui tam* action and the requirement for relators to bring novel evidence not already possessed by the government or the public (referred to as the public disclosure bar).[10] These lasting changes to the FCA led to significant underutilization

6 United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) ("The Civil False Claims Act was born in 1863 to a nation engulfed in a civil war. The War Department found itself at the hands of unscrupulous and corrupt government contractors. The abuses and damage done to the federal treasury and war effort was, for defense contractors, an opportunity for windfall profit. The contractors were fast becoming 'proverbially and notoriously rich.' . . . Based on the record of widespread fraud by contractors, Congress, at the urging of President Lincoln, enacted the False Claims Act.") (internal citation omitted).

7 David S. Mitchell, Jr., *An Introduction to the False Claims Act*, 51 ARK. LAW. 26, 27 (Summer 2016).

8 J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 555–56 (2000) ("Individuals could pursue this remedy through a *qui tam* action, and the informer was entitled to half the total recovery.").

9 *Id.* at 556.

10 *Id.* at 560–61 ("Moreover, the legislation deprived the courts of jurisdiction over any *qui tam* action based upon information or evidence already possessed by the government at the time the suit was commenced.").

of the FCA during the decades following the 1943 amendments.[11]

Congress amended the FCA again in 1986 in order to bring the statute back into common use, responding to a proliferation of fraud across the government; rampant "defense procurement and health care benefits" frauds were specifically of concern to Congress at the time.[12] To remedy this, the congressional amendment "provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed the *qui tam* plaintiff to remain a party in the action even if the Government intervenes."[13] Allowing for *qui tam* plaintiffs to continue as private plaintiffs enabled the private prosecution of fraud, which is not subject to the limitations of scarce government enforcement resources.[14] More significantly, the 1986 FCA amendments still allowed relators to collect their portion of a settlement or judgment, ranging from fifteen to twenty-five percent, even if the government had intervened in the action.[15] With these collective changes, these amendments significantly increased the financial incentives for relators to not only reveal instances of fraud to the government, but also to continue to pursue these actions in a private capacity, should the government decline to intervene. In the modern context, the FCA "covers all fraudulent attempts to cause the Government to pay out sums of money."[16] The FCA is now

11 *See* Bell & Miller, *supra* note 3, at 278 ("The 1943 amendments went too far and the FCA fell into disuse.").

12 S. REP. NO. 99-345, at 4 (1986).

13 United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) (explaining the strengthening of *qui tam* provisions in the 1986 FCA amendments).

14 *See* Beck, *supra* note 8, at 564 ("The benign explanation for the Justice Department's failure to prosecute more fraud claims was the need to ration enforcement resources.").

15 An Act to amend title 31, United States Code, with respect to the fraudulent use of public property or money, Pub. L. No. 99–562 (S 1562), 100 Stat 3153 (1986).

16 United States *ex rel.* Bahrani v. Conagra, Inc., 465 F.3d 1189, 1194 (10th Cir. 2006) (citing United States v. Neifert-White Co., 390 U.S. 228, 232–33) (explaining the modern scope of the FCA).

used to combat various types of frauds and recover substantial government funds.[17] For example, in 2020, the federal FCA was used to recover over $2.2 billion, through settlements and judgments, to the federal government.[18]

A recurring theme throughout the life of the FCA is the tension between the need to uncover fraud against the government and the need for the government to efficiently contract with private sector parties. A weakened FCA reduces the ability of the statute to uncover fraud, while an excessively strong FCA invites inefficiencies through frivolous litigation and increased transaction costs for the federal government.[19] Any significant decisions rendered on the FCA must strike a balance between these two interests. Moreover, an unclear FCA regime, as is the case with the current circuit split, can ultimately lead to both decreased effectiveness at uncovering fraud and frivolous litigation until resolution.

B. Basic Elements of the False Claims Act

The FCA creates liability for parties found guilty of falsely submitting claims for government payment, making false statements when facilitating claims, or otherwise receiving money from the government under fraudulent circumstances.[20] This definition is expansive and reflects

17 Carolyn V. Metnick, *The Jurisdictional Bar Provision: Who Is an Appropriate Relator?*, 17 ANNALS HEALTH L. 101, 102 (2008) ("It is estimated that from 1986 to 2005, the United States has recovered more than $9.6 billion from FCA *qui tam* litigation.").

18 U.S. Department of Justice, *Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020*, JUST. NEWS (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [https://perma.cc/6DUX-LNHL].

19 *See* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 295 (2010) (explaining that Congress seeks to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits").

20 31 U.S.C. § 3729(a)(1); *see* Universal Health Servs., Inc. v. United States, 579 U.S. 176 (2016) (establishing the implied false certification theory); United States *ex rel.* Bain v. Georgia Gulf Corp., 386 F.3d 648, 652 (5th Cir. 2004) ("Under the reverse False Claims Act subsection, a plaintiff

Congress' intention to "reach all types of fraud without qualification, that might result in financial loss to the Government."[21] The FCA, as currently applied, is "remedial in nature" and its provisions are accordingly broadly construed.[22] However, Congress did not intend for the FCA to serve as an "all-purpose antifraud statute" or "a vehicle for punishing garden-variety breaches of contract or regulatory violations."[23] In addition, "not every undisclosed violation of an express condition of payment automatically triggers liability."[24] Relatedly, the FCA "attaches liability not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"[25]

While the FCA empowers the government to pursue actions against parties committing fraud in government contracting, the primary means of FCA enforcement is *qui tam* actions that relators bring.[26] The *qui tam* provision of the FCA allows for individual parties, within certain statutory restrictions, to bring claims against other parties engaged in fraud and receive fifteen to twenty-five percent of the proceeds that the government ultimately recovers.[27] These parties can either be the federal government or relators.[28] Even when a relator brings a claim, the federal government may choose to

may recover against 'any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.'") (citing 31 U.S.C. § 3729(a)(7)).

21 United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

22 Townsend v. Bayer Corp., 774 F.3d 446, 459 (8th Cir. 2014).

23 Universal Health Servs., Inc v. United States, 136 S.Ct. 1989, 2003 (2016) (quoting Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008)).

24 *Id.* at 2001.

25 Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 877–78 (6th Cir. 2006) (quoting United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)).

26 *DOJ, Fraud Statistics—Overview: October 1, 1986 – September 30, 2018*, U.S. DEP'T OF JUST. 1–3, https://www.justice.gov/file/1467871/download [https://perma.cc/V28Q-R4MT] (last visited Sep. 1, 2022).

27 31 U.S.C. § 3730(d).

28 31 U.S.C. § 3730(b).

intervene in the action by taking over the case and either litigating the matter itself or dismissing the case, with the court's approval.[29] If the plaintiff is able to prevail on a FCA claim, the liable parties must pay a statutory cash penalty between $5,000 and $10,000 and, more significantly, mandatory treble damages of the amount fraudulently acquired from the government.[30] This enforcement of mandatory treble damages has a noticeably punitive effect, especially considering that *qui tam* actions are civil suits and not criminal suits.[31] Some commentators have argued that this sort of punitive regime is unsuitable in a business setting, claiming that the lowered evidentiary bar in a civil proceeding, in conjunction with the mandated treble damages and the presence of self-interested parties bringing *qui tam* actions, leads to tremendous uncertainty and risk regarding potential FCA liability.[32]

III. LEGAL BACKGROUND

In order to successfully bring a FCA claim, the plaintiff must prove the four elements of falsity, causation, scienter,

29 *Id.*

30 *Id.* § 3729(a)(1).

31 Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784 (2000) ("[T]he current version of the FCA imposes damages that are essentially punitive in nature.").

32 *See, e.g.,* Stephanie L. Trunk, *Sounding the Death Toll for Health Care Providers: How the Civil False Claims Act Has a Punitive Effect and Why the Act Warrants Reform of Its Damages and Penalties Provision*, 71 GEO. WASH. L. REV. 159, 177 (2003) ("Unless the CFCA is amended, providers will continue to be 'bullied' into settlement, fearing the death toll of Medicare exclusion, and they will continue to aggressively challenge the harshness of CFCA fines and penalties under the Excessive Fines Clause of the Eighth Amendment."), Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CAL. L. REV. 227, 231 (2013) ("However, for several reasons—chief among them contractor competence and the adhesive nature of government contracts—businesses entering into procurement contracts with the government often fail to include provisions governing the extent to which a claim for payment impliedly certifies compliance with contractual, statutory, and regulatory provisions.").

and materiality.[33] This Note primarily concerns the falsity element and the issues of (1) whether expert testimony should be able to satisfy the falsity element and (2) to what degree one should distinguish the falsity element from the scienter element.

A. Falsity & Scienter

To start, the statutory language defines scienter (which the FCA refers to as "knowledge") relatively well. A party is acting knowingly when they, "with respect to information (i) ha[ve] actual knowledge of the information; (ii) act[] in deliberate ignorance of the truth or falsity of the information; or (iii) act[] in reckless disregard of the truth or falsity of the information"; specific proof of an "intent to defraud" is not required.[34]

In comparison, the statutory language of the FCA does not expressly define falsity.[35] Because of this, the FCA follows the common law definitions of "false or fraudulent."[36] Over time, FCA case law has evolved to define two categories of falsity that can satisfy this element: factual falsity and legal falsity.[37] Factual falsity is the more readily understandable of the two, and refers to when the facts surrounding the submission of a claim are false, such as an "incorrect description of goods or services provided or a request for reimbursement for goods or services never provided."[38] Discrepancies that are the result of "innocent" error, as opposed to intentional lies, are not

[33] *See* United States *ex rel.* Petratos v. Genentech Inc, 855 F.3d 481, 487 (3d Cir. 2017) (defining the four elements of the FCA).

[34] 31 U.S.C. § 3729(b)(1).

[35] 31 U.S.C. § 3729.

[36] *See* Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1117 (9th Cir. 2020) (describing the definition of common law fraudulence).

[37] United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1168 (10th Cir. 2010) ("Under § 3729(a), liability can attach when a government payee submits either a legally or factually false request for payment.").

[38] *Id.*

actionable under the FCA.[39] However, errors that are the result of reckless disregard are still able to satisfy the falsity element by themselves in some federal jurisdictions.[40]

Legal falsity, in contrast, refers to falsifying compliance with statutory or regulatory terms of a government contract.[41] Under the express false certification theory, legal falsity can be found where the government has required specific "conditions as a prerequisite to a government benefit, payment, or program" and the defendant has expressly certified this compliance to receive compensation, despite knowingly failing to meet those conditions.[42] The presence of However, direct misrepresentation to the federal government is not necessarily required to find legal falsity. Under the implied false certification theory, legal falsity can be found when a defendant fails to disclose their "violation of a material statutory, regulatory, or contractual requirement" despite

[39] United States *ex rel.* Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 832 (7th Cir. 2011) (describing what types of factually inaccurate statements are actionable under the FCA); *see also* United States *ex rel.* Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 376 (5th Cir. 2004) ("[T]he FCA requires a statement known to be false, which means a lie is actionable but not an error.").

[40] *See* 31 U.S.C. § 3729(b)(1)(A)(iii); United States v. TDC Mgmt. Corp., 24 F.3d 292, 296 (D.C. Cir. 1994) ("[T]he government need not prove that [defendant] had an intent to deceive when it knowingly or recklessly made false statements to the government."); United States v. Medquest Assocs., Inc., 702 F. Supp. 2d 909, 917 (M.D. Tenn. 2010) ("Reckless disregard is sufficient for FCA liability because a specific intent to defraud is not required under the FCA.").

[41] United States v. Care Alternatives, 952 F.3d 89, 96 (3d Cir. 2020) ("[L]egal falsity can be express, such as a false affirmative statement of compliance with a statutory, regulatory, or contractual prerequisite, or it can be implied—for instance, the absence of a material disclosure that would have prevented compliance with a statutory, regulatory, or contractual prerequisite.").

[42] *See, e.g.*, Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 786–87 (4th Cir. 1999) (describing cases where courts have allowed for or found false certification); United States *ex rel.* Thomas v. Black & Veatch Special Projects Corp., 820 F.3d 1162, 1169 (10th Cir. 2016) (explaining the express false certification theory).

submitting a claim that "impliedly certifies compliance with all conditions of payment."[43]

Legal falsity may satisfy the FCA's falsity requirement, but this is not the case in every jurisdiction. Some jurisdictions only allow falsity to be proven through "objective falsehoods," which effectively necessitates legal falsity to prove the falsity element as factual falsity alone is insufficient.[44] For example, the Seventh Circuit has ruled that, "[a]lthough a breached contractual term may be considered a falsehood in a looser sense—a false promise—a mere breach of a contractual duty does not satisfy this standard."[45] Other circuit courts that have rejected the objective falsity standard allow for both factual falsity and legal falsity to satisfy the falsity element in their jurisdictions.[46] This inconsistent application of the falsity element in different jurisdictions, along with the consequent overlap into the scienter element, has resulted in the circuit split in question.

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43 Universal Health Servs., Inc. v. United States *ex rel.* Julio Escobar and Carmen Correa, 579 U.S. 176, 180–87 (2016) (explaining the implied false certification theory).

44 *See* United States *ex rel.* Loughren v. Unum Grp., 613 F.3d 300, 310 (1st Cir. 2010) (stating that facts that could be false must be those that an "applicant could 'reasonably classify as true or false' as opposed to 'legal argumentation and possibility'") (internal citation omitted); United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 383 (4th Cir. 2015) ("[T]he statement or conduct alleged must represent an objective falsehood.") (internal citation omitted); United States *ex rel.* Morton v. A Plus Benefits, Inc., 139 F. App'x 980, 982 (10th Cir. 2005) ("At a minimum the FCA requires proof of an objective falsehood."); United States v. AseraCare, Inc., 938 F.3d 1278, 1290 (11th Cir. 2019) ("[T]he FCA's falsity element requires proof of an objective falsehood").

45 United States *ex rel.* Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 836 (7th Cir. 2011).

46 *See* United States v. Care Alternatives, 952 F.3d 89, 95 (3d Cir. 2020) ("[W]e decline to adopt the District Court's 'objective' falsity standard"); Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1117 (9th Cir. 2020) ("[T]he FCA imposes liability for all 'false or fraudulent claims'—it does not distinguish between 'objective' and 'subjective' falsity.").

B. Circuit Split History

This circuit split concerns the overlap of and potential confusion between these two different falsity regimes in the context of expert testimony. First, in *United States v. AseraCare*, the Eleventh Circuit affirmed the objective falsity standard in regard to expert testimony in a health care context. [47] In *AseraCare*, the government brought an FCA claim alleging that defendants admitted elderly patients for hospice care, despite these patients not being terminally ill.[48] The government alleged that there was an immense financial incentive for defendants to engage in this fraudulent behavior, as the hospice care in question was funded entirely through Medicare.[49] Physicians at the hospital were responsible for utilizing their professional judgment and discretion to determine whether or not an elderly patient would be eligible for hospice care.[50] At trial, expert testimony was inconclusive as to whether these physician judgments could satisfy the falsity element; the defendant's and the government's respective expert witnesses came to "opposite conclusions" regarding whether the physicians had made reasonably acceptable determinations.[51]

On appeal, the Eleventh Circuit ruled that this reasonable difference in opinion among physicians was insufficient to satisfy the falsity element of the FCA; consequently, physicians applying their expert judgment could not be found to have acted fraudulently unless they had engaged in actions that would render their judgment objectively false, such as failure to "review a patient's medical records," or when expert evidence suggests that "no reasonable physician could have

47 *AseraCare*, 938 F.3d at 1301, 1305.

48 *Id.* at 1284–86.

49 *Id.* at 1281–84 ("In the underlying civil suit, the Government alleged that Defendants had certified patients as eligible for Medicare's hospice benefit, and billed Medicare accordingly, on the basis of erroneous clinical judgments that those patients were terminally ill.").

50 *Id.*

51 *Id.* at 1289–90 (describing the divergence in expert testimony).

concluded that a patient was terminally ill."[52] The Eleventh Circuit was primarily concerned that physicians would be obstructed in rendering their professional judgments by the threat that these "judgments [would] be second-guessed after the fact by laymen in a liability proceeding."[53] The trial in the district court exemplified these concerns, as "the jury was to decide which expert it thought to be more persuasive, with the less persuasive opinion being deemed to be false" despite the two physician experts having reasonable disagreements in professional opinion when interpreting the same medical records.[54] By establishing this ruling, the Eleventh Circuit validated the objective falsity standard in the context of expert discretion to avoid this potential problem, but in doing so, blurred the distinction between the falsity and scienter elements of the FCA.[55]

After this, two different circuit courts either rejected or inconsistently applied the ruling in *AseraCare*. In *United States v. Care Alternatives*, relators brought a FCA claim against Care Alternatives, a company that provides hospice care.[56] Relators alleged that Care Alternatives excessively admitted ineligible patients into hospice care and improperly received Medicare and Medicaid reimbursement as a result.[57] During the discovery process, expert witnesses for both parties reached opposing conclusions about whether a reasonable physician could have made the hospice care determinations in question.[58] Care Alternatives moved for

[52] *Id.* at 1297, 1300 ("[O]pinions may trigger liability for fraud when they are not honestly held by their maker, or when the speaker knows of facts that are fundamentally incompatible with his opinion.").

[53] *Id.* at 1295.

[54] *Id.* at 1288–89.

[55] *Id.* at 1290 ("Because '[t]he government [ ] presented no evidence of an objective falsehood for any of the patients at issue,' it could not prove the falsity element of the FCA as a matter of law.") (internal citation omitted).

[56] United States v. Care Alternatives, 952 F.3d 89, 93 (3d Cir. 2020).

[57] *Id.* ("They brought this action under the FCA alleging, among other things, that Care Alternatives admitted ineligible patients and directed its employees to alter Medicare certifications to increase the number of eligible patients.").

[58] *Id.* at 94 (describing diverging expert testimony).

summary judgment based on this inability to establish the falsity element, which the district court granted based on its application of the objective falsity standard in *AseraCare*.[59] On appeal, the Third Circuit reversed, ruling that this concept of objective falsity used in *AseraCare* "improperly conflates the elements of falsity and scienter" and is "inconsistent with the application of the FCA."[60] Accordingly, the court reasoned that the scienter element was sufficient to protect physicians rendering their professional judgment in good faith and rejected the "bright-line rule that a doctor's clinical judgment cannot be 'false.'"[61]

In this ruling, the Third Circuit effectively lowered the threshold required for falsity by allowing legal falsity to be applied to an expert judgment.[62] The decision also shifted the crux of these hospice care claims to the scienter element. The court believed that establishing a bright-line rule protecting expert testimony would allow bad-faith experts to avoid FCA liability for expert determinations that they did not believe or fully stand by.[63] However, the Third Circuit also attempted to reconcile its interpretation of falsity with that of the Eleventh Circuit by stating that the Eleventh Circuit's emphasis on objectivity would be better applied to the element of scienter.[64] Ultimately, the Third Circuit rejected the objective falsity standard and allowed legal falsity to be demonstrated through

59 *Id.* ("Care Alternatives moved for summary judgment arguing that Appellants could not make out the four prima facie elements of a claim under the FCA: falsity, causation, knowledge, and materiality.").

60 *Id.* at 95 ("[W]e decline to adopt the District Court's 'objective' falsity standard, as the test is inconsistent with the statute and contrary to this Court's interpretations of what is required for legal falsity.").

61 *Id.* at 98 ("Contrary to the District Court's reasoning, medical opinions may be 'false' and an expert's testimony challenging a physician's medical opinion can be appropriate evidence for the jury to consider on the question of falsity.").

62 *Id.* (explaining that a clinical judgement could be false).

63 *Id.* (describing ruling in Sixth Circuit that rejected a bright-line rule protecting expert testimony).

64 *Id.* at 100 ("However, we find that objectivity speaks to the element of scienter, not falsity.").

conflicting expert testimony, relying on the scienter element to protect legitimate expert discretion.[65]

Similarly, in *Winter ex rel. United States v. Gardens Regional Hospital*, relators brought a FCA claim against the defendant, alleging that physicians improperly admitted an excessive proportion of patients from a nearby nursing home for inpatient treatment to inflate Medicare reimbursement bills.[66] The physicians in this case were required to determine and document whether the "complex medical factors" in question warranted patients' admissions into inpatient treatment at the hospital.[67] The relator in this action, an experienced nurse whom Gardens Regional had recently hired, claimed that when she raised the issue of improper admission to the responsible physicians, her concerns were ignored or rebuffed by other physicians and hospital administrators.[68] Thus, the relator alleged that these physicians knowingly abused their professional standing to submit false claims to the federal government for reimbursement.

The district court granted Gardens Regional's motion to dismiss based on the objective falsity theory as applied to expert physician judgment, ruling that the physicians' judgment could not be found to be false if these physicians are acting in good faith.[69] However, the Ninth Circuit overruled

[65] *Id.* ("So, regarding FCA falsity, we reject the objective falsehood standard. Instead, we hold that for purposes of FCA falsity, a claim may be 'false' under a theory of legal falsity, where it fails to comply with statutory and regulatory requirements.").

[66] Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1115 (9th Cir. 2020), *cert. denied sub nom.* RollinsNelson LTC Corp. v. United States *ex rel.* Winters, 141 S. Ct. 1380, 209 L. Ed. 2d 124 (2021).

[67] *Id.* at 1114.

[68] *Id.* at 1115–16 (describing the interactions between Winter and the physicians/hospital administrators).

[69] *Id.* at 1116 ("The district court granted the motions, dismissing Winter's three FCA claims against all Defendants for the same reasons: (1) because a determination of 'medical necessity' is a 'subjective medical opinion[ ] that cannot be proven to be objectively false,' and (2) because the alleged false statements, which the district court characterized as the

the lower court's use of the objective falsity standard and also allowed legal falsity to be applied against expert physician judgment, similarly to the holding in *CareAlternatives*.[70] Notably, the Ninth Circuit believed that its ruling was not necessarily contrary to that of the Eleventh Circuit in *AseraCare*. The Ninth Circuit chose to interpret the *AseraCare* ruling narrowly to concern only "whether a reasonable disagreement between physicians, *without more*, was sufficient to prove falsity at summary judgment."[71]

Ultimately, the Supreme Court denied certiorari on this circuit split in February 2021.[72] As a result, the answer to the question of whether conflicting expert testimony can be used to establish the falsity element currently varies across jurisdictions.

C. Ramifications of the Circuit Split

The primary question at issue in this circuit split is whether the government or relator(s) may use their own expert's testimony against the defendants' expert testimony to establish falsity in a FCA proceeding. Circuit courts appear to follow either the Eleventh Circuit's approach of utilizing the objective falsity standard and preventing conflicting expert testimony from establishing the falsity element,[73] or follow the Third and Ninth Circuits' approach of rejecting objective

'failure to meet InterQual criteria,' were not material.") (internal citation omitted).

70 *Id.* at 1113–20 (invoking similar arguments as in *Care Alternatives* about scienter being sufficient to protect physicians exercising their judgment).

71 *Id.* at 1118.

72 Care Alternatives v. United States *ex rel* Druding, 141 S. Ct. 1371, 1371 (2021).

73 *AseraCare*, 938 F.3d at 1290 ("Because '[t]he government [ ] presented no evidence of an objective falsehood for any of the patients at issue,' it could not prove the falsity element of the FCA as a matter of law.") (internal citation omitted).

falsity and allowing conflicting expert testimony to establish falsity.[74]

This circuit split, despite initially appearing to be largely technical, has immense ramifications for the practical application of the FCA. Uniform application of the Eleventh Circuit's objective falsity standard would lead to significant difficulties when relators or the government bring a FCA claim against a professional who was acting in bad faith. The heightened presumption of validity is a potent bulwark that bad faith professionals could potentially use against legitimate FCA claims in the pleading stage.[75] This heightened bar to bring claims could very likely revert the FCA to its historical status as an underused and ineffective statute.

If the Third/Ninth Circuits' approach is uniformly applied, the scienter requirement may ultimately vindicate those defendants who simply relied on their professional's good faith judgments. However, the Ninth Circuit's ruling in *Care Alternatives* has significant ramifications in terms of relators' pleadings and their ability to survive summary judgment. Rejecting objective falsity would allow significantly more potential FCA cases to pass the pleadings stage, opening the door to potential settlements or trials, as scienter is allowed to be alleged generally at the pleadings stage as opposed to the heightened requirements for the other FCA elements.[76] This, in light of the statistic that the vast majority of FCA cases settle before going to trial, can lead to increased

74 *Care Alternatives*, 952 F.3d at 100 ("So, regarding FCA falsity, we reject the objective falsehood standard. Instead, we hold that for purposes of FCA falsity, a claim may be 'false' under a theory of legal falsity, where it fails to comply with statutory and regulatory requirements.").

75 Bell v. Cross, No. 21-11064, 2021 WL 5544685, at *3 (11th Cir. Nov. 26, 2021) (affirming summary judgment based on *AseraCare*); Simon v. HealthSouth of Sarasota Ltd. P'ship, No. 8:12-CV-236-VMC-AEP, 2021 WL 1989918, at *3 (M.D. Fla. Apr. 14, 2021) (denying plaintiff's motion for relief from summary judgment based on *AseraCare*).

76 FED. R. CIV. P. 9(B) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

incentives for frivolous litigation against businesses whose professionals are acting in good faith.[77] Essentially, under the Third/Ninth Circuits' regime, most relators with a claim that relies on contestable expert testimony would likely be able to survive summary judgment and force a settlement against these *qui tam* defendants.[78]

While these rulings might appear to apply narrowly to a health care context, the consideration of expert testimony in determining the falsity element can have significant consequences in numerous other types of industries that receive federal government funding. Businesses that employ a variety of professionals, such as accountants and scientists, and that rely on these professionals' judgments for certifying payment claims to the federal government, would all have to contend with an inconsistent FCA that ambiguously expands their vulnerability to frivolous *qui tam* actions. Every kind of industry is affected, with those that particularly rely on federal funds being especially at risk.[79] This lack of uniformity makes it unclear when private businesses would face

77 Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 264–65 (1999) (explaining that, "because few fraud and abuse cases involving genuine providers are ever tried[,] virtually all are settled"; and that allowance of *qui tam* relators removes practical constraints to litigation and may lead to "coerced, extortionate settlements.").

78 *Id.* at 307 (explaining that settlement is far more attractive as it avoids larger penalties, litigation costs, loss of investor confidence, and most importantly, "criminal culpability").

79 *See* United States *ex rel.* v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047 (9th Cir. 2011) (military technology contracting); United States *ex rel.* Crennen v. Dell Mktg. L.P., 711 F. Supp. 2d 157 (D. Mass. 2010) (computer equipment); United States *ex rel.* Jefferson v. Roche Holding AG, 489 F. Supp. 3d 418 (D. Md. 2020) (government purchases of pharmaceutical products); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) (nuclear power plant management); United States v. Anchor Mortgage Corp., 711 F.3d 745 (7th Cir. 2013) (mortgages); United States v. Majestic Blue Fisheries, LLC, 196 F. Supp. 3d 436 (D. Del. 2016) (fishing licenses); United States *ex rel.* Longhi v. United States, 575 F.3d 458 (5th Cir. 2009) (technology research grants); Cause of Action v. Chicago Transit Auth., 815 F.3d 267 (7th Cir. 2016) (public transportation).

litigation risk, thus forcing these varied businesses to always prepare for the worst case scenario of broad FCA liability.

Ultimately, this circuit split could further dissuade private firms from doing business with the government or cause these firms to significantly increase fees to compensate them for the difficulties and risk of doing so.[80] Private firms are already "concerned that onerous terms and conditions and overwhelming administrative requirements [will be] costly and bear immeasurable risk for the company" simply from the regular government contracting process.[81] The addition of ambiguously expanded FCA liability will exacerbate these concerns on behalf of companies, thus causing these firms to avoid working with the government until the potential reward increases to become proportional to the risk of contracting.[82] Either of these results would negatively impact the federal government's ability to effectively and efficiently render the services for which it is responsible.[83]

A number of private parties are preparing for the potential ramifications of this circuit split outside of the health care context. Major law firms are specifically commenting on the potential applicability of this circuit split to the more general

80 Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into A Modern Weapon*, 65 TENN. L. REV. 455, 456–57 (1998) (describing the FCA as a "modern nightmare" for the health care industry and noting that "[s]ome commentators have observed that the False Claims Act was not crafted with modern business transactions in mind.").

81 Nancy O. Dix, Fernand A. Lavallee & Kimberly C. Welch, *Fear and Loathing of Federal Contracting: Are Commercial Companies 'Really' Afraid to Do Business with the Federal Government? Should They Be?*, 33 PUB. CONTRACT L.J. 5, 9 (2003).

82 *Id.* ("Specifically, companies are concerned that onerous terms and conditions and overwhelming administrative requirements will prove to be costly and bear immeasurable risk for the company.").

83 *See* Melissa E. Najjar, *When Medical Opinions, Judgments, and Conclusions Are "False" Under the False Claims Act: Criminal and Civil Liability of Physicians Who Are Second-Guessed by the Government*, 53 SUFFOLK U. L. REV. 137, 156 (2020) ("As a result of the risk of such harsh penalties, physicians may be reluctant to provide services for the already-underserved populations covered by Medicare and Medicaid, or may stop participating in Medicare and Medicaid plans altogether.").

field of government contracting.[84] An even clearer indication of this magnified risk to private businesses that receive payment from the federal government is the Chamber of Commerce's strongly worded amicus brief to the Supreme Court requesting a resolution to this circuit split.[85] The Chamber of Commerce argued that, without uniform adherence by the courts to the objective falsity theory, the FCA may be warped into a tool for overzealous relators to extract settlements from *qui tam* defendants through meritless lawsuits, thus converting "the Act from a fraud prevention statute into something else entirely."[86] Additionally, the Chamber of Commerce argued that rejecting the objective falsity theory would transform the factual uncertainty inherent in the scientific and other technical processes into an evaluation of moral judgment.[87] The Chamber of Commerce warned that the various types of threats from a successful FCA action (or even a pending suit) would essentially force private firms to give in to relators' demands, lest they suffer severe reputational damage, effective blacklisting from government contracting, and the

84 *See* Clifford Chance LLP, *US Supreme Court Asked to Resolve Circuit Split over the Scope of the False Claims Act*, CLIFFORD CHANCE (Nov. 2020), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/11/US-supreme-court-asked-to-resolve-circuit-split-over-the-scope-of-the-false-claims-act.pdf [https://perma.cc/K38S-ARCN] (summarizing circuit split and briefly describing potential consequences); Gibson, Dunn & Crutcher LLP, *False Claims Act Circuit Splits Proliferate as Supreme Court Declines to Resolve Split Concerning Key Element of FCA Claims*, GIBSON DUNN (Mar. 9, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/03/false-claims-act-circuit-splits-proliferate-as-supreme-court-declines-to-resolve-split-concerning-key-element-of-fca-claims.pdf [https://perma.cc/MK55-UF4B] (explaining potential ramifications of the circuit split on other businesses).

85 *See* Brief of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America (PhRMA) As Amici Curiae In Support of Petitioner at 3, Care Alternatives v. United States *ex rel* Druding, 141 S. Ct. 1371 (No. 20-371).

86 *Id.* at 2, 11, 20 ("[R]elators are keenly aware that mere allegations, regardless of their merit, can 'be used to extract settlements.'") (internal citations omitted).

87 *Id.* at 13.

punitive wrath of the FCA's treble damages provision.[88] These claims have significant merit, as the sheer use of FCA *qui tam* actions has ballooned in the past several years, coinciding with recent 2009 changes that have made it easier for relators to bring a FCA claim: the total settlements and judgments from *qui tam* actions increased from just under $2 billion in 2009 to nearly $4.5 billion in 2014, with the number oscillating between $2 and $3 billion from 2015 onwards.[89] In addition, the bulk of this increase in settlements and judgments from *qui tam* actions was from outside the Department of Defense and Department of Health and Human Services, indicating that much of the post-2009 increase in claims resulted from outside the health care and defense industries.[90]

In the contemporary context, this circuit split is especially problematic in regard to COVID-19 financial relief programs because of the certifications that businesses made in order to receive Paycheck Protection Program ("PPP") loans from the federal government, particularly in consideration of the sheer speed at which these funds were distributed.[91] While the PPP

88 *Id.* at 3–4 ("The False Claims Act is a *fraud* prevention statute. Yet, the decision below imposes the prospect of False Claims Act liability, with the risk of crippling treble damages, penalties, and grave reputational harm, on every government contractor, grantee, and program participant whenever a self-interested private relator (supported by a paid expert) steps forward to second-guess a subjective judgment or offer a different interpretation of any one of countless byzantine regulations or contract provisions.").

89 David Baker, *A Whole New World of False-Claims-Act Liability: The 2009 Amendments and Learning Where to Draw the Line*, 61 CATH. U. L. REV. 201, 216–17 (2011); *Fraud Statistics - Overview*, U.S. DEP'T OF JUST. (last visited Jan. 27, 2022), https://www.justice.gov/opa/press-release/file/1354316/download [https://perma.cc/3L5Z-RUYR], Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617 (May 20, 2009).

90 *Fraud Statistics - Overview*, U.S. DEP'T OF JUST. (last visited Jan. 27, 2022), https://www.justice.gov/opa/press-release/file/1354316/download [https://perma.cc/3L5Z-RUYR].

91 *See* Sacha Pfeiffer & Austin Fast, *How the Paycheck Protection Program Went From Good Intentions to a Huge Free-For-All*, NPR (Jan. 9, 2023), https://www.npr.org/2023/01/09/1145040599/ppp-loan-forgiveness

system may be rife with instances of intentional fraud,[92] of greater concern are the cases of legitimate PPP disbursements that did not completely comply with every requirement of the novel, and consequently unreliable, PPP legislation.[93] As the program was "drafted, passed, and implemented in a matter of weeks" and "little information or guidance regarding compliance with the program was available," the professional judgment of whether specific businesses were able to qualify for the program will undoubtedly generate potential FCA liability and corresponding *qui tam* actions.[94] As this swiftly-drafted act applied to effectively every kind of business suffering economic harm from the pandemic, private firms in nearly every industry, including even those that did not

[https://perma.cc/JG2K-6H8F] ("In the frenzied early days of COVID, as PPP was created in great haste to keep businesses from potentially collapsing, the loans were simple to get: Companies simply had to pledge that the economic threat of the pandemic made the funding necessary.").

92 *See* OFF. OF PUB. AFFS., *Florida Man who Used COVID-Relief Funds to Purchase Lamborghini Sports Car Charged in Miami Federal Court*, U.S. DEP'T OF JUST. (July 27, 2020), https://www.justice.gov/opa/pr/florida-man-who-used-covid-relief-funds-purchase-lamborghini-sports-car-charged-miami-federal [https://perma.cc/C83A-5PUQ]; OFF. OF PUB. AFFS., *Nine Charged with $24 Million COVID-Relief Fraud Scheme*, U.S. DEP'T OF JUST. (Aug. 6, 2020), https://www.justice.gov/opa/pr/nine-charged-24-million-covid-relief-fraud-scheme [https://perma.cc/9K8M-F96A].

93 *See* Austin & Fast, *supra* note 91 ("As the program evolved, its rules became increasingly complicated, and even experts struggled to make sense of them. At one point, the SBA published a list of frequently asked questions on loan forgiveness that was 11 pages long. One consulting firm issued a client advisory with the headline 'Fast and furious: The rules for the PPP . . . continue to emerge at a brisk pace, often updating previous guidance.'").

94 Jason W. McElroy & Lindsay L. Buchanan, *False Claims Act Considerations for the Covid-19 Era*, 39 BANKING & FIN. SERVS. POL'Y REP. 1, at 1, 6 (2020) ("[T]hese certifications encompass nuanced determinations of financial wherewithal at a specific point in time, or they incorporate all statements and documents associated with the application."); *see* 15 U.S.C. § 636(36)(G)(i) (eligible recipients were required to make a "good faith" certification that (1) the Paycheck Protection Program loan was necessary under current economic conditions, (2) funds will be used for payroll and upkeep, (3) multiple loans were not requested under same act, and (4) funds were not already received).

traditionally do business with the government, could find themselves subject to FCA liability.

IV. PROPOSED SOLUTION

A. Considerations

The current circuit split can be summarized into two general approaches: the Eleventh Circuit's objective falsity approach raises the bar to proving falsity, because conflicting expert testimony is insufficient to establish falsity under this approach, while the Third and Ninth Circuits favor a lowered falsity bar that places more emphasis on the scienter requirement to protect experts practicing their professional judgment. The Eleventh Circuit's approach effectively makes the scienter requirement redundant, as its interpretation of the falsity element coopts part of the scienter element's functions. Accordingly, the Eleventh Circuit is far more protective of expert testimony and bolsters the falsity element to reflect this. In contrast, the Third and Ninth Circuits have chosen to weaken protections for expert testimony based on what they understand to be Congress's intent, instead relying on the scienter element to ultimately exonerate good faith defendants.

Any modification to the FCA, whether through judicial rulings or legislative action, should take into consideration the primary objective of the FCA, which is to deter fraud and minimize financial loss to the federal government as a result of its engagements with private businesses. Congress did not intend for the FCA to serve as a criminal statute or a contract dispute mechanism for the federal government.[95] Historically,

[95] *See* Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005) ("The history of the False Claims Act's *qui tam* provisions demonstrates repeated attempts by Congress to balance two competing policies. . . . On the one hand, the *qui tam* provisions seek to encourage 'whistleblowers to act as private attorneys-general' in bringing suits for the common good. . . . On the other, the provisions seek to discourage opportunistic plaintiffs from bringing parasitic lawsuits whereby would-be

Congress has oscillated between excessively empowering *qui tam* actions, and consequently the self-interested relators who enforce the FCA, and tamping down rampant abuse of the *qui tam* provisions by these same relators.[96] This history reflects the difficulty in balancing between the need to deter fraud in government contracting and the ability for private businesses to efficiently contract with the federal government. The government should provide enough financial incentives to make it desirable for private businesses to contract with it for goods and services, thus generating the competition that would theoretically deliver superior purchases, while having a fraud enforcement mechanism outside of the traditional criminal remedies that require a higher standard of proof.[97]

The problem with this particular circuit split, aside from the inherent uncertainty of an unresolved circuit split issue, is that the current choice between fully adopting or wholly rejecting the objective falsity standard results in the polar extremes that have defined most of the FCA's history. Full adoption blurs the distinction between the falsity and scienter elements, while full rejection could lead to a considerable increase in frivolous and meritless *qui tam* litigation. Thus, a nuanced approach, which would ideally involve legislative action, is necessary to balance the FCA to be in line with its original goals.

Specifically, in the context of this circuit split, serving these goals might require assuring private businesses that good-faith professional judgments will not be vulnerable to frivolous FCA claims. This would mean consciously circumscribing the FCA's reach to cases of clear, intentional fraud only. Indeed, a large body of case law supports the

relators merely feed off a previous disclosure of fraud.") (internal citations omitted).

96 Meador & Warren, *supra* note 80, at 458–61.

97 Claire M. Sylvia, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT §4:34 (Thomson West, 3d ed. 2022) (explaining that there is a "perceived need to limit the reach of the False Claims Act so that it does not capture minor violations of laws or fail to provide adequate notice to government contractors of their potential liability.").

conclusion that opinions,[98] reasonable attempts to abide by ambiguous statutes,[99] and simple, honest mistakes[100] are not actionable under the FCA; in contrast, professional judgments do not have the same degree of clarity, as evidenced by this circuit split. At the same time, the FCA must be broad enough to sufficiently tackle the fraud that does take place, in keeping with Congress' intention to "reach all types of fraud, without qualification, that might result in financial loss to the government."[101]

This section will consider three potential remedies to the current circuit split, listed in accordance with their ability to balance these aforementioned interests and adherence to the broader ethos and themes of the FCA over time.

B. Objective Falsity Standard—A Last Resort

Courts should uniformly adopt the objective falsity standard across circuits as a last resort, in the event that legislative change through Congressional action is infeasible. This is because the current rendition of the FCA, especially after the 1986 and 2009 legislative changes, has excessively lowered the barriers for relators to bring a *qui tam* action.[102]

98 Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999) ("Expressions of opinion are not actionable as fraud.").

99 United States *ex rel.* Sheldon v. Forest Lab'ys, LLC, 499 F. Supp. 3d 184, 207 (D. Md. 2020) (the FCA does not reach "those claims based on reasonable but erroneous interpretations of a defendant's legal obligations"); Pack v. Hickey, 776 F. App'x 549, 557 (10th Cir. 2019) ("possible ambiguity in the applicable rules and policies" suggested that "false billing was not done knowingly," which precluded FCA liability).

100 United States *ex rel.* Complin v. N. Carolina Baptist Hosp., 818 F. App'x 179, 184 (4th Cir. 2020) ("[The] FCA does not punish 'honest mistakes or incorrect claims submitted through negligence.'") (internal citation omitted); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[E]rrors based simply on faulty calculations or flawed reasoning are not false under the FCA."); United States *ex rel.* Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 109 (3d Cir. 2007).

101 United States v. Neifert-White Co, 390 U.S. 228, 232 (1968) (footnote omitted).

102 U.S. *ex rel* Stinson v. Prudential Ins., 944 F.2d 1149, 1154 (3d. Cir. 1991) (describing the revitalized *qui tam* provisions in the 1986 act).

This has led to the rapid ballooning of FCA claims, both those with merit and without.[103] This has created an unfortunate situation where, as one plaintiff put it, "there is a virtual cottage industry of False Claims Act claims brought by both relators and the government pursuing suits based on reasonableness certifications."[104] Courts should, at the very least, standardize their approach by fully adopting one of the extremes presented by the current circuit split for the sake of bringing consistency to application of the FCA. Uniform adoption of the objective falsity standard with respect to expert discretion will stem some of these concerns, although it is a partial solution to a greater problem of legislative misbalancing.

C. Restoring Pre-1986 Burdens of Proof—A Second-Best Approach

Another potential solution to consider is returning to the pre-1986 burdens of proof for the FCA. Prior to the 1986 amendments to the FCA that loosened many of the practical restrictions of bringing a *qui tam* action, the ambiguous statutory language of the original act and the later 1943 amendments gave courts the opening to interpret the evidentiary standards for the FCA, specifically by evidentiary standards of common law fraud.[105] This resulted in a

[103] Brief of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America (PhRMA) As Amici Curiae In Support of Petitioner at 19, Care Alternatives v. United States *ex rel* Druding, 141 S. Ct. 1371 (No. 20-371) ("Wholly apart from the prospect of an eventual judgment, simply defending a False Claims Act case requires a 'tremendous expenditure of time and energy.' . . . For example, '[p]harmaceutical, medical devices, and health care companies' alone 'spend billions each year' dealing with False Claims Act investigations.") (internal citations omitted).

[104] *Id.* at 14.

[105] Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943), U.S. *ex rel*. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Acc. Ins. Co., 721 F. Supp. 1247, 1252 (S.D. Fla. 1989) ("The amendments sought to loosen restrictive judicial interpretation of the Act's liability standard and the burden of proof by defining previously undefined terms, by expanding the *qui tam* jurisdictional provisions, and by increasing civil penalties.").

generally higher burden of proof for each of the FCA elements than the traditional preponderance of the evidence standard for most civil cases,[106] specifically through the heightened scienter requirement of having a "specific intent to defraud."[107]

There is a strong argument for returning to the former heightened standard, which was previously described as "the functional equivalent of a criminal standard," through legislative action,[108] given the explosion of FCA claims that has followed the 1986 and succeeding amendments.[109] Some critics argue that the current FCA regime has created an untenable business environment where dealing with FCA claims, meritless or not, is an unavoidable part of doing business with the federal government.[110] These proponents claim that the relators' relatively ease in surviving summary judgment under the current FCA regime forces businesses to either expend considerable resources in defending these claims, meritorious or not, or simply settle in order to avoid the expense of litigation and prevent additional complications.[111] This history, in juxtaposition to the current state of the FCA, warrants revisiting previous FCA regimes as potential solutions for the current circuit split.

However, this solution would not be ideal as it does not fully balance the competing themes and interests of the FCA as delicately as the next, more optimal solution does. In

106 United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962) (the government had to establish FCA claim with "clear, unequivocal and convincing evidence").

107 *See id.*; Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 HAMLINE L. REV. 373, 380 (2002); *see also* 31 U.S.C. § 3729(b)(1)(B) (the current version of the FCA requires "no proof of specific intent to defraud").

108 *Id.*, S. REP. 99-345 ("The burden of proof in civil false claims cases has also evolved through caselaw into an ambiguous standard.").

109 Baker, *supra* note 89, at 227.

110 Brief of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America (PhRMA) As Amici Curiae In Support of Petitioner at 4, Care Alternatives v. United States *ex rel* Druding, 141 S. Ct. 1371 (No. 20-371).

111 *Id.* at 19–20.

enacting the 1986 FCA amendments, Congress responded to demands for a less restrictive FCA regime in order to combat the excessive proliferation of fraud that had resulted from the FCA's disuse between 1943 and 1986.[112] These pre-1986 FCA burden-of-proof interpretations had effectively turned the FCA into a quasi-criminal statute, given the raised evidentiary bar and punitive damages, and had made it difficult to incentivize relators to bring forth their own claims.[113] Returning to this previous burden of proof would be preferable to the proliferation of litigation and uncertainty under the current circuit split, but such a heavy-handed change would cause the FCA to be doomed to repeat the mistakes of the past.

D. Raising Scienter Particularity—An Optimal Approach

An ideal solution would be to incorporate the desirable elements of wholly accepting and rejecting the objective falsity standard; specifically, this would be the maintenance of falsity and scienter as separate elements and a sufficient procedural bar to preclude frivolous *qui tam* actions that exploit the lowered Rule 9(b) pleading requirement for scienter. Such a solution would facilitate sufficient allowance in the pleading standard to actually allow relators to bring forth viable claims against bad-faith experts, while also having the simultaneous effect of raising the procedural bar against frivolous FCA claims designed to extract settlements.

One way that this optimal balancing could be achieved would be through rejecting the objective falsity standard, while altering the application of Rule 9(b) to heighten the

112 *See* Provident Life, 721 F. Supp. at 1252 ("The amendments sought to loosen restrictive judicial interpretation of the Act's liability standard and the burden of proof by defining previously undefined terms, by expanding the *qui tam* jurisdictional provisions, and by increasing civil penalties."); S. REP. NO. 99-345 at 3 (1989); PL 99–562 (S 1562).

113 S. REP. NO. 99-345 at 7 (1989) ("Some courts have required that the United States prove a violation by clear and convincing, or even clear, unequivocal and convincing evidence . . . which the Justice Department has testified is the 'functional equivalent of a criminal standard.'").

particularity requirement for scienter when expert discretion is involved. There is some precedent for this in a case called *U.S. ex rel. Atkinson v. Pennsylvania Shipping Co.* In this case, a relator brought a *qui tam* action claiming that defendants "conspired to defraud, and did defraud, the Navy by getting false claims and reverse false claims paid or allowed in connection with [a] Navy shipbuilding contract."[114] In *Pennsylvania Shipping Co.*, the court situationally extended the Rule 9(b) particularity requirement to the scienter element, reasoning that "[i]f the falsity of a statement that was made to get a fraudulent claim turns on what a defendant intended, that intent . . . must be pleaded with sufficient particularity to satisfy the requirements of the first sentence of Rule 9(b)"; to rule otherwise would have allowed relators to "survive a motion to dismiss a claim of an FCA violation with nothing more than general allegations of intent."[115]

There are considerable advantages to this approach. Creating a uniform extension of this particularity requirement in Rule 9(b) to the scienter element when expert discretion is involved would allow for both of the aforementioned problems to be solved. Scienter would be preserved as an independent FCA element, and frivolous FCA claims that rely on contested expert discretion would be filtered out at the pleadings stage. This regime would effectively create a "safe harbor" for the exercise of professional discretion, at least for the purposes of the pleadings stage; there would be a strong inference in favor of the validity of expert opinion that must be overcome in order for a plaintiff's claim to survive a motion to dismiss. Through application of this solution, legitimate FCA claims that involve experts exercising their discretion in bad faith will still be allowed to advance, while private businesses will not

114 United States *ex rel.* Atkinson v. Pennsylvania Shipbuilding Co., No. CIV. A. 94-7316, 2000 WL 1207162, at *1 (E.D. Pa. Aug. 24, 2000).

115 *Id.* at *9 ("The requirement that the circumstances constituting the fraud be pleaded with particularity remains in effect even if one of the circumstances that must be pleaded with particularity—e.g., falsity—turns on a defendant's specific intent.").

have to overextend themselves by litigating every meritless FCA claim that concerns expert discretion. In effect, both goals of the FCA would be furthered through this change.

As this change would essentially require a change to Rule 9(b), legislative action is likely necessary to carry out the implementation of this regime. Along with *Pennsylvania Shipping Co.*, there is strong precedent for such a legislative action. Raising the evidentiary bar is in line with Congress's intent in passing the FCA and current caselaw. As previously mentioned, Congress passed the FCA to stop blatant fraud, not to punish honest mistakes, reasonable interpretations, and expressions of opinion.[116] This change would allow for greater differentiation between substantive FCA claims that are worth pursuing and frivolous *qui tam* actions that should be disincentivized. In addition, raising the Rule 9(b) bar is in line with decisions from several jurisdictions regarding pleading scienter in FCA cases. While there are numerous decisions in which courts have allowed for a very general pleading standard in line with the statutory language of Rule 9(b),[117] other courts have recognized the practical necessity of raising the evidentiary standard for scienter on their own to avoid the aforementioned frivolous FCA claim problem.[118]

116 *See* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999); United States *ex rel.* Sheldon v. Forest Lab'ys, LLC, 499 F. Supp. 3d 184, 187 (D. Md. 2020); Pack v. Hickey, 776 F. App'x 549, 557 (10th Cir. 2019); United States *ex rel.* Complin v. N. Carolina Baptist Hosp., 818 F. App'x 179, 184 (4th Cir. 2020); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999); United States *ex rel.* Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 109 (3d Cir. 2007).

117 *See* United States v. Assocs. in Eye Care, P.S.C., No. CIV. 13-27-GFVT, 2014 WL 414231, at 6* (E.D. Ky. Feb. 4, 2014). ("With regard to intent, the Defendants' state of mind may be pled generally rather than with particularity under Rule 9(b)."); United States *ex rel.* Notorfransesco v. Surgical Monitoring Assoc., No. CIV.A. 09-1703, 2014 WL 4375654, at *14–15 (E.D. Pa. Sept. 3, 2014). ("Rule 9(b), however, explicitly allows general allegations as to a person's knowledge."); United States *ex rel.* McLain v. Fluor Enterprises, Inc., No. CIV.A. 06-11229, 2013 WL 4721365, at *3 (E.D. La. Sept. 3, 2013). ("When pleading fraud, 'knowledge, and other conditions of a person's mind maybe alleged generally.'").

118 *See* United States v. Comstor Corp., 308 F. Supp. 3d 56, 89 (D.D.C. 2018) ("As noted, scienter may be 'averred generally' but that does not

Ultimately, there is strong existing support for this potential solution, even if it is not currently uniformly present in judicial precedent.

There are still concerns and drawbacks to this solution. First, there may be concerns that this regime would not allow for sufficient protection of expert judgment past the pleadings stage; there still remains the Eleventh Circuit's concern in *AseraCare* that "laymen" should not be the deciding force between two conflicting expert testimonies.[119] This need to protect professionals' ability to safely render honest judgments, particularly in the medical context, could potentially warrant a thorough belt-and-suspenders approach of a bright-line rule protecting expert discretion to fully alleviate the fear of wasteful litigation. Assuming falsity is proven in a case with expert testimony, this need is made more apparent by the consideration that juries would then be tasked with determining if there was requisite scienter, an endeavor that is far more open to subjective interpretation. It is also important to note that, given that the FCA is a civil action, the propensity of evidence standard would apply, thus lowering the bar for the jury to find scienter relative to the effectively punitive nature of the FCA.[120] All of these factors lead to a strong argument for the adoption of a general bright-line rule protecting exercises of expert discretion.

obviate pleading the underlying facts with particularity."); United States v. Americus Mortg. Corp., No. 4:12-CV-02676, 2013 WL 4 829271, at *8 (S.D. Tex. Sept. 10, 2013) ("Even though scienter may be plead generally, the Government must still allege facts supporting an 'inference of fraud.'") (internal citation omitted); United States *ex rel.* Kirk v. Schindler Elevator Corp., 926 F. Supp. 2d 510, at 522 (S.D.N.Y. 2013) ("Rule 9(b) requires allegations of 'facts giving rise to a strong inference of fraudulent intent.'") (internal citation omitted).

119 United States v. AseraCare, Inc., 938 F.3d 1278, 1295 (11th Cir. 2019).

120 *See* 31 U.S.C. 3730(b); John Terrence A. Rosenthal & Robert T. Alter, *Clear and Convincing to Whom? The False Claims Act and Its Burden of Proof Standard: Why the Government Needs A Big Stick*, 75 NOTRE DAME L. REV. 1409, 1411 (2000). ("Given the Act's 'preponderance of the evidence' burden of proof standard, critics insist that 'it is too easy for the Government to prevail in marginal cases' and that the 'risk of loss weighs far more heavily on defendants than plaintiffs.'") (internal citation omitted).

However, Congress should resist the urge to establish a bright-line rule. First, the scienter element should theoretically be sufficient to protect experts acting in good faith; the heightened evidentiary standard would screen out meritless claims and juries should generally be able to differentiate between experts who commit FCA-liable acts, such as unambiguous fraud, and those whose acts are not considered liable, like reasonable exercises of discretion, interpretation, or rendering opinions. In addition, the imposition of such a bright-line rule would realize the Third and Ninth Circuits' primary concerns of bad faith experts being able to shield themselves from FCA liability by virtue of their professional accreditation.[121] A bright-line rule would swing the FCA to the polar extreme of insulating fraudulent actors from liability and thus incentivizing more fraud to occur, again flying in the face of the goals of the FCA.

Second, it might be quite difficult to pass such legislation. Historically, Congress has only amended the FCA in response to considerable public outrage or egregious abuse of the *qui tam* provisions. As previously mentioned, the 1943 legislative amendments to the FCA were the result of relators abusing loose *qui tam* provisions by submitting *qui tam* actions that were identical to the government's claims.[122] In addition, the 1986 amendments required extremely egregious cases of publicized fraud in order to motivate Congress to act.[123] Finally, the recent 2009 amendments that facilitated greater numbers of *qui tam* suits were themselves a reaction to concerns of potential fraud from the 2009 financial crisis.[124] This legislative history indicates that any major legislative change to the FCA will have to be precipitated by significant political pressure, such as through egregious abuse of the *qui tam* provision or publicized accounts of excessive fraud in

121 United States v. Care Alternatives, 952 F.3d 89, 98 (3d Cir. 2020)

122 Beck, s*upra* note 8, at 556.

123 Beck, *supra* note 8, at 561 ("This was the era of the $435 hammer, the $640 toilet seat cover, and the $7622 coffee maker.").

124 S. REP. NO. 111-10, at 2 (2009) ("With the new tools and resources in this bill, it will be easier to ensure that all of those responsible for these financial crimes are held accountable.").

government contracting. It is unlikely that such legislative change can occur without the necessary political momentum.

V. CONCLUSION

The FCA is an invaluable tool in the government's arsenal to combat the inevitable fraud that arises from the federal government's extensive business engagements with private firms. However, throughout the FCA's history, the Act has struggled to balance incentivizing the relators that are key to the FCA's enforcement and protecting the businesses with whom the government contracts. The current circuit split, particularly at the pleadings stage, has pushed the FCA far too much toward the former by enabling expert discretion to establish the falsity element, as evidenced by the significant increase in FCA claim payouts.[125] This imbalance has the effect of hindering the government's ability to efficiently contract with private sector businesses and, consequently, lowering the quality of services that the federal government is able to render to the public.

A resolution to this particular circuit split is required to bring the act back into equilibrium with the FCA's historical and statutory intentions. While there are several possible solutions, the combination of rejecting the objective falsity standard and raising the scienter particularity requirement in the pleading stage will allow for the FCA to return to the middle ground between these two competing interests. Congress should take prompt legislative action in order to rectify this imbalance, lest this circuit split further compound the difficulties and risks associated with government contracting by private businesses.

[125] Baker, *supra* note 89, at 216–17.