

REASONABLE, BUT WRONG: RECKLESS DISREGARD AND DELIBERATE IGNORANCE IN THE FALSE CLAIMS ACT AFTER *HIXSON*

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Defendants may be liable under the False Claims Act (FCA) if they acted with “reckless disregard.” But can defendants be reckless if the laws they break are unclear? The Eighth Circuit says no: A defendant cannot be reckless if there is any “inherent ambiguity” in the relevant law. Its reasoning suggests that textual ambiguity alone is enough to foreclose liability completely. This Note argues to the contrary: if all other elements of the FCA are satisfied, defendants may be held liable even if the law is unclear. The clarity of the law is only one factor that may help determine whether the defendant acted recklessly. The question is not simply whether the law is ambiguous, but whether the defendant’s interpretation of it is “reasonable.” Given the purpose and history of the FCA, what is “reasonable” involves more than just the text of the law: It also includes the totality of the circumstances that may warn the defendant that it is breaking the law. Otherwise, defendants could exploit whatever ambiguity they could find even if they intended to defraud the government, a result the Eighth Circuit’s decisions may support. But this would undermine the clear purpose of the FCA, obliterate decades of precedent on the meaning of “reckless disregard,” and effectively write out “deliberate ignorance” and “actual knowledge” from the text of the FCA.

INTRODUCTION

*“[T]here is no kind of dishonesty into which otherwise good people more easily and frequently fall, than that of defrauding [the] government”*¹

The False Claims Act (FCA) is the “government’s primary litigation tool for recovering losses sustained as the result of fraud” on the federal government.² It principally functions as a procedural tool for enforcing substantive laws, such as Medicare regulations or government procure-

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1. Benjamin Franklin, “F.B.”: On Smuggling, The Papers of Benjamin Franklin, <http://franklinpapers.org/franklin/framedVolumes.jsp?vol=14&page=315a> (on file with the Columbia Law Review) (last visited Feb. 15, 2017).

2. *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008) (paraphrasing *Avco Corp. v. U.S. Dep’t of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989)).

ment contracts.³ Since 1986, Congress has consistently expanded and strengthened the Act,⁴ and in recent decades, the FCA has been an effective⁵ but controversial law.⁶ Courts, however, have often found ways of narrowing its scope and effectiveness.⁷ Their concern has been that liability may be “almost boundless” due to the FCA’s high damages and expansive coverage.⁸

3. See *infra* section I.B (describing the elements of FCA liability and the role of substantive law); *infra* notes 47–49 and accompanying text (outlining typical FCA cases).

4. See, e.g., Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 2:12 (2016) (“Congress amended the FCA in 2009 . . . to address [a number of restrictive] court interpretations of the statute and to clarify Congress’s intent in enacting the 1986 Amendments.”); Jerald D. Stubbs, *The 2009 Amendment Expands the Types of Fraud Subject to the Federal False Claims Act*, Fla. B.J., Feb. 2013, at 17, 17 (noting the 2009 Amendment’s effect of expanding the scope of FCA liability and correcting erroneous judicial interpretations that had narrowed its scope); *infra* notes 33–34 and accompanying text (noting motivations behind the 1986 amendments and their success in stimulating FCA recoveries). The one nominal exception to this expansion might be the 1988 amendments, which had the very narrow purpose of “limit[ing] the ability of a culpable relator to benefit under the *qui tam* provisions.” Sylvia, *supra*, § 2:10.

5. See Jack A. Meyer, *Health Mgmt. Assocs., Fighting Medicare & Medicaid Fraud: The Return on Investment from False Claims Act Partnerships I* (2013), <http://www.taf.org/TAF-ROI-report-October-2013.pdf> [<http://perma.cc/XR7M-ZAMV>] (detailing the cost-effectiveness of the FCA).

6. See, e.g., Peter B. Hutt II et al., *U.S. Chamber Inst. for Legal Reform, Fixing the False Claims Act: The Case for Compliance-Focused Reforms 1–2* (2013), http://www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf [<http://perma.cc/F4DH-Y88J>] (detailing criticisms of the FCA, particularly its failure to prevent the bulk of fraud against the government).

7. See, e.g., *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671–72 (2008) (limiting FCA liability to false claims made for the express purpose of getting the government to pay claims, rather than for any party benefiting from government funding or standing in the shoes of the government); *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 268 (2d Cir. 2006) (holding that the government’s complaint did not relate back to a relator’s original *qui tam* complaint, thus causing the statute of limitations to run adversely against the government); *Mikes v. Strauss*, 274 F.3d 687, 697 (2d Cir. 2001) (limiting the scope of FCA cases premised on certification); *United States v. Q Int’l Courier, Inc.*, 131 F.3d 770, 773–74 (8th Cir. 1997) (limiting what counts as an obligation for purposes of reverse false claims cases); see also James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* 79 (6th ed. Supp. 2014) (“[C]ourts . . . act[ing] contrary to legislative intent chipped away at the robust 1986 Amendments to the Act.”).

8. *Allison Engine*, 553 U.S. at 669; see also *Mikes*, 274 F.3d at 699 (expressing concern about the FCA being used as a “blunt instrument” for enforcing vast and complicated regulations); Robert Salcido, *The 2009 False Claims Act Amendments: Congress’ Efforts to Both Expand and Narrow the Scope of the False Claims Act*, 39 *Pub. Cont. L.J.* 741, 744 (2010) (discussing courts’ fears that the FCA could become “some super enforcement tool” to impose treble damages); William Y. Culbertson, *Whistleblowers and Prosecutors: Achieving the Best Interests of the Public*, 17 *Bus. L. Today*, May–June 2008, at 30, 33 (“[M]ost federal courts have favored restraint in interpreting the *qui tam* provision”); *infra* note 70 (citing cases narrowly construing FCA liability due to concerns about its penal nature). These courts may be justified in their concern about the *amount of damages* that may follow from FCA liability, but this is a question of damages rather than liability.

This Note considers one emerging question as to the Act's scope: whether liability should be foreclosed if the law is ambiguous. That is, can defendants be guilty if the laws they break are unclear? Specifically, this Note considers an emerging circuit split created by the Eighth Circuit in *United States ex rel. Hixson v. Health Management Systems, Inc.*⁹ Before *Hixson*, courts applied a fact-sensitive analysis, considering the totality of circumstances¹⁰ to determine whether a defendant had the requisite state of mind (scienter) to support FCA liability.¹¹ But in *Hixson*, the Eighth Circuit held that to establish scienter, the government¹² "must show that there is no reasonable interpretation of the law that would make the allegedly false statement true."¹³ In other words, under *Hixson*, FCA liability cannot be established any time a defendant can point to a reasonable interpretation of the law supporting its position.¹⁴ Thus,

9. 613 F.3d 1186 (8th Cir. 2010); see also *United States ex rel. Chilcott v. KBR, Inc.*, No. 4:09-cv-4018, 2013 WL 6797391, at *2 (C.D. Ill. Dec. 23, 2013) (noting *Hixson* has created a contestable legal issue by conflicting directly with precedent in other circuits).

10. See *infra* notes 102–112 and accompanying text (detailing the standard and factors relied upon to determine reckless disregard). Although courts have not used the term "totality of the circumstances" to describe the standard applied, courts have typically considered whatever facts may bear on the defendant's intent. See, e.g., *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 531 (6th Cir. 2012) (deriving the relevant factors for determining intent from factual circumstances). Moreover, courts have treated the standard like any other negligence-type standard, see, e.g., *United States v. Krizek*, 111 F.3d 934, 941–42 (D.C. Cir. 1997) (defining reckless disregard as a form of "gross negligence"), which requires "fact-driven" inquiries that "depend[] upon the circumstances." Kenneth S. Abraham, *The Forms and Functions of Tort Law* 52 (4th ed. 2012) (describing the negligence standard).

11. See, e.g., *United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983–84 (D.C. Cir. 2008) (employing a totality of the circumstances standard to find the plaintiff could not prove the defendant knowingly submitted false claims to the government).

12. The court actually described the burden as on the "relator" to prove liability. *Hixson*, 613 F.3d at 1191. Relators are private parties who may bring FCA actions on behalf of, and often with the assistance of, the government. See *infra* notes 44–45 and accompanying text. For simplicity, "government" is used interchangeably with "relator" in this Note, given that there is no significant difference between establishing liability in an FCA case involving a relator and one involving the government. See David Farber, Note, *Agency Costs and the False Claims Act*, 83 *Fordham L. Rev.* 219, 221–24 (2014) (explaining the "avenues" of FCA cases and noting the difference between *qui tam* actions, which involve a private party, and direct enforcement actions, which involve only the government).

13. *Hixson*, 613 F.3d at 1191. A question that remains after *Hixson* is what factors determine whether a defendant's interpretation of the law is reasonable. See *infra* section II.C (considering the factors a court uses to evaluate reasonableness). What is clear, however, is that the defendant's subjective intent, as well as what steps the defendant took to determine whether its interpretation was correct, is irrelevant. See *infra* section II.C. Arguably, *Hixson* precludes examining evidence of anything other than the text of the substantive law for the purpose of undermining a defendant's interpretation. See *infra* section II.C.

14. See *infra* section II.C (discussing the meaning and scope of a "reasonable" interpretation).

rather than considering all factors, including whether the defendant *intended* to defraud the government,¹⁵ *Hixson* asks only whether the law could be plausibly interpreted to justify the defendant's violation of it.¹⁶ A defendant could have both the actus reus (falsity)¹⁷ and the mens rea (knowledge¹⁸ or specific intent) of an FCA violation but still avoid liability. As a consequence, *Hixson* may grant defendants a right to exploit all advantageous ambiguity in the law without risking FCA liability.¹⁹

The key question after *Hixson* is what factors should determine whether a defendant's interpretation of the law is reasonable.²⁰ The Eighth Circuit's opinion clearly excludes subjective intent from the analysis: Intent to defraud or the belief that a claim is false does not make an interpretation unreasonable under *Hixson*.²¹ But what other factors make an interpretation unreasonable: Is it merely a textual question? Or does it include relevant industry practice, interpretive guidance, or legislative history? If the question is only textual, as a close

15. See *infra* section II.C (noting that *Hixson* precludes examination of a defendant's subjective intent).

16. See *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015) (preventing a defendant in the D.C. Circuit from applying *Hixson* to bar evidence of intent and relevant interpretive guidance). But see *United States ex rel. Chilcott v. KBR, Inc.*, No. 09-cv-4018, 2013 WL 5781660, at *6 (C.D. Ill. Oct. 25, 2013) ("Reasonableness is relevant to the question of whether a misinterpretation was knowing or deliberate, but it is not dispositive of that question or of the question of falsity.").

17. See *infra* section I.B (outlining the elements of liability and the relationship between falsity and scienter).

18. There are some troubling questions about the line between "knowledge" and "belief" that are beyond the scope of this Note. If there is sufficient ambiguity to support a defendant's interpretation of some relevant substantive law, then presumably the defendant can have only the "belief" that its interpretation is erroneous. Thus its claim is false, given that knowledge in one sense is belied by the uncertainty in the law. See, e.g., Rollin M. Perkins, "Knowledge" as a Mens Rea Requirement, 29 *Hastings L.J.* 953, 955–56 (1978) (equating belief with knowledge under a common law interpretation); see also *infra* note 191 (elaborating on the distinction between knowledge and belief).

19. There may be remedies other than the FCA available to the government. But the failure of other remedies to protect government money is precisely the reason the FCA was initially passed. See Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 *Notre Dame L. Rev.* 995, 998–1000 (1983) (noting discussions prior to the adoption of the 1986 FCA amendments about the failure of other civil and criminal penalties to deter fraud).

20. See *infra* section II.C (discussing the meaning and scope of a "reasonable" interpretation of the substantive law).

21. *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (noting that "tak[ing] advantage of a disputed legal question" does not make an interpretation unreasonable (quoting *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996))). Moreover, *Hixson* is premised on a Supreme Court case, *Safeco Insurance Co. of America v. Burr*, which notes that subjective intent is irrelevant for determining reckless disregard. See *Hixson*, 613 F.3d at 1190 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70–71 n.20 (2007)); see also section II.A (explaining the relationship between *Hixson* and *Safeco*).

reading of *Hixson* suggests,²² then defendants could exploit any uncertainty in the law even when circumstances inform them that their interpretations are wrong.²³

How these issues are resolved could have a significant effect on the strength of the FCA given that interpreting law is essential to every FCA case.²⁴ It may be true that in most cases where a defendant relies on a reasonable interpretation of the law, however “reasonable” is defined, scienter cannot and should not be established.²⁵ But the multifactor, totality of the circumstances analysis used by every court before *Hixson*—and most courts since—already dismisses these cases.²⁶ The net effect of *Hixson*, then, may be to dismiss cases where evidence of the defendant’s bad faith or actual knowledge is overwhelming but the defendant finds some way to show that the law is theoretically unclear.²⁷ As one court noted:

Applied strictly, *Hixson*’s rule would put an impossible burden on the drafters of statutes, regulations, and government contracts to avoid all potential ambiguity in order to prevent intentional fraud against the government; it would incentivize the intentional twisting of language in order to find profitable erroneous interpretations of the controlling text, even though all those subject to the text were well-aware of its intended meaning.²⁸

22. See *infra* section II.C (outlining the scope of *Hixson*’s reasonableness inquiry and suggesting the dispositive factor is textual reasonableness).

23. See *infra* note 28 and accompanying text (providing an example of a court noting this concern).

24. See *infra* notes 51–64 and accompanying text (explaining the role of substantive law in FCA cases).

25. The more rule-like function of *Hixson* and the idea that it likely achieves the correct result in most cases seem to be the underlying argument in its favor. One prominent FCA practitioner, for instance, argues that the Ninth Circuit’s decision in *Oliver v. Parsons* is “wrongly decided” because, even though the court found in favor of the defendant, it did so on the basis of the defendant’s good faith *rather than* on the reasonableness of the defendant’s interpretation. John T. Boese, Civil False Claims and Qui Tam Actions § 2.06 (2016) (citing United States ex rel. *Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999)).

26. See, e.g., United States ex rel. *K & R Ltd. P’ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 984 (D.C. Cir. 2008) (dismissing an FCA case where nothing “warned [the defendant] away from the [interpretation of an ambiguous rule] it took” (internal quotation marks omitted) (quoting *Safeco*, 551 U.S. at 70)); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (“If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive.”).

27. See, e.g., United States ex rel. *Estate of Donegan v. Anesthesia Assocs. of Kan. City*, No. 4:12–CV–0876–DGK, 2015 WL 3616640, at *10 (W.D. Mo. June 9, 2015) (finding the defendant had employed a “plausible definition” of a disputed term and thus was not liable under the FCA).

28. United States ex rel. *Chilcott v. KBR, Inc.*, No. 09–cv–4018, 2013 WL 5781660, at *7 (C.D. Ill. Oct. 25, 2013).

Hixson is thus at odds with the clear intent of the FCA—to protect government money—because it shields those who would take advantage of the government fisc.²⁹

Part I of this Note gives background on the False Claims Act, its scienter requirement, and the “reckless disregard” standard before *Hixson*. Part II examines how *Hixson* created a new test that changes the scienter requirement and narrows the scope of FCA liability. Part III argues in favor of the pre-*Hixson* interpretation of the scienter requirement and considers whether “deliberate ignorance” might be used as a theory of liability if *Hixson* is interpreted to foreclose a finding of “reckless disregard.”

I. HISTORY AND EVOLUTION OF THE FCA’S SCIENTER REQUIREMENT

This Part explores the evolving meaning of the FCA’s scienter requirement. Section I.A provides historical background and context to the FCA. Section I.B explains the basic elements of FCA liability. Section I.C examines the legislative and judicial history surrounding the 1986 amendments to the Act. Section I.D considers the scope and application of the “reckless disregard” standard after the 1986 amendments.

A. *False Claims Act History and Background*

For most of its 150-year history,³⁰ the FCA was rarely used and little known.³¹ But in 1986, reports of widespread fraud³²—and the failure of federal enforcement agencies to combat it—led Congress to pass a major

29. See H.R. Rep. No. 99-660, pt. 1, at 16 (1986) (explaining the purpose of the 1986 amendments to the FCA was “to strengthen and clarify the government’s ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud”); see also Salcido, *supra* note 8, at 742 (outlining the purpose of the FCA and citing the House report on the 1986 amendments); *infra* note 75 and accompanying text (explaining the concern of the FCA is not punishment but protection and restoration of government money); Farber, *supra* note 12, at 238–41 (noting the FCA’s *qui tam* system functions as a “monitoring system” helping to uncover often difficult-to-detect corporate fraud and ensuring government enforcers “devote more time and resources to aggressively attacking fraud against taxpayers”).

30. What follows is a short history. For a more detailed analysis, see generally Boese, *supra* note 25, §§ 1.01–.05.

31. See Sylvia, *supra* note 4, §§ 2:6, 2:8 (noting that “few cases were brought under the Act prior to World War II” and between World War II and 1986, *qui tam* actions were “rarely viable”); Stephen F. Hayes, *Enforcing Civil Rights Obligations Through the False Claims Act*, 1 *Colum. J. Race & L.* 29, 32 (2011) (“[R]estrictive amendments in 1946 . . . effectively precluded any viable use of the Act for the next forty years.”).

32. See Chemerinsky, *supra* note 19, at 995 (estimating that in the 1980s “the United States treasury [was] cheated out of \$25 to \$70 billion a year”); see also S. Rep. No. 99-345, pt. 2, at 3 (1986) (finding estimates of fraud “range from hundreds of millions of dollars to more than \$50 billion per year” and noting that the Department of Justice (DOJ) estimated a cost to taxpayers of “\$10 to \$100 billion annually” due to fraud against the government).

amendment strengthening the Act.³³ Since then, the FCA has recovered a lot of money, whatever its merit as a matter of policy. Before 1986, the Department of Justice (DOJ) averaged \$40 million a year in FCA recoveries.³⁴ By 1992, after a slow start,³⁵ the FCA brought in over \$270 million.³⁶ In 1994, recoveries exceeded \$1 billion,³⁷ and in 2014, recoveries reached an all-time high of \$6 billion,³⁸ which amounted to a quarter of all DOJ civil and criminal recoveries that year.³⁹

Whether the FCA is efficient is a complicated question, but according to a report prepared for the Taxpayers Against Fraud (TAF) Education Fund,⁴⁰ the federal government recovered \$16.33 “for each dollar [it]

33. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729–3733 (2012)); see *infra* notes 79–83 and accompanying text (detailing changes to the scienter requirement in the 1986 amendments, which strengthened the FCA). For background on the motivations behind the amendment, see S. Rep. No. 99-345, pt. 2, at 7 (finding that “perhaps the most serious problem plaguing effective [antifraud] enforcement is a lack of resources on the part of Federal enforcement agencies”); Sylvia, *supra* note 4, § 2:9 (outlining evidence of fraud that served as motivation behind the 1986 amendments (citing S. Rep. No. 99-345)); Culbertson, *supra* note 8, at 32 (“Congress . . . bow[ed] to the public outrage over wasteful government spending . . . and ultimately decided to punish government contractors rather than overhauling the [federal] procurement system.”). This was only the second “major overhaul” of the FCA since its passage in 1863; the first was in 1943, when the FCA was restricted. See Wayne Turner, *The False Claims Act: How Vigilantes Find Justice Fighting Government Fraud and Corruption*, 12 UDC L. Rev. 115, 117 (2009) (describing 1943 overhaul).

34. See S. Rep. No. 99-345, pt. 6, at 37 (noting that DOJ estimated FCA recoveries averaged \$40 million annually but with wide fluctuations); Helmer, *supra* note 7, at 8 (concluding FCA recoveries amounted to more than \$30 billion from 1986 to 2012, even though prior to 1985, DOJ “managed to recover only \$27 million for civil fraud”).

35. Sylvia, *supra* note 4, § 2:11 (noting that “[t]he impact of the 1986 amendments was not immediately felt” while *qui tam* suits wound their way through the court system).

36. Civil Div., U.S. Dep’t of Justice, *Fraud Statistics-Overview*, October 1, 1987–September 20, 2013, at 1 (2013) [hereinafter *Fraud Statistics*], http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf [<http://perma.cc/C65W-ZLY4>]. All of the numbers cited in this section are confirmed in DOJ’s released fraud statistics or, if more recent, in DOJ press releases. Some sources have claimed other, usually larger, numbers. See, e.g., *The False Claims Amendments Act of 1993: Hearing on S. 841 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 2–3 (1993) (statement of Sen. Charles E. Grassley) (stating *qui tam* recoveries *alone* were \$250 million in 1992).

37. *Fraud Statistics*, *supra* note 36, at 1.

38. Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, *Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014), <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014> [<http://perma.cc/QKL6-NVWN>] [hereinafter 2014 FCA Press Release].

39. Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, *Justice Department Collects More than \$24 Billion in Civil and Criminal Cases in Fiscal Year 2014* (Nov. 19, 2014), <http://www.justice.gov/opa/pr/justice-department-collects-more-24-billion-civil-and-criminal-cases-fiscal-year-2014> [<http://perma.cc/H5T7-HYVU>].

40. In fairness, TAF is not an unbiased source given that it exists in part to “protect[]” and “expand[]” the FCA. See *Twenty Things Taxpayers Against Fraud and the TAF Education Fund Are Doing for You*, Taxpayers Against Fraud, <http://www.taf.org/>

spent . . . investigating and prosecuting civil health care fraud.”⁴¹ With criminal fines associated with FCA cases factored in, the estimated value recovered per dollar spent exceeds \$20.⁴² But this analysis does not include the amount of fraud deterred from the *threat* of FCA liability, which would push that number even higher.⁴³

One of the distinguishing provisions of the FCA is its *qui tam* provision, which allows private plaintiffs—called “relators”—to bring suit on behalf of the government.⁴⁴ Although the DOJ may bring direct enforcement actions under the Act, the “overwhelming majority of actions filed under the FCA are *qui tam* actions, and the vast majority of recoveries under the FCA are attributable to *qui tam* cases.”⁴⁵ In 2013, for instance, *qui tam* recoveries made up over three-fourths of all FCA recoveries, or approximately \$3 billion.⁴⁶

Typical FCA cases involve fraud on Medicare, Medicaid, housing and mortgage programs, government grants and contracts, or other government-spending programs.⁴⁷ Not surprisingly, as government spending increases,⁴⁸ the FCA becomes an increasingly valuable tool for combating fraud.⁴⁹

who-we-are/what-we-do [<http://perma.cc/PED3-S5SH>] (last visited Oct. 11, 2016) (detailing the activities of the TAF Education Fund). But the report’s method of determining the cost effectiveness of the FCA is reasonable in light of available information. Information on recoveries is widely available, but information on costs must be inferred from appropriations. See Meyer, *supra* note 5, at 6–11 (discussing method for determining the benefit-to-cost ratio of the FCA).

41. Meyer, *supra* note 5, at 10. This recovery is left over after allowing for the amounts paid to relators or whistleblowers, who bring suit on behalf of the government. See *id.*; see also *infra* note 44 and accompanying text (explaining the term “relator”). Health care is one of the largest areas of FCA enforcement. In 2014, it represented \$2.3 billion of the \$6 billion recovered under the FCA. 2014 FCA Press Release, *supra* note 38.

42. See Meyer, *supra* note 5, at 14.

43. See *id.* at 1.

44. See 31 U.S.C. § 3730 (2012). See generally Richard C. Danysh & Christopher C. Rulon, A False Claims Act Primer, 47 *Advoc. (Texas)* 48 (2009) (outlining the basic structure and procedures of the FCA). Relators are often informally called “whistleblowers.” Jonathan D. Grossman, The Case Against the Tax Deductibility of FCA Relator Fees, 87 *N.Y.U. L. Rev.* 1452, 1453 (2012).

45. Farber, *supra* note 12, at 221–22.

46. Fraud Statistics, *supra* note 36, at 2.

47. See Neil Gordon, DOJ Announces Record-Setting Year for Fraud Recovery, Project on Gov’t Oversight (Dec. 3, 2014), <http://www.pogo.org/blog/2014/12/20141203-doj-announces-record-setting-year-for-fraud-recovery.html> [<http://perma.cc/C8UV-VFAH>] (noting the FCA is the primary tool in recovering funds from federal programs like “Medicare and Medicaid, contracts and grants, housing programs, disaster relief loans, and agricultural subsidies”).

48. See Office of Mgmt. & Budget, Fiscal Year 2016 Historical Tables: Budget of the U.S. Government 10 (2016), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/hist.pdf> [<http://perma.cc/CU7G-V5XH>] (noting the “growth in total Federal spending as a percentage of GDP in recent decades”).

49. See, e.g., *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 55 (8th Cir. 1973) (stating that the scope of the FCA has become more important as the “federal

B. *Elements of Liability*

Establishing liability under the FCA requires four elements: “(1) a false statement or fraudulent course of conduct; (2) that was made or carried out with the requisite scienter; (3) that was material [to the government’s decision to pay out a claim]; and (4) that caused the government to pay out money (i.e., that involved a claim).”⁵⁰ Whether a cognizable false claim has occurred often depends on the interpretation of some other law, such as a statute, regulation, or contract.⁵¹ For instance, a Medicare FCA claim depends on the existence and meaning of Medicare regulations dictating particular types of medical services and the payments associated with them.⁵² Similarly, a government-contractor FCA claim depends on the meaning of relevant contract provisions, whether the provisions detail the services required, the payments due, or any other burdens or benefits.⁵³ Indeed, every false claim must arise from some set of legal entitlements or obligations—what one might think of simply as “the law”—and how a court interprets the law underlying an FCA claim can affect all four elements of a successful claim.⁵⁴ In this

budget and payments to citizens grow even larger”); Hayes, *supra* note 31, at 33 (noting both the 2008 “bailout” legislation and the recent health care reform act amended the FCA to facilitate qui tam suits in order to monitor federal spending); Comment, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 Nw. U. L. Rev. 446, 476–77 (1972) (observing that the value of the FCA has increased since its initial enactment given increases in government spending).

50. *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365 (5th Cir. 2014) (citing *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009)). These elements are codified at 31 U.S.C. § 3729(a)–(b) (2012). The “materiality” requirement is not considered in this Note, but it is worth noting that its application, which stems from a controversial history, is more complicated than it might appear here or in the statute. See Boese, *supra* note 25, § 2.04 (discussing the materiality requirement); Sylvia, *supra* note 4, § 4:57 (same).

51. See Boese, *supra* note 25, § 2.03 (noting “false” and “fraudulent” turn on judicial construction, typically guided by “interpretation and construction of the terms in other statutes”).

52. See, e.g., *United States ex rel. Estate of Donegan v. Anesthesia Assocs. of Kan. City*, No. 4:12–CV–0876–DGK, 2015 WL 3616640, at *2 (W.D. Mo. June 9, 2015) (analyzing FCA liability based on the meaning of the term “emergence” in health care regulations pertaining to anesthesiology).

53. See, e.g., *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1363 (Fed. Cir. 1998) (analyzing FCA liability as turning on whether the defendant violated the express terms of an excavation contract).

54. See, e.g., *United States v. Cohn*, 270 U.S. 339, 345–46 (1926) (analyzing the claim element as turning on the interpretation of customs law); *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 530–31 (6th Cir. 2012) (analyzing the scienter element as turning on the interpretation of a Medicare subsidy); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010) (finding the materiality element satisfied based on an interpretation of a contractual provision); *United States ex rel. K & R Ltd. P’ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983–84 (D.C. Cir. 2008) (finding that the scienter element turned on the interpretation of a mortgage housing subsidy); *Daff v. United States*, 78 F.3d 1566, 1573–74 (Fed. Cir. 1996) (assessing falsity

respect, the Act is just a procedural tool for enforcing other law. What is “false” or “fraudulent” in a false claim is the violation of the law, whatever that may be in the particular circumstances.

Given the structure of FCA claims, it is important to understand and distinguish the first two elements of FCA liability: falsity⁵⁵ and scienter.⁵⁶ Falsity requires that some law has been violated.⁵⁷ Scienter is a separate but related requirement: It requires determining whether the defendant *knew* that some law was being violated.⁵⁸ In other words, scienter is a question of whether the defendant knew there was falsity. These two elements may be difficult to distinguish because sometimes a defendant may avoid FCA liability because its misinterpretation of the law was reasonable (scienter),⁵⁹ even though the court determines that a violation of that law nevertheless occurred (falsity).⁶⁰ To put it differently, a defendant may avoid liability on scienter grounds, due to the reasonableness of its position, even though the court finds the defendant’s position was ultimately incorrect.⁶¹ As one court explained:

Where a relator alleges that a claimant’s interpretation of an ambiguous regulation renders its claims false under the FCA, falsity is evaluated by examining whether the interpretation is *correct* in light of applicable law; but whether a claimant acted knowingly in submitting a false claim turns on the “*reasonableness* of [the claimant’s] interpretation.”⁶²

based on the interpretation of a government contract and the Federal Acquisition Regulations System).

55. 31 U.S.C. § 3729(a) (2012).

56. *Id.* § 3729(b)(1).

57. See Boese, *supra* note 25, § 2.03 (providing an overview of the falsity requirement). As John Boese notes, falsity is often obvious, such as when a government contractor bills for more hours than it actually performed. See *id.* (citing *United States ex rel. Ferguson v. Gen. Dynamics Corp.*, No. CV 90-4703 MRP, 1994 U.S. Dist. LEXIS 7666 (C.D. Cal. Apr. 28, 1994)).

58. The statute is written such that the state of mind required for purposes of scienter is tied specifically to “the truth or falsity of the information.” 31 U.S.C. § 3729(b)(1)(A)(ii).

59. The scope and meaning of “reasonableness” is considered in some depth in this Note. See *infra* notes 102–112 and accompanying text (explaining the totality of the circumstances analysis that courts employ).

60. See, e.g., *United States ex rel. Chilcott v. KBR, Inc.*, No. 09-cv-4018, 2013 WL 5781660, at *6 (C.D. Ill. Oct. 25, 2013) (“It is for the Court to determine the proper interpretation of the contract’s terms, which will resolve whether Defendants’ claims were ‘false’ under the statute. If they are incorrect, and therefore ‘false,’ the Court must determine whether Defendants ‘knew’ . . . that their interpretation was wrong.” (citation omitted)).

61. The title of this Note derives from this idea. A defendant may be reasonable—but wrong. The question considered in this Note is ultimately whether a reasonable but incorrect interpretation of the law should preclude FCA liability in every instance.

62. *United States ex rel. Colucci v. Beth Israel Med. Ctr.*, 785 F. Supp. 2d 303, 316 (S.D.N.Y. 2011) (quoting *Robert Fabrikant et al., Health Care Fraud: Enforcement and Compliance* § 4:01 (2011)), *aff’d sub nom.* 531 F. App’x 118 (2d Cir. 2013).

Despite this distinction, courts have found a specific relationship between scienter and falsity. While the reasonableness of a defendant's interpretation of the law is "part of [a court's] determination of whether the defendant acted with the requisite level of knowledge in submitting its claim to the government,"⁶³ "[t]he clarity of the falsity supports the . . . position that a failure to know of the falsity was at least reckless."⁶⁴ In other words, the clearer the law, the clearer the violation. And the clearer the violation, the clearer the state of mind. But as the law gets more ambiguous, scienter becomes harder to establish.⁶⁵

C. *The Scienter Requirement: Before and After 1986*

Before 1986, "knowledge" was required to establish FCA liability but not defined in the Act itself, leading courts to differ over how to interpret its meaning.⁶⁶ As one scholar noted, scienter was "the most complex of all the elements of liability" under the FCA.⁶⁷ Some courts—including the Fifth and Ninth Circuits—required specific intent to defraud the government and rejected any forms of "constructive knowledge,"⁶⁸ such as reckless disregard or deliberate ignorance.⁶⁹ These courts often reasoned that the FCA is sufficiently punitive to merit strict interpretation and narrow application.⁷⁰

63. *KBR*, 2013 WL 5781660, at *9; see also *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999) ("[T]he reasonableness of [the defendant's] interpretation of the applicable accounting standards may be relevant to whether it knowingly submitted a false claim . . .").

64. *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436, 447 (S.D.N.Y. 1999).

65. See *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 564 (E.D. Va. 2003) ("[B]oth the clarity of the regulation and the reasonableness of a contractor's interpretation are relevant in deciding whether a failure to disclose charging practices is indicative of a reckless disregard of their falsity.").

66. H.R. Rep. No. 99-660, pt. 2, at 17 (1986) ("The current law contains no definition of these terms and has therefore resulted in different interpretations among the Circuit Courts of Appeals."). Compare, e.g., *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 60 (8th Cir. 1973) ("[N]egligent misrepresentation can constitute the necessary 'knowledge' [under the FCA]."), with *United States v. Mead*, 426 F.2d 118, 122 (9th Cir. 1970) ("[T]o recover under the False Claims Act, the government must prove that the defendant had the specific intent of deceit.").

67. Boese, *supra* note 25, § 2.06.

68. See *infra* note 81 (explaining the term "constructive knowledge").

69. See, e.g., *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972); *Mead*, 426 F.2d at 122; *United States v. Priola*, 272 F.2d 589, 593–94 (5th Cir. 1959).

70. See, e.g., *Priola*, 272 F.2d at 593–94, 594 n.9; *United States v. De Witt*, 265 F.2d 393, 401–04 (5th Cir. 1959) ("That the False Claims Act is remedial and civil in nature, and hence not penal for purposes of double jeopardy does not minimize its being 'drastically penal' in fact." (quoting *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942))); *Bausch & Lomb Optical*, 131 F.2d at 547 (avoiding the "necessary" result under the statute because of its "drastically penal" nature and "odious" *qui tam* provision).

Other courts—including the First, Sixth, Seventh, and Tenth Circuits—found that the FCA only required a finding of actual knowledge.⁷¹ In *United States v. Hughes*, for instance, the Seventh Circuit reasoned that, while the Act has punitive elements, the Supreme Court has held that it is remedial and civil and therefore imputing a heightened scienter requirement is unnecessary.⁷²

Most significantly, a third set of courts—including, notably, the Eighth Circuit—found that recklessness or possibly even negligence was sufficient to establish liability.⁷³ In *United States v. Cooperative Grain & Supply Co.*, the Eighth Circuit also noted that the FCA is remedial and civil.⁷⁴ Its purpose is to protect the government against fraud rather than simply punish those who commit it.⁷⁵ Therefore, a more lenient, civil definition of knowledge—recklessness or negligence—should apply because it better empowers the government to pursue those who defraud it.⁷⁶ As applied to the case, the court held that the “extreme carelessness” of the defendants could establish scienter under the pre-1986 Act.⁷⁷

71. *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992) (indicating that prior to certain amendments to the FCA “the statute included a single intent standard: actual knowledge of falsity”); *United States v. Hughes*, 585 F.2d 284, 287 (7th Cir. 1978) (examining the ambiguity of the FCA but determining that liability incurs when someone “presents any claim upon or against the [g]overnment . . . knowing such claim to be false”); *United States v. Ekelman & Assocs.*, 532 F.2d 545, 548 (6th Cir. 1976) (“[T]he law of this Circuit requires a showing of actual knowledge to establish liability under the False Claims Act.”); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964) (discussing knowledge as the requisite mental state for incurring liability).

72. 585 F.2d at 287 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943)). It is worth noting, however, that the Supreme Court has not always found the FCA to be a remedial rather than a penal statute. See *United States v. McNinch*, 356 U.S. 595, 598 (1958) (calling the FCA a “criminal statute”).

73. *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 60 (8th Cir. 1973) (“Since we have decided that a false claim, not only a fraudulent claim, is actionable under the Act, a negligent misrepresentation can constitute the necessary ‘knowledge.’”). The fact that the Eighth Circuit had previously adopted the most lenient scienter standard is somewhat ironic given that the Eighth Circuit has now heightened the scienter standard through *Hixson* and its progeny. See *infra* section II.B (considering how *Hixson* has changed the FCA scienter requirement).

74. 476 F.2d at 59. The court in *Cooperative Grain* cited *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943), where the Supreme Court made this determination.

75. *Coop. Grain*, 476 F.2d at 59–60 (“Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him.” (internal quotation marks omitted) (quoting *Hess*, 317 U.S. at 550)); see also *Hess*, 317 U.S. at 548–49 (finding that the FCA is a civil statute and thus FCA actions are “brought primarily to protect the government from financial loss” rather than to impose “criminal punishment to vindicate public justice”); *supra* note 74 (noting *Cooperative Grain*’s reliance on *Hess*).

76. *Coop. Grain*, 476 F.2d at 58. While the case is often cited for the sufficiency of recklessness in establishing scienter, the court also opined on the sufficiency of negligence, stating, “since we have decided that a false claim, not only a fraudulent claim, is actionable under the Act, a negligent misrepresentation can constitute the necessary

These cases show that, with the exception of the Eighth Circuit, a majority of courts held that the FCA required actual knowledge or specific intent before 1986.⁷⁸ But in 1986, Congress took the view of the Eighth Circuit⁷⁹ and rejected the “unduly restrictive scienter requirement” adopted by other courts.⁸⁰ Congress amended the FCA’s scienter requirement to include two types of constructive knowledge⁸¹—reckless disregard and deliberate ignorance—intended to apply to “persons who ignore ‘red flags’ that the information [submitted as part of a false claim] may not be accurate.”⁸² These amendments expanded the scope of liability under the Act so that it covers “not just those who set out to defraud the government, but also those who ignore obvious warning signs.”⁸³

The structure of the FCA’s scienter requirement after the 1986 amendments is worth considering in detail. The text of the statute defines liable conduct as “knowingly”⁸⁴ engaging in certain types of actions outlined in § 3729(a)(1), such as “present[ing] . . . a false or

‘knowledge.’” *Id.* at 60. But given that “extreme carelessness” was the basis of the decision affirming liability, the court’s statements with respect to negligence may be mere dicta. See *id.*

77. *Id.* at 60.

78. See *supra* notes 66–77 (describing three different approaches to scienter federal courts used before 1986).

79. See S. Rep. No. 96-615, at 5 (1980) (“In keeping with the concept that the Act is civil, not criminal, in nature, [the FCA] . . . requires only that the government prove that the defendant had either actual or constructive knowledge that the claim was false or fictitious. This comports with the . . . better reasoned view . . . taken in . . . *Cooperative Grain* . . .”). But see *United States v. Hercules, Inc.*, 929 F. Supp. 1418, 1427 (D. Utah 1996) (calling *Cooperative Grain* a “minority position and a maverick in its construction of the FCA”).

80. S. Rep. No. 96-615, at 5.

81. The modifier “constructive” is used in law to mean “legally imputed.” See *Constructive*, Black’s Law Dictionary (10th ed. 2014). In the FCA context, constructive knowledge means that certain forms of scienter will be treated the same as actual knowledge—and thus be sufficient to establish FCA liability—even though they are not literally forms of actual knowledge. One reason constructive knowledge might be used or adopted as a standard is to avoid difficult questions of establishing state of mind when the facts are sufficient to suggest that actual knowledge likely did exist or at least should have existed. See *Siebert v. Gene Sec. Network, Inc.*, 75 F. Supp. 3d 1108, 1116 (N.D. Cal. 2014) (“Deliberate indifference and reckless disregard can be means of inferring actual knowledge in the absence of direct evidence.” (citing *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997))); *Constructive Intent*, Black’s Law Dictionary, *supra* (“A legal principle that actual intent will be *presumed* when an act leading to the result could have been reasonably expected to cause that result.” (emphasis added)).

82. H.R. Rep. No. 99-660, pt. 5, at 20–21 (1986). Significantly, the legislative history treats these two standards together. See *infra* notes 220–221 and accompanying text (explaining possible significance to legislative history’s joint treatment of reckless disregard and deliberate ignorance).

83. *UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 793 (1999).

84. 31 U.S.C. § 3729(a)(1) (2012). There is one limited exception. Under § 3729(a)(1)(E), FCA liability attaches only when the defendant has the intent to defraud. Otherwise, intent to defraud is not required. *Id.* § 3729(b)(1)(B).

fraudulent claim for payment or approval.”⁸⁵ Section 3729(b)(1) then defines the terms “knowing” and “knowingly” to include three forms of scienter: First, the defendant “has actual knowledge of the information [making the claim false]”; second, the defendant “act[ed] in deliberate ignorance of the truth or falsity of the information”; and third, the defendant “act[ed] in reckless disregard of the truth or falsity of the information.”⁸⁶ Significantly, the statute specifically states that “no proof of specific intent to defraud” is required.⁸⁷ Conceptually, then, the Act has a single scienter standard—knowledge—that is defined as at least one of three things: actual knowledge, deliberate ignorance, or reckless disregard. But practically, FCA liability simply requires that the defendant acted with actual knowledge, deliberate ignorance, *or* reckless disregard.

The 1986 expansion of the Act’s knowledge requirement to include reckless disregard and deliberate ignorance also spurred a judicially recognized “limited duty to inquire.”⁸⁸ A proposal of the 1986 amendments included an express definition of this duty: “to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim.”⁸⁹ But when the Senate and House proposals were merged, this language was lost.⁹⁰ Even so, several courts have since adopted the duty to inquire as an element of constructive knowledge.⁹¹ These courts typically note that this duty is not

85. *Id.* § 3729(a)(1)(A).

86. *Id.* § 3729(b)(1)(A)(i)–(iii).

87. *Id.* § 3729(b)(1)(B). But see *supra* note 84 (noting an exception for when a defendant has intent to defraud).

88. See, e.g., *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 530 (6th Cir. 2012) (noting that a duty to inquire was adopted to target defendants who “buried [their] head in the sand” (quoting S. Rep. No. 99-345, pt. 4, at 21 (1986))); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) (citing language from legislative history proposing a duty in order to clarify the scienter requirement); *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 513 F. Supp. 2d 866, 876 (S.D. Tex. 2007) (adopting the limited duty to inquire).

89. S. Rep. No. 99-345, pt. 4, at 20. The report also noted that “[a] rigid definition of that ‘duty’, however, would ignore the wide variance of circumstances under which the Government funds its programs and the correlating variance in sophistication of program recipients.” *Id.*

90. Compare S. 1562, 99th Cong. (as reported by S. Comm. on the Judiciary, July 28, 1986) (including definition of duty), with S. 1562, 99th Cong. (as referred to H.R., Aug. 15, 1986) (excluding definition of duty); see also False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729–3733 (2012)) (excluding definition). There are no explanations in the legislative history or otherwise for why this language was lost. Surprisingly, there is almost no judicial comment on the loss of this definition, even though courts often cite its language. E.g., *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 (11th Cir. 2015); *Renal Care Grp.*, 696 F.3d at 530; *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp.*, 370 F. Supp. 2d 18, 41 (D.D.C. 2005).

91. E.g., *Sci. Applications Int’l*, 626 F.3d at 1274; *United States ex rel. K & R Ltd. P’ship v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 63 (D.D.C. 2006); *Hamilton Sec. Grp.*, 370 F. Supp. 2d at 43. The theory behind this judicial expansion seems to be that the “applicant

intended to be a “burdensome obligation,”⁹² but a duty to be “informed,” particularly when red flags warn a defendant about its actions, positions, or interpretations of the law.⁹³

D. *The Reckless Disregard Standard Before Hixson*

Even though the FCA defines three forms of knowledge, courts have long used only reckless disregard to establish liability.⁹⁴ The most likely explanation is that reckless disregard is the easiest standard to satisfy.⁹⁵ While deliberate ignorance and actual knowledge require some proof of the defendant’s state of mind, reckless disregard does not.⁹⁶ One court has called the difference between reckless disregard and deliberate ignorance a “distinction . . . without a difference” because reckless disregard is the “floor for the required mental state for a FCA claim.”⁹⁷

for public funds” has a higher burden to be informed than is typical in other contexts. *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 55 (8th Cir. 1973).

92. *Sci. Applications Int’l*, 626 F.3d at 1274 (internal quotation marks omitted) (quoting S. Rep. No. 99-345, pt. 4, at 21).

93. *Coop. Grain*, 476 F.2d at 55. Although *Cooperative Grain* is a pre-1986 case, it is relevant because the court defined “knowledge” as at least recklessness. Moreover, the legislative history pointed specifically to this case as the correct interpretation of the FCA’s scienter requirement. S. Rep. No. 96-615, at 5 (1980). Other pre-1986 cases are also relevant given that they defined “knowing” as actual knowledge or specific intent. Because recklessness is the easier standard to satisfy, any factor used to establish actual knowledge could be used to establish recklessness. See Model Penal Code § 2.02(5) (Am. Law Inst. 1985) (“When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly.”).

94. The Sylvia treatise, for instance, fails to cite a single post-1986 case relying on actual knowledge or deliberate ignorance. See Sylvia, supra note 4, § 4:43 (outlining “actual knowledge” and “deliberate ignorance” standards). Boese fares little better, with a single case from *before* the 1986 amendments illustrating deliberate ignorance. Boese, supra note 25, § 2.06 (citing *United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982)); see also *Urquilla-Diaz*, 780 F.3d at 1058 n.15 (“The parties do not cite, nor was our research able to find, a case discussing the meaning of *deliberate ignorance*.”). But see *Visiting Nurse Ass’n of Brooklyn v. Thompson*, 378 F. Supp. 2d 75, 96 (E.D.N.Y. 2004) (finding defendants had actual knowledge or “at best” acted in deliberate ignorance). Some cases, particularly cases before the 1986 amendments, however, find actual knowledge or specific intent. See, e.g., *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1008 (5th Cir. 1972) (finding failure to inform the government of “deliberate misbranding” indicated “nothing less than an intention to deceive”); see also *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (citing *Aerodex* and holding “requisite state of mind can be inferred” when the contractor adopts an implausible contractual interpretation).

95. See *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013) (calling reckless disregard “the most capacious of the three [standards]”).

96. *United States v. Krizek*, 111 F.3d 934, 941–42 (D.C. Cir. 1997) (holding that “reckless disregard” is an “extreme version of ordinary negligence” that “may be established without reference to the subjective intent of the defendant”).

97. *United States ex rel. Streck v. Allergan, Inc.*, 894 F. Supp. 2d 584, 600 n.11 (E.D. Pa. 2012); see also *Krizek*, 111 F.3d at 941 (“[R]eckless disregard lies on a continuum between gross negligence and intentional harm.”).

As a result, most cases involving the Act's scienter requirement consider only reckless disregard.⁹⁸

Since 1986, federal courts have consistently defined reckless disregard as "an extension of gross negligence."⁹⁹ Courts have not specifically articulated what "gross negligence" means or the exact scope of reckless disregard in the FCA context, but some courts have looked to the common law for guidance, where recklessness entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known."¹⁰⁰ But however the standard is described, establishing reckless disregard has involved an objective inquiry that may be satisfied without evidence of the defendant's state of mind.¹⁰¹

Other circuits have made it clear that determining whether a defendant acted with reckless disregard is a fact-sensitive inquiry that requires consideration of the totality of the circumstances.¹⁰² Indeed, one likely reason that courts have been reluctant to articulate a specific standard of reckless disregard is the highly fact-dependent nature of the inquiry.¹⁰³ Courts have typically considered a range of factors,¹⁰⁴ including:

98. See *supra* note 94 and accompanying text (noting the lack of case law on deliberate ignorance and actual knowledge).

99. *United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 124 (D.C. Cir. 2015) (internal quotation marks omitted) (quoting *Krizek*, 111 F.3d at 942). But see *King-Vassel*, 728 F.3d at 713 (adopting an arguably more liberal standard of recklessness by stating, "[A] person acts with reckless disregard 'when the actor knows or has reason to know of facts that would lead a reasonable person to realize' that harm is the likely result of the relevant act" (quoting *Disregard*, *Black's Law Dictionary* (9th ed. 2009))).

100. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007) (internal quotation marks omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)); see also, e.g., *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 59–60 (8th Cir. 1973); *United States ex rel. Davis v. Prince*, No. 1:08cv1244, 2011 WL 13092085, at *4 (E.D. Va. June 23, 2011) (applying *Safeco's* definition of recklessness to the FCA).

101. *Krizek*, 111 F.3d at 941–42 ("[A]n FCA violation may be established without reference to the subjective intent of the defendant."); see also *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 682 (10th Cir. 1998) (citing *Krizek* for the proposition that recklessness is a form of gross negligence); *Siebert v. Gene Sec. Network, Inc.*, 75 F. Supp. 3d 1108, 1116 (N.D. Cal. 2014) ("Deliberate indifference and reckless disregard can be means of inferring actual knowledge in the absence of direct evidence." (citing *Krizek*, 111 F.3d at 941)).

102. See, e.g., *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 530–31 (6th Cir. 2012) (describing various factors considered); see also *infra* notes 104–110 (citing cases employing a range of factors).

103. See Abraham, *supra* note 10, at 60 ("[O]ften, perhaps even usually, there are no pre-existing, sufficiently concrete and uniform norms that jurors can invoke in order to decide whether the defendant was negligent. The facts of actual cases are so varied that general norms do not definitely resolve them."). Although Professor Kenneth Abraham is discussing the application of negligence, in the FCA context the same principles apply to reckless disregard, which is merely a form of common law gross negligence. See *supra* notes 10, 100–101 and accompanying text.

104. *Renal Care* is a rare example of a case where the court specifically stated what factors it considered. *Renal Care*, 696 F.3d at 531. In that case, the defendant created a

(1) the defendant's adherence to custom or industry practice;¹⁰⁵ (2) the defendant's existing knowledge or expertise;¹⁰⁶ (3) any legal advice the defendant received;¹⁰⁷ (4) any professional or expert advice the defendant received;¹⁰⁸ (5) the defendant's disclosure of its conduct to the government;¹⁰⁹ (6) the existence of any guidance or authority from an administrative agency or court;¹¹⁰ (7) the reasonableness of the defendant's actions, positions, or interpretations;¹¹¹ and (8) the defendant's motive.¹¹²

subsidiary company to take advantage of a Medicare reimbursement loophole. *Id.* at 520–21. The court granted summary judgment to the defendant because: (1) creation of the subsidiary company was not obviously inconsistent with legislative purpose, (2) the defendant sought legal counsel on the issue and legal counsel sought clarification from the government, (3) other industry participants had created similar subsidiaries and industry publications advocated for the practice, (4) the defendant had been open with the government about its conduct. *Id.* at 531.

105. See, e.g., *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (holding contractor may be liable under the FCA without evidence of deliberate misstatement or concealment “when [the] contractor adopts a contract interpretation that is implausible [given] . . . the unambiguous terms of the contract and other evidence (such as repeated warnings from a subcontractor or . . . contrary well-established industry practice)”; *Coop. Grain*, 476 F.2d at 60–61 (finding defendants’ “extreme carelessness” established scienter, in part, because few others had engaged in the same scheme).

106. See, e.g., *United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 413 (3d Cir. 1999) (noting that a researcher who failed to disclose industry funding in grant applications should reasonably “know of the government’s heightened interest in avoiding bias [H]e must be fully aware that rooting out potential sources of bias in our interpretations of empirical data is central to scientific inquiry”).

107. See, e.g., *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 375–76 (4th Cir. 2015) (finding hospital shopped for counsel and then withheld critical information and distorted other information in order to obtain a favorable opinion of its conduct).

108. See, e.g., *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436, 446–47 (S.D.N.Y. 1999) (noting advice from prestigious institutions about eligibility for nonprofit mailings may be a factor weighing against finding scienter); see also *Coop. Grain*, 476 F.2d at 60 (finding a manager had specific intent to defraud while finding those who relied on his advice had shown only extreme carelessness, though holding all defendants ultimately met the scienter requirement); cf. *Chen-Cheng Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) (holding poor work by engineers was not necessarily a violation of the FCA because “[b]ad math is no fraud”).

109. See, e.g., *United States ex rel. Laird v. Lockheed Martin Eng’g & Sci. Servs. Co.*, 491 F.3d 254, 262–63 (5th Cir. 2007) (holding that a contractor “cannot be said to have knowingly presented a fraudulent or false claim” when the presenter and government have been working toward a common solution and the government has approved a particular claim for payment before it is presented). But see *Sylvia*, supra note 4, § 4:49 (noting “government knowledge” is not a defense to FCA liability but may support an inference that the defendant did not hold the requisite scienter).

110. See, e.g., *Visiting Nurse Ass’n of Brooklyn v. Thompson*, 378 F. Supp. 2d 75, 96 (E.D.N.Y. 2004) (noting a defendant’s alleged reliance on its own private interpretation of the statute “becomes presumptively unreasonable once the government has formally declared that it has adopted a different interpretation”).

111. This is, of course, the factor that *Hixson* has made dispositive. For examples of how other courts have considered it, see, e.g., *United States ex rel. K & R Ltd. P’ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983–84 (D.C. Cir. 2008) (noting the defendant

E. *Observations*

The effectiveness of the FCA in the last few decades has been the result of congressional expansion and judicial acquiescence.¹¹³ The post-1986 scienter requirement has been a key part of expanding the scope of FCA liability.¹¹⁴ But *Hixson* may represent another judicial attempt to limit the reach of the Act.¹¹⁵ By creating a test that excludes consideration of previously relevant circumstances,¹¹⁶ *Hixson* may meaningfully alter the Act's effectiveness in those cases that turn on interpretations of the law.¹¹⁷

II. THE *HIXSON* PROBLEM

Part II explores the issues *Hixson* raises, specifically how it changes the reckless disregard standard. Section II.A examines *Safeco Insurance Co. of America v. Burr*,¹¹⁸ a Supreme Court case that laid the foundation for *Hixson*. Section II.B addresses how *Hixson* changed the test that courts previously used to determine whether a defendant acted with reckless disregard. Section II.C considers what factors might be used to determine whether a defendant's interpretation is "reasonable" under *Hixson*'s new test, and finally, whether *Hixson*'s reasonableness analysis applies only to

submitted excessive claims for mortgage subsidies and finding no scienter because the relevant statute was ambiguous: The "failure to obtain a legal opinion or prior [government] approval cannot support a finding of recklessness without evidence of anything that might have given it reasons to do so"); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (holding that a contractor may be liable without evidence of deliberate misstatement or concealment "when [the] contractor adopts a contract interpretation that is implausible . . . [given] the unambiguous terms of the contract and other evidence (such as repeated warnings from a subcontractor or . . . contrary well-established industry practice)").

112. See, e.g., *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 528 (6th Cir. 2012) (concluding economic motive behind erroneous interpretation of substantive law was insufficient to infer knowledge given that the scheme did not obviously violate legislative intent and defendant had made good faith efforts to determine whether its conduct was prohibited); *United States ex rel. Feldman v. City of New York*, 808 F. Supp. 2d 641, 655 (S.D.N.Y. 2011) (rejecting the City of New York's assertion that it would not overprescribe health care that it partially paid for because "[i]t is altogether plausible to characterize the City's alleged misconduct . . . as economically (and politically) self-interested, broadly defined").

113. See *supra* notes 4–7 and accompanying text; *supra* section I.A (considering congressional amendments and judicial developments).

114. See *supra* section I.C (examining changes to the scienter requirement).

115. See *supra* note 7 and accompanying text (citing the cases limiting the scope of FCA liability).

116. See *supra* section I.D (exploring, pre-*Hixson*, the reckless disregard standard and the relevant factors considered).

117. See *supra* notes 25–27 and accompanying text (considering the net effect of *Hixson*).

118. 551 U.S. 47 (2007).

reckless disregard or whether it also applies to cases alleging that the defendant acted with deliberate ignorance or actual knowledge.

A. *Safeco: A Foundation for Hixson*

Safeco marked the beginning of a shift in how “reckless disregard” is understood. At issue was the meaning of reckless disregard in the context of the Federal Credit Reporting Act (FCRA).¹¹⁹ The relevant statutory provision¹²⁰ required insurance companies to notify customers if their credit report caused an “adverse action,” such as an increase in the cost of their insurance.¹²¹ The plaintiff alleged that insurance companies were not notifying customers when they “raised” introductory rates for new customers, in part, on the basis of their credit reports.¹²² The insurance companies responded that there was no agreed-upon baseline from which to determine adverse action and that it was reasonable for them to interpret adverse action to mean a change in the existing policy of a current customer, rather than a decision to offer a particular price to a new customer.¹²³

The Court agreed that the insurance companies’ interpretation was reasonable but held that it was wrong nonetheless.¹²⁴ The question for the Court, then, was whether conduct based on a reasonable-but-incorrect interpretation of a statute could constitute reckless disregard. The Court held that in order to establish reckless disregard, a statutory interpretation must be so “objectively unreasonable” as to create “a risk of violating the law substantially greater than the risk associated” with a merely negligent reading.¹²⁵ Significantly, the Court stated in a footnote that Congress could not have intended liability for an “interpretation that could reasonably have found support in the courts, *whatever [the defendants’] subjective intent may have been.*”¹²⁶ The Court’s language and analysis suggests that above all, the statutory text determines whether a defendant’s interpretation is reasonable.¹²⁷

But *Safeco* does contain important qualifications. The Court specifically found that there was no authoritative guidance on the proper

119. *Id.* at 52.

120. 15 U.S.C. § 1681m (2012).

121. *Safeco*, 551 U.S. at 52–53.

122. *Id.* at 54.

123. *Id.* at 60–61.

124. *Id.* at 69. The Court’s finding is thus equivalent to finding falsity but not scienter. See *supra* notes 59–61 and accompanying text (explaining the relationship between falsity and scienter in the FCA).

125. *Safeco*, 551 U.S. at 69.

126. *Id.* at 71 n.20 (emphasis added).

127. *Id.* at 69–70 (“While we disagree with *Safeco*’s analysis, we recognize that its reading has a foundation in the statutory text . . .”).

interpretation of the FCRA provision at issue.¹²⁸ The Court explained that “given [the] dearth of guidance and the less-than-pellucid statutory text, [defendant’s] reading was not objectively unreasonable, and so falls well short of raising the ‘unjustifiably high risk’ of violating the statute necessary for reckless liability.”¹²⁹ The Court left open the question of how its analysis would have changed had there been more guidance or other factors “warn[ing the defendant] away from the view it took.”¹³⁰

B. *Hixson After Safeco*

Soon after *Safeco*, courts began considering its effect on the FCA.¹³¹ *Hixson* has arguably been its most controversial application.¹³² *Hixson* broadens *Safeco* in two important respects. First, it extends *Safeco* to the FCA.¹³³ Second, it does not contain the qualifications present in *Safeco* that may limit the holding to situations where the defendant has no guidance or red-flags warning against the interpretation it adopts.¹³⁴ While *Safeco* qualifies its holding by noting a “dearth of guidance” that may have warned the defendant,¹³⁵ *Hixson* does not: “[T]he relators must show that there is no reasonable interpretation of the law that would make the allegedly false statement true.”¹³⁶ This language suggests that if

128. *Id.* at 70.

129. *Id.*

130. *Id.*

131. E.g., *United States ex rel. Davis v. Prince*, No. 1:08cv1244, 2011 WL 13092085, at *5 (E.D. Va. June 23, 2011) (applying *Safeco*’s definition of recklessness to the FCA); *United States ex rel. Fry v. Health All. of Greater Cincinnati*, No. 1:03-CV-00167, 2009 WL 485501, at *6 (S.D. Ohio Feb. 26, 2009) (choosing not to consider an interlocutory appeal concerning *Safeco*’s application to the FCA’s pleading requirement); see also S.L. Owens, *Avoiding the Urkel Defense (Did I Do That?): How Safeco Has and (Has Not) Begun to Provide an Affirmative Defense Against Statutory Willfulness*, 82 *Def. Couns. J.* 51, 52 (2015) (noting most circuits have refused to apply *Safeco* to the FCA).

132. *United States ex rel. Estate of Donegan v. Anesthesia Assocs. of Kan. City*, No. 4:12-CV-0876-DGK, 2015 WL 3616640, at *9 (W.D. Mo. June 9, 2015) (providing in-depth treatment of *Hixson*); *United States ex rel. Chilcott v. KBR, Inc.*, No. 09-CV-4018, 2013 WL 5781660, at *7 (C.D. Ill. Oct. 25, 2013) (rejecting *Hixson*).

133. *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (adopting the proposition that acting under a reasonable interpretation of the statute is a sufficient defense to FCA liability and citing *Safeco*).

134. See *id.* at 1190 (“Because the plain language of . . . [the relevant statute] and the legislature’s apparent intent quite evidently at the very least support . . . [defendant’s interpretation], the defendant’s interpretation of the applicable law is a reasonable interpretation, perhaps even the most reasonable one.”); see also *infra* note 136 (noting *Hixson*’s exception for when there is a contrary authoritative interpretation). While *Hixson* cites to and adopts the principles behind *Safeco*, it does not discuss the case in any depth. See *Hixson*, 613 F.3d at 1190; see also *supra* note 13 and accompanying text; *infra* section II.C.

135. *Safeco*, 551 U.S. at 70.

136. *Hixson*, 613 F.3d at 1191. It is important to note that *Hixson* does say that “a statement . . . defendant makes based on a reasonable interpretation of a statute cannot

a defendant has an interpretation plausibly rooted in the text of the underlying substantive law, the relator will be unable to demonstrate that “no reasonable interpretation of the law” exists supporting the defendant, thus foreclosing FCA liability.¹³⁷

While *Hixson* may seem to effect a minor change in the law, it has closed the door on the multifactor analysis used by other courts¹³⁸ with a single, preliminary question: Was there a reasonable interpretation of the law by which the defendant’s actions were not false or fraudulent? If an interpretation is objectively reasonable, then even bad faith or intent to defraud¹³⁹ cannot be used to establish scienter.¹⁴⁰ This means *Hixson* may shield a defendant that defrauded the government with overwhelming bad faith only because the defendant could supply post hoc, textually plausible support. And *Hixson* may require dismissal of these cases before discovery can begin to uncover the defendant’s bad faith or intent,¹⁴¹ even though scienter is usually a question of fact for the jury, not a question of law for the judge.¹⁴²

support a claim under the FCA *if there is no authoritative contrary interpretation of that statute.*” Id. at 1190 (emphasis added). But that statement does not belie the opinion’s otherwise broad holding. An authoritative contrary interpretation is only authoritative insofar as it requires compliance, which is another way of saying that an authoritative interpretation, by definition, makes all contrary interpretations unreasonable. See supra notes 63–65 and accompanying text (discussing the relationship between clarity of falsity and scienter). The more important question regards the impact of nonbinding, nonauthoritative guidance, such as industry practice, agency guidance, or other “red flags,” warning the defendant away from its interpretation. See *Safeco*, 551 U.S. at 70 (noting that Safeco did not have guidance from the Federal Trade Commission “that might have warned it away” from its interpretation of the Act); H.R. Rep. No. 99-660, pt. 5, at 20–21 (1986) (stating that people who ignore such “red flags” should be liable under the Act); supra note 110 and accompanying text (considering agency guidance in scienter determination).

137. *Hixson*, 613 F.3d at 1191 (emphasis added); infra section III.C (considering the scope and meaning of “reasonableness”).

138. See supra notes 102–112 and accompanying text (outlining the multifactor analysis).

139. It may also be true that a defendant has “actual knowledge” that its interpretation is incorrect even though its position is reasonable. This requires recognizing the crucial distinction between falsity and scienter. A defendant may subjectively believe that its position is incorrect and that its claim is false even though one could objectively argue that its position had a reasonable basis in the statutory text, for instance. See supra note 18 (explaining the relationship between knowledge and belief).

140. See *Safeco*, 551 U.S. at 70 n.20 (“Congress could not have intended [liability] . . . for those who followed an interpretation that could reasonably have found support in the courts, *whatever their subjective intent may have been.*” (emphasis added)); *Hixson*, 613 F.3d at 190 (citing *Safeco*, 551 U.S. at 70 n.20); see also infra note 193 and accompanying text (explaining how *Hixson* applies broadly to scienter rather than merely to recklessness).

141. *Hixson* itself was decided on a 12(b)(6) motion. *Hixson*, 613 F.3d at 1187–88; see also, Boese, supra note 25, § 2.06 (arguing that *Safeco*’s intent standard benefits defendants because, in cases involving ambiguous provisions, the “purely legal issue of reasonableness” lends itself to early resolution by negotiations and motions to dismiss).

142. FCA cases do not often address this issue. But see *United States v. Estate of Rogers*, No. 1:97CV461, 2001 WL 818160, at *4 (E.D. Tenn. June 28, 2001) (“With regard

C. *The Scope of Hixson: Factors in Determining Reasonableness*

Hixson left several important questions as to its scope. The first question is what factors should be or can be considered in determining whether a defendant's interpretation of the law is reasonable. *Hixson* seems to hold that authoritative guidance is relevant but subjective intent is not.¹⁴³ But one remaining question is whether nonauthoritative guidance is relevant, such as nonbinding agency determinations, industry practice, or legislative history, all of which may establish the intended meaning of the law or at least warn the defendant away from an incorrect interpretation.¹⁴⁴

The court's opinion in *Hixson* does not resolve the question. It does consider the "legislature's apparent intent"¹⁴⁵ and even a second statute to help interpret the relevant one.¹⁴⁶ But the court uses this information to *support* rather than *undermine* the defendant's interpretation.¹⁴⁷ Thus, the information is only used to show that there is "a reasonable interpretation of the law" supporting the defendant's conduct.¹⁴⁸ But the existence of *other* reasonable interpretations does not necessarily make the defendant's interpretation less reasonable.¹⁴⁹ There could be many

to the specific element of falsity under the FCA, it is immaterial whether defendants did or did not make reasonable interpretations of the applicable . . . rules and regulations governing the related-party issue."); see also Owens, *supra* note 131, at 61 ("Courts additionally prefer for juries to determine whether an FCA defendant has acted reasonably under the disputed law."). *Scienter* has long been considered a jury question in other contexts similar to the FCA, such as securities fraud. See, e.g., *In re Cerner Corp. Sec. Litig.*, 425 F.3d 1079, 1084–85 (8th Cir. 2005) ("*Scienter* is normally a factual question to be decided by a jury . . ."); *Malone v. Microdyne Corp.*, 26 F.3d 471, 479 (4th Cir. 1994) ("[I]ssues of intent typically go to the jury and defendants are not entitled to judgment as a matter of law 'on the ground of lack of scienter . . .'" (quoting *Wechsler v. Steinberg*, 733 F.2d 1054, 1059 (2d Cir. 1984))); see also Fed. R. Evid. 704(b) (stating that *mens rea* is an issue for the trier of fact).

143. See *Hixson*, 613 F.3d at 1190 ("[A] statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute."); *supra* note 21 and accompanying text (explaining how *Hixson* impliedly excludes subjective intent); *supra* note 136 (explaining *Hixson's* qualification with respect to authoritative guidance does not meaningfully limit the reach of the opinion); cf. *infra* notes 147–165 and accompanying text (noting nonauthoritative guidance may be relevant at least for supporting a defendant's interpretation). *Hixson's* seeming concession to authoritative guidance may be a little misleading. Guidance in the form of an authoritative interpretation is not guidance, but the law itself.

144. See, e.g. *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 289–90 (D.C. Cir. 2015) (examining whether informal guidance is sufficient to combat an FCA claim).

145. *Hixson*, 613 F.3d at 1190.

146. *Id.* at 1191.

147. *Id.* at 1190–91.

148. *Id.* at 1191 (emphasis added).

149. Suppose, for instance, that the relevant law turned on the word "cleave," an auto-antonym. The *Oxford English Dictionary* has two relevant definitions of the verb form. First, "to split" and second, "to stick fast or adhere." Compare *Cleave*, v.1, *Oxford English*

reasonable interpretations, as the indefinite article in “a reasonable interpretation” suggests.¹⁵⁰ And under a strict reading of *Hixson*, as long as *one* interpretation supports the defendant, the defendant cannot be held liable.¹⁵¹

In a recent case, the Eighth Circuit appears to have adopted this strict reading of *Hixson*. In *Olson v. Fairview Health Services of Minnesota*, the Eighth Circuit refused to use the relator’s evidence of legislative history and other contextual evidence against the defendant.¹⁵² In fact, it found that the relator’s reliance on this evidence to support his interpretation of the relevant statute “cripple[d] his argument” by demonstrating the ambiguity and incompleteness of the law.¹⁵³ The court suggested that if “determining the true meaning . . . [of the relevant law] requires reference to . . . [legislative intent and] contextual considerations, then the language is not unambiguous . . . [and defendant therefore] did not act fraudulently.”¹⁵⁴

In *Olson*, the issue was the meaning of the term “children’s hospital.”¹⁵⁵ Recent rules had reduced how much hospitals could charge the government for patients receiving medical assistance.¹⁵⁶ But children’s hospitals were exempt from the new rules, which meant they could still charge a higher rate for their services.¹⁵⁷ The defendant was a general-purpose hospital with a children’s unit that “arranged . . . to be reimbursed at the higher, children’s hospital rates” even for children treated outside the children’s unit and even when those services were not those typically provided by children’s hospitals.¹⁵⁸ The children’s unit was not separately licensed but integrated with the larger hospital.¹⁵⁹ The defendant lobbied for the application of the children’s hospital exemption from government staffers in charge of paying the hospitals, even though the relator,

Dictionary, <http://www.oed.com/view/Entry/34105> [<http://perma.cc/H3VA-9AGQ>] (last updated 2016), with Cleave, v.2, Oxford English Dictionary, <http://www.oed.com/view/Entry/34106> [<http://perma.cc/8RZ4-WXJL>] (last updated 2016). Even though these two definitions are contradictory, the existence of both does not make choosing one unreasonable, absent other context.

150. *Hixson*, 613 F.3d at 1191 (emphasis added).

151. *Id.* (“[T]o prevail here the relators must show that there is *no* reasonable interpretation of the law that would make the allegedly false statement true.” (emphasis added)).

152. No. 15-1780, 2016 WL 4169134, at *6 (8th Cir. Aug. 8, 2016).

153. *Id.* A biting dissent by Chief Judge William Riley criticized the majority’s logic, noting that even if the statutory provision at issue was ambiguous, the “crucial question, then, is whether [defendant] resolved the ambiguity reasonably.” *Id.* at *9 (Riley, C.J., concurring in the judgment in part, dissenting in part).

154. *Id.* at *6 (majority opinion).

155. *Id.* at *2–3.

156. *Id.* at *1.

157. *Id.*

158. *Id.* at *8–9 (Riley, C.J., concurring in the judgment in part, dissenting in part).

159. *Id.* at *2 (majority opinion).

the manager of the payment program and the *drafter* of the relevant rules, had rejected the defendant's argument for an exemption three times.¹⁶⁰ The relator had concluded that the exemption was meant only for separately licensed hospitals predominantly serving children under eighteen, as the term had been interpreted since it was introduced into the payment rules over three decades earlier.¹⁶¹ The relator's belief was later confirmed when a government audit concluded that exempting the defendant was not "consistent with the law or how other similarly situated children's facilities [we]re treated."¹⁶² Nevertheless, the Eighth Circuit held that, despite this overwhelming contextual evidence against the defendant's interpretation, the ambiguity of the statute required dismissing the case on summary judgment.¹⁶³

Together, *Hixson* and *Olson* suggest that defendants can seize textual ambiguity to adopt the most advantageous interpretation of the underlying law and ignore any circumstances suggesting their interpretations are wrong.¹⁶⁴ Indeed, the Eighth Circuit has also said that any "inherent" ambiguity in the law "belies the scienter necessary to establish a claim of fraud under the FCA."¹⁶⁵ If inherent ambiguity is textual uncertainty—for, what else would it be?—and that uncertainty is enough to foreclose liability, then all other content is irrelevant once the law is found to be unclear.

III. SAVING SCIENTER AFTER *HIXSON*

Part III considers why courts should reject *Hixson*. Section III.A argues in favor of the pre-*Hixson* interpretation of scienter under the FCA. Section III.B considers the historical meaning and use of deliberate ignorance in the Act as well as other areas of law to determine whether deliberate ignorance might be used as an alternate theory of liability in jurisdictions where *Hixson* forecloses using reckless disregard. Section

160. *Id.* at *2–3; see also *Olson v. Fairview Health Servs. of Minn. (Olson I)*, No. 13–2607 (MJD/JJK), 2015 WL 1189823, at *3 (D. Minn. Mar. 16, 2015). Neither the district court nor the Eighth Circuit is entirely clear on the issue, but it seems that the staffers simply acted outside their authority in applying the exemption. *Olson*, 2016 WL 4169134, at *2–3; *Olson I*, 2015 WL 1189823, at *3. The relator was officially Manager of Payment Policy and Rates Management, "where he established payment rates for inpatient hospitals," including the defendant's. *Olson*, 2016 WL 4169134, at *1–2.

161. *Olson*, 2016 WL 4169134, at *2.

162. *Id.* at *3 (internal quotation marks omitted) (quoting audit report).

163. *Id.* at *8 (holding dismissal is proper because the hospital's interpretation was not shown to be unreasonable).

164. Such a defendant might be liable for damages to the government for adopting an erroneous legal position harming the government, but it would not be liable under the much higher damages provisions of the FCA due to lack of scienter. See 31 U.S.C. § 3729(a) (2012) (allowing statutory damages as well as up to three times the amount of "damages which the Government sustains" because of falsity).

165. *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013).

III.C proposes a definition of deliberate ignorance that may add theoretical clarity to the Act's three definitions of knowledge, while making the standard more practically applicable.

A. *Hixson Should Be Rejected in Favor of Prior Interpretations of Reckless Disregard*

The basic purpose behind the FCA—protecting the government from fraud—is perhaps the simplest reason to reject *Hixson* in favor of other courts' more inclusive scienter analysis.¹⁶⁶ But the Supreme Court's opinion in *Safeco*¹⁶⁷ and the history and text of the Act suggest several other reasons to either reject *Hixson* or narrow its impact.

First, *Hixson* rests on the premise that *Safeco* should apply to FCA cases in the first place.¹⁶⁸ But *Safeco* limited its definition of "reckless disregard" to situations, like the FCRA, where there is no reason to believe that "Congress had something different in mind."¹⁶⁹ The Court adopted its own interpretation of the common law definition of reckless disregard only after failing to find any evidence of what Congress meant the FCRA "intent" requirement to be.¹⁷⁰ But Congress was clearer in its purpose in defining the intent requirement of the FCA. Unlike the definition adopted in *Hixson* or suggested in *Safeco*, the definition of reckless disregard outlined in the FCA's legislative history suggests that warning signs, red flags, and the subjective intent of the defendant are important, if not essential, considerations.¹⁷¹ Congress also endorsed cases interpreting the scienter requirement in a manner that contradicts *Hixson*: It rejected cases construing scienter too narrowly and approved those that

166. See supra notes 28–29 and accompanying text (noting *Hixson* vitiates congressional intent to police fraud and reduce government monitoring costs); supra notes 73–77 and accompanying text (explaining that the Eighth Circuit initially adopted lenient pre-1986 scienter standard in order to better protect government); see also supra section I.D (exploring the pre-*Hixson* reckless disregard standard and relevant factors considered).

167. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

168. At least some courts have concluded that *Safeco* is not applicable to the FCA. See, e.g., *United States ex rel. Fry v. Health All. of Greater Cincinnati*, No. 1:03-CV-00167, 2008 WL 5282139, at *10 (S.D. Ohio Dec. 18, 2008) ("The Court is not convinced that *Safeco* applies in the FCA context[.] . . .").

169. *Safeco*, 551 U.S. at 69.

170. *Id.* ("There being no indication that Congress had something different in mind, we have no reason to deviate from the common law understanding in applying the statute.").

171. See H.R. Rep. No. 99-660, pt. 5, at 20–21 (1986) (noting those who act with reckless disregard and in deliberate ignorance are those "persons who ignore 'red flags' that . . . information may not be accurate"); S. Rep. No. 96-615, at 5 (1980) (rejecting the "unduly restrictive scienter requirement" that courts applied). Congressional intent behind the FCRA, on the other hand, is not so easy to divine: The FCRA did not even use the term reckless disregard. *Safeco*, 551 U.S. at 59 (finding legislative history on the FCRA's scienter requirement unhelpful). Instead, it used the ill-defined term "willfully." *Id.*

required only “extreme carelessness” based on all the circumstances.¹⁷² More broadly, Congress has amended the Act several times in its long history, each time expanding the scope of liability,¹⁷³ and its adoption of deliberate ignorance and actual knowledge suggest that it did not intend a purely objective legal inquiry to foreclose liability.¹⁷⁴

Second, *Hixson* applies *Safeco* to all FCA cases. But *Safeco*’s holding is limited to situations where guidance or red flags are lacking.¹⁷⁵ The Court noted that the case involved a “less-than-pellucid” statute with a “dearth of guidance”¹⁷⁶ and even specified that it was “not a case” where guidance “warned [the defendant] away from the view it took.”¹⁷⁷ Thus, *Safeco* may be limited to cases where the *only* question is the defendant’s interpretation of the text of the relevant law.

But the Court did hint that the defendant’s awareness of guidance or red flags does not factor into determining whether the defendant acted recklessly.¹⁷⁸ In a footnote, the Court stated:

To the extent that [the respondent-plaintiffs] argue that evidence of subjective bad faith can support a willfulness finding even when the company’s reading of the statute is objectively reasonable, their argument is unsound. Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator. Congress could not have intended such a result for those who followed an interpretation that could reasonably have found

172. S. Rep. No. 96-615, at 5 (“Section 2 of this bill requires only that the government prove that the defendant had either actual or constructive knowledge that the claim was false or fictitious[,] . . . comport[ing] with . . . *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973) [and other cases].”); 132 Cong. Rec. 29,322 (1986) (statement of Rep. Berman) (“The language specified in this section of the law is intended to clarify what has been the law which has been properly interpreted in the case of [*Cooperative Grain*].”); see also *supra* notes 73–77 and accompanying text (explaining *Cooperative Grain* and its reasoning).

173. See S. Rep. No. 96-615, at 5 (rejecting the “unduly restrictive scienter requirement” that courts applied). While congressional silence is of questionable probative value, it is also worth considering that Congress has never reacted to the pre-*Hixson* interpretation of the scienter requirement despite having opportunities to do so, including in 1986 when it specifically validated courts that applied a standard contrary to *Hixson*’s reasonableness test. See *supra* notes 79–80 and accompanying text (examining legislative history suggesting congressional intent contrary to *Hixson*).

174. 31 U.S.C. § 3729(b)(1)–(2) (2012); see *supra* notes 28–29 and accompanying text (noting *Hixson* vitiates congressional intent to police fraud and reduces government monitoring costs).

175. See *supra* notes 135–136 and accompanying text (considering *Safeco*’s qualifications).

176. *Safeco*, 551 U.S. at 70.

177. *Id.*

178. See *id.* at 70 n.20 (rejecting evidence of subjective bad faith as irrelevant).

support in the courts, *whatever their subjective intent may have been*.¹⁷⁹

While this language strongly suggests that reckless disregard precludes consideration of subjective intent, the issue of guidance or red flags might be reframed as an objective question: A court need not ask whether the defendant was aware of red flags or other guidance but simply whether red flags or guidance existed to warn a reasonable person. The existence of warnings is then a question of the reasonableness *of the interpretation*, rather than the reasonableness *of the defendant*.¹⁸⁰ The Supreme Court seemed to endorse this understanding given that it appeared to reject subjective evidence only “[w]here . . . the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation.”¹⁸¹ Once these objective indicators are lacking, the only question left is the defendant’s subjective intent, and only then does the Supreme Court appear to bar subjective evidence. If this is the case, *Safeco* might have a more limited effect: It may still narrow the scope of FCA liability—particularly when the defendant has an intent to defraud absent objective indicators that its interpretation is unreasonable—but it would not change the majority of cases where red flags and guidance are available.¹⁸²

Third, it may be the case that *Safeco*, and by implication *Hixson*, just got it wrong. Both courts seem to assume that an objective standard that *does not require* subjective evidence *necessarily precludes* its use.¹⁸³ But reckless disregard is a statutory “floor.”¹⁸⁴ It exists to ease the burden of

179. *Id.* (emphasis added).

180. *Safeco* suggests that this type of distinction is important in its statement that “Congress could not have intended . . . [liability for a defendant] who followed an interpretation that could *reasonably* have found support in the courts . . .” *Id.* (emphasis added).

181. *Id.*

182. See *supra* note 25 and accompanying text (considering when *Hixson* may affect the outcome of an FCA case).

183. Furthermore, *Hixson* and *Safeco* fail to address the extent to which “the actor’s situation” is included in even an objective standard. See Model Penal Code § 2.02 (Am. Law Inst. 1985). Examining mere textual reasonableness fails to recognize the breadth required of an objective standard. In other contexts, objective standards often involve the addition of subjective elements in the context of the actor’s “situation.” For instance, the Supreme Court has noted in the Confrontation Clause context that “[t]aking into account a victim’s injuries does not transform [an] objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim . . .” *Michigan v. Bryant*, 562 U.S. 344, 369 (2011). Similar logic could apply here. The objective inquiry in the FCA context should not ask whether any reasonable interpretation of the law exists supporting the defendant’s position but whether the defendant’s interpretation of the law was reasonable given known circumstances, such as the existence of a contrary industry practice or agency guidance that is relevant to the situation.

184. See *supra* notes 97–98 and accompanying text (explaining the role of reckless disregard as a statutory floor).

plaintiffs trying to prove the defendant's state of mind.¹⁸⁵ A plaintiff may always prove that a defendant had a *more culpable* state of mind.¹⁸⁶ In fact, the FCA is unusual in expressly including such states of mind in the statutory text: The standards of deliberate ignorance and actual knowledge, which require subjective evidence, are always available independently of reckless disregard. There is thus no justification to preclude evidence under one theory of liability (reckless disregard) but *require* it under another, more demanding theory of liability (deliberate ignorance or actual knowledge).¹⁸⁷

Suppose, for instance, an entire industry, including the defendant, had always correctly interpreted and fulfilled an ambiguous statutory obligation the same way, even though the ambiguity had never been firmly resolved by any legal authority.¹⁸⁸ Then, the defendant changed its practice *for the purpose* of defrauding the government while also believing that its actions violated the law.¹⁸⁹ If the court decided the ambiguity in the law against the defendant,¹⁹⁰ then that defendant would possess both the mens rea and actus reus of an FCA violation: The defendant pur-

185. See Sandford H. Kadish et al., *Criminal Law and Its Processes* 250 (9th ed. 2012) (noting negligence standards are “[a]nother response to the difficulty of establishing internal thoughts and perceptions”); supra notes 78–83 and accompanying text (explaining the congressional purpose in expanding the FCA to include recklessness and deliberate ignorance).

186. See, e.g., Model Penal Code § 2.02 (creating a hierarchy of mens rea).

187. See supra notes 97–98 and accompanying text (explaining reckless disregard's role as a statutory floor). The common law also assumes a certain hierarchy of mens rea, stretching from negligence to recklessness, knowledge/belief, and purpose. See, e.g., Model Penal Code § 2.02 (noting the different types of mens rea requirements). The FCA seems to expressly contemplate this hierarchy by including not only actual knowledge but also reckless disregard and deliberate ignorance as definitions of knowledge. See 31 U.S.C. § 3729(b)(1)(A) (outlining definitions of knowledge). While “specific intent” is not listed as a sufficient form of scienter under the FCA, it could hardly be doubted that specific intent is enough to satisfy the FCA given that early cases actually required specific intent and Congress amended the FCA to avoid this standard because it was too demanding. See supra section I.A (exploring the legislative and judicial history); supra notes 171–173 and accompanying text (considering the legislative history).

188. See, e.g., *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 60–61 (8th Cir. 1973) (finding defendants had the requisite intent when defendants substituted purchased grain for produce grain in order to obtain a price clearly intended for produced grain when few others had attempted to do the same). Only a few cases like this reach courts, likely because these types of cases settle on the facts, especially after the judicially imposed specific intent requirement was removed in the 1986 amendments. See supra section I.A (exploring the legislative and judicial history); supra notes 171–173 and accompanying text (considering the legislative history).

189. Finding knowledge here may require courts to grant some level of discovery on the issue. A 12(b)(6) dismissal would be inappropriate. See supra notes 141–142 (considering why 12(b)(6) motions are inappropriate for resolving questions of scienter).

190. This is the independent question of falsity. See supra notes 55–65 (considering the relationship between scienter and falsity). The court could always find the ambiguity in the law cut in favor of the defendant's position as a matter of falsity, whatever the defendant's scienter.

posely broke the law at the government's expense.¹⁹¹ In this situation, the ambiguity of the law is irrelevant because the culpable state of mind at issue is specific intent. Nevertheless, if the courts in *Hixson* and *Safeco* are taken at their word, the court cannot look into the defendant's state of mind and liability is foreclosed. If nothing else, this anomaly suggests that while *Safeco* and *Hixson* may be binding precedent, *Safeco* should not be extended beyond the FCRA nor *Hixson* beyond the Eighth Circuit, and to the extent possible, both should be interpreted to maximize a court's ability to consider all relevant circumstances, including arguably subjective ones.¹⁹²

B. *Deliberate Ignorance Could Be a Substitute for Reckless Disregard*

By its own terms, *Hixson's* reasonableness analysis applies to the FCA's scienter requirement broadly rather than specifically to reckless disregard.¹⁹³ Even so, the availability of deliberate ignorance presents both a challenge to *Hixson* and a possible workaround. Deliberate igno-

191. Often the FCA case itself would make the defendant's erroneous interpretation clear, which would call upon the court to interpret the statute authoritatively. This hypothetical does raise some difficult questions about the relationship between purpose, knowledge, and belief. In the hypothetical above, the defendant has purpose and belief, but its knowledge is belied by the plausibility of its textual interpretation. In other words, there is a question about whether one can know something that is unknowable (based on ambiguous statutory text) by believing it to be the case. See *supra* note 18 (discussing how the defendant can have knowledge of an improper interpretation).

192. See *supra* notes 178–182 and accompanying text (explaining how subjective factors may be viewed as objective ones). One other reason *Hixson* and *Safeco* might not or should not apply to this situation is that the defendant did not *rely* on the reasonable interpretation of the law it purports. Instead, the defendant simply decided to defraud the government, without any consideration of how the law might be interpreted. See *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1272 (D.C. Cir. 2010) (affirming judgment of liability when evidence would permit a factfinder to “discredit” defendant’s claim of belief in reasonable interpretation). As one court has noted: “One can make an objectively reasonable claim he or she subjectively knows to be false. For example, an objectively reasonable interpretation may nevertheless be knowingly false if the speaker is cognizant of facts that undermine the basis for that interpretation.” *United States v. Kellogg Brown & Root Servs., Inc.*, No. 12-cv-4110-SLD-JAG, 2014 U.S. Dist. LEXIS 43000, at *24 (C.D. Ill. Mar. 31, 2014). But at least one court—the Third Circuit—has rejected this theory, holding it was “expressly foreclosed by *Safeco*, which held that evidence of subjective bad faith or intent of the defendant is irrelevant when there is an objectively reasonable interpretation of the statute that would allow the conduct in question.” *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 377 (3d Cir. 2012).

193. The court held that “a statement that a defendant makes based on a reasonable interpretation of a statute cannot support a *claim* under the FCA if there is no authoritative contrary interpretation of that statute . . . because the defendant . . . could not have acted with the *knowledge* that the FCA requires” *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (emphasis added). The use of the terms “claim” and “knowledge” suggest that the court’s holding applies to all three standards of knowledge under the FCA. In addition, the Eighth Circuit later stated that a reasonable interpretation “belies . . . scienter.” *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013).

rance has not been addressed in the false claims context,¹⁹⁴ but legislative history sheds some light on Congress's intent. The "deliberate ignorance" standard was created to "enable[] the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play 'ostrich.'"¹⁹⁵ It addresses the "refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know."¹⁹⁶ But no case has ever expressly relied on deliberate ignorance since the 1986 amendments.¹⁹⁷

Courts typically view deliberate ignorance as lying between reckless disregard and actual knowledge.¹⁹⁸ Other legal contexts seem to support that conclusion.¹⁹⁹ Defendants who exhibit deliberate ignorance are considered less culpable than those with actual knowledge because the former have "knowledge" of only a high *probability* that they have done something wrong, rather than certain, affirmative knowledge.²⁰⁰ But these defendants are more culpable than those acting with reckless

194. See *supra* note 94 (noting the lack of cases relying on deliberate ignorance).

195. H.R. Rep. No. 99-660, pt. 5, at 21 (1986); see also S. Rep. No. 99-345, pt. 2, at 7 (1986) ("[I]n judicial districts observing an 'actual knowledge' standard, the Government is unable to hold responsible those corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates. This 'ostrich-like' conduct which can occur in large corporations poses insurmountable difficulties for civil false claims recoveries."); Boese, *supra* note 25, § 2.06[C][2].

196. S. Rep. No. 99-345, pt. 3, at 14–15.

197. See *supra* note 94 (noting the lack of deliberate-ignorance cases). While it is rarely used in FCA cases given the availability of "reckless disregard," a deliberate-ignorance instruction was employed in *United States v. Cincotta*, 689 F.2d 238, 243 (1st Cir. 1982). See also *Visiting Nurse Ass'n of Brooklyn v. Thompson*, 378 F. Supp. 2d 75, 96 (E.D.N.Y. 2004) (finding defendants had actual knowledge or "at best" acted in deliberate ignorance).

198. See *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 n.15 (11th Cir. 2015) ("[Deliberate ignorance] plainly demands even more culpability than that needed to constitute reckless disregard."); *supra* notes 97–98 and accompanying text (explaining the role of reckless disregard as a statutory floor).

199. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (noting deliberate ignorance requires that "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact").

200. It is worth noting that in the criminal context, deliberate ignorance is typically equated with actual knowledge. See, e.g., Model Penal Code § 2.02(7) (Am. Law Inst. 1985); see also *United States v. Jewell*, 532 F.2d 697, 700–01 (9th Cir. 1976) (adopting the Model Penal Code § 2.02(7) understanding of knowledge and deliberate ignorance); *United States v. Hercules, Inc.*, 929 F. Supp. 1418, 1430 (D. Utah 1996) (noting that federal courts have been "uneven" in their adoption of the "concept of deliberate ignorance"). The Supreme Court has also recently held that deliberate ignorance is a form of knowledge in patent law. *Global-Tech*, 563 U.S. at 768. It is also worth noting that, as a theoretical matter, the difference between deliberate ignorance and actual knowledge is only a difference in degree: "Certain" knowledge is still a matter of probability. But actual knowledge might still be distinguished categorically as a high probability coupled with *belief*. See *supra* note 18 (considering the relationship between knowledge and belief).

disregard because deliberate ignorance requires a specific state of mind: a conscious awareness of the risk that conduct is prohibited.²⁰¹

The placement of the standard of deliberate ignorance between actual knowledge and reckless disregard, and its key differences from those two standards, suggest that the holdings of *Safeco* and *Hixson* are meant to apply to cases alleging *only* reckless disregard.²⁰² As noted above, the FCA's inclusion of two subjective standards—deliberate ignorance and actual knowledge—makes it hard to justify precluding consideration of subjective factors merely because an objective standard is also available.²⁰³

But perhaps *Hixson* is meant to apply only to recklessness given that the case implicated little else.²⁰⁴ *Hixson* was a case with virtually no evidence of subjective bad faith, knowledge, or interpretive guidance to support a claim of deliberate ignorance or actual knowledge.²⁰⁵ Thus, deliberate ignorance and actual knowledge were not at issue for the court, and perhaps the court's holding has little precedential effect beyond reckless disregard.²⁰⁶

On the other hand, *Hixson* may have simply overlooked deliberate ignorance and actual knowledge given that reckless disregard is the only standard that has ever been applied by courts, and thus practically, the only standard that matters.²⁰⁷ Indeed, courts in general have overlooked the availability of deliberate ignorance in the statutory scheme of the

201. See Sylvia, *supra* note 4, § 4:45. In the Model Penal Code, recklessness *does* require an awareness of the risk that conduct is prohibited. Such awareness forms the basis for distinguishing recklessness from negligence. Model Penal Code § 2.02(2)(c) (“A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”).

202. See *supra* note 193 and accompanying text (noting *Hixson* applies beyond recklessness by its own terms and its subsequent judicial interpretation).

203. See *supra* note 187 (describing the relevance of subjective evidence to determinations of deliberate ignorance and actual knowledge and discussing the “specific intent” standard).

204. *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 657 F. Supp. 2d 1039, 1057 n.14 (S.D. Iowa 2009) (finding the only evidence of bad faith was the defendants' ordinary self-interest), *aff'd*, 613 F.3d 1186 (8th Cir. 2010).

205. *Id.* at 1057.

206. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–27 (1935) (noting that statements by a court “beyond the point involved” or “beyond the case” do not have precedential effect).

207. See *supra* notes 94–97 and accompanying text (finding reckless disregard was the only standard courts applied).

FCA. There are several likely explanations for this,²⁰⁸ but there are also many reasons deliberate ignorance deserves more traction.²⁰⁹

One likely reason courts have not used deliberate ignorance is that, under common law, deliberate ignorance is carefully circumscribed. But deliberate ignorance in the FCA may not come with the limitations of deliberate ignorance in the common law. At common law, deliberate ignorance was a proxy for actual knowledge²¹⁰ that was developed initially in *criminal* prosecutions.²¹¹ Therefore, courts were much more hesitant about using it for fear of substituting a negligence-type standard in place of a more demanding actual-knowledge standard, and they added limitations to deliberate ignorance for this reason.²¹² Most significantly, courts required that deliberate ignorance involve some specific, affirmative action by the defendant to avoid confirming its suspicion that it was breaking the law.²¹³

But deliberate ignorance under the FCA is *not* a proxy for actual knowledge: It is an independent basis for establishing liability.²¹⁴ And unlike common law deliberate ignorance, it was developed in a *civil* law context where the stakes for the defendant are much lower and the burden of proof facing the government much lighter.²¹⁵ This, coupled

208. The most likely reason is that reckless disregard has been available as the easiest standard to satisfy. *Supra* notes 94–98 and accompanying text.

209. Each of the following paragraphs necessarily speculates as to why courts may have been reluctant to use deliberate ignorance as a basis for establishing scienter given that courts have not used the standard. See *supra* notes 97–98 and accompanying text (explaining the role of reckless disregard as a floor for establishing knowledge). Thus, the following paragraphs attempt to undermine possible objections a court could raise in the event *Hixson* foreclosed recklessness liability.

210. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (“The traditional rationale for . . . [deliberate ignorance] is that defendants who behave in this manner are just as culpable as those who have actual knowledge.”); *United States v. Jewell*, 532 F.2d 697, 707 (9th Cir. 1976) (finding that the relevant substantive law required actual knowledge for the purposes of establishing scienter).

211. See *Global-Tech*, 563 U.S. at 766 (addressing first the issue of whether the doctrine of willful blindness even applies to the civil context and noting “[t]he doctrine of willful blindness is well established in criminal law”); Boese, *supra* note 25, § 2.06 (“Although there is little case law in civil FCA cases regarding the meaning of ‘deliberate ignorance,’ the test for it has been addressed by courts in the criminal law context . . .”).

212. See Boese, *supra* note 25, § 2.06(C)(2) (citing *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1988)).

213. See, e.g., *Global-Tech*, 563 U.S. at 769, 771 (noting deliberate ignorance requires “deliberate actions” or “deliberate steps”).

214. 31 U.S.C. § 3729(b)(1)(A)(ii) (2012).

215. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (finding that the FCA is a civil statute); see also *In re Winship*, 397 U.S. 358, 372 (1970) (noting the reasons for applying different standards to civil and criminal suits). Under the FCA, liability must be proved by a preponderance of evidence, not beyond a reasonable doubt. See *United States ex rel. Asher v. Momen Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 714 (7th Cir. 2014) (“[U]nder the FCA, the plaintiff must prove all essential elements of the

with the fact that reckless disregard—an even looser form of scienter²¹⁶—is available for establishing knowledge, makes common law concerns moot and common law limitations unnecessary.²¹⁷

Common law deliberate ignorance had also not been fully developed when the 1986 amendments were passed, and the legislative history makes no indication that it drew its understanding of the term from any case law.²¹⁸ Indeed, the legislative history adopts an understanding of deliberate ignorance that is inconsistent with the common law. The legislative history defines both deliberate ignorance and reckless disregard as forms of constructive knowledge that apply to “persons who ignore ‘red flags’ that the information may not be accurate” *without* any mention of common law concerns or limitations.²¹⁹

But even if courts decide that the common law understanding of deliberate ignorance is intended to apply to the FCA, these courts could recognize that the FCA imposes a “duty to inquire” that satisfies or eliminates the need for the most significant common law limitations.²²⁰ Particularly, this “duty to inquire” may either supply the affirmative action required to satisfy the existing deliberate-ignorance standard defined in the common law²²¹ or justify expanding deliberate ignorance in the FCA context where this duty is always present.

cause of action, including damages, by a preponderance of the evidence.” (quoting 31 U.S.C. § 3731(d)).

216. See *supra* notes 97–98 and accompanying text (explaining the role of reckless disregard as a floor for establishing knowledge).

217. This is because, under the FCA, deliberate ignorance is not being used as a proxy for actual knowledge. See *supra* notes 211–214 and accompanying text (explaining the significance of deliberate ignorance being used as a proxy for actual knowledge in the criminal context and how deliberate ignorance in the FCA is different).

218. The legislative history cites no cases on the meaning of deliberate ignorance and makes no mention of any of the limitations placed on deliberate ignorance in other contexts. See *supra* notes 211–215 and accompanying text (outlining basic limitations); see, e.g., H.R. Rep. No. 99-660, pt. 5, at 20–21 (1986) (stating that deliberate ignorance is intended for those who merely ignore red flags). Analogy might be made to *Safeco*, where the Court looked to the common law only in the absence of congressional indication to the contrary. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 51 (2007); see also Owens, *supra* note 131, at 61 (“Unlike the FCRA at issue in *Safeco*, Congress intended to give recklessness a different meaning under the FCA than its common law meaning.”). If Congress indicated that deliberate ignorance was meant to lie between reckless disregard and actual knowledge, courts should not treat it as merely a proxy for actual knowledge under the common law.

219. H. R. Rep. No. 99-660, pt. 5, at 20–21.

220. See *supra* notes 88–93 and accompanying text (explaining the duty to inquire).

221. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (noting deliberate ignorance requires “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take *deliberate actions* to avoid learning of that fact” (emphasis added)).

C. *Observations*

For the reasons stated above, one possible reading of the FCA is as follows: Reckless disregard is still, as courts have commonly held, the easiest standard to satisfy,²²² but adopting the reasoning of the Supreme Court in *Safeco* and the Eighth Circuit in *Hixson*, it is entirely objective.²²³ Courts may consider the totality of circumstances—including red flags and other warnings—but may not inquire into the defendant’s state of mind *for the purpose of finding recklessness*.²²⁴ Deliberate ignorance, then, would be a subjective counterpart to reckless disregard, available when objective factors are insufficient to find recklessness but evidence of subjective knowledge is available to “fill the gap” to establish scienter.²²⁵

Both standards would overlap, but each would have independent applicability. Consider, for instance, how each standard might weigh red flags. For reckless disregard, red flags would warrant liability if they were sufficient (in conjunction with other facts) to warn an objectively reasonable person away from an incorrect interpretation, such that it would be grossly negligent to adopt it.²²⁶ For deliberate ignorance, the same red flags would be either irrelevant, if the defendant was unaware of them, or relevant if the defendant was aware of them—but only based on the *defendant’s* perspective, rather than that of an objectively reasonable person. Thus, red flags that might not be sufficient to warn away an objectively reasonable person might nevertheless establish scienter if the defendant believed its interpretation was incorrect on the basis of those red flags and adopted that interpretation nonetheless.

This reading of the statute is logically more consistent insofar as it distinguishes reckless disregard and deliberate ignorance without rendering either standard superfluous.²²⁷ Furthermore, it partially reconciles the divide between *Hixson*, *Safeco*, and courts using the totality of the circumstances test because it adopts *Safeco-Hixson’s* interpretation of reckless disregard as a purely objective inquiry, while still allowing courts

222. See *supra* notes 94–98 and accompanying text (explaining this relatively easy standard).

223. See *supra* section II.A–.B.

224. See *supra* notes 178–182 and accompanying text (explaining how red flags and other guidance might be reframed as an objective inquiry).

225. An example of this is intent to defraud. See *supra* notes 15–19 (considering a hypothetical).

226. *Safeco* articulated this type of test. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007) (noting statutory interpretation must be so “objectively unreasonable” as to create “a risk of violating the law substantially greater than the risk associated” with merely negligent reading).

227. See *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” (internal quotation marks omitted) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988))).

to consider the totality of the circumstances through a *combination* of reckless disregard and deliberate ignorance.²²⁸ Finally, this reading may be justified as refining the scienter inquiry by considering each relevant factor under two different standards. Intuitively, how a court should *weigh* certain factors depends on whether the defendant knew about them. To continue with the example of red flags, an objective recklessness test should require red flags to do more “work” if the defendant is unaware of them: The red flags should be so serious that the defendant should have known about them and should have avoided the erroneous interpretation those red flags warned against. In comparison, under a subjective deliberate ignorance test, once the defendant *is* aware of red flags, the red flags do not have to do the same amount of work: The defendant *has been warned*, and the question for the court is then how seriously the defendant ignored that warning.²²⁹

A reading of the statute that codifies this weighing process through separate objective and subjective standards might be sensible, but it might also be unnecessarily complicated. Indeed, this reading suggests that the courts before *Hixson*, at least in the FCA context, had been right all along: Courts should simply consider the totality of circumstances—including the defendant’s state of mind—in determining whether the defendant had the requisite scienter.²³⁰ A reading that separates reckless disregard from deliberate ignorance on an objective–subjective line is no different in substance to what courts already did through a broad, recklessness standard. Those courts used common sense to implicitly weigh factors in light of *all* circumstances at the same time without spilling the ink required to weigh each factor twice: once ignoring the defendant’s state of mind and once considering it.²³¹ Thus, whether one prefers the two-tiered reading—where reckless disregard and deliberate ignorance are separated—to the collapsed, single-tiered reading—where reckless disregard is interpreted broadly—may be a matter of form only. Even so, it is important to recognize that the two-tiered reading may be available when *Hixson* narrows the scope of reckless disregard, and perhaps more fundamentally, it may be the very reason *Hixson* should be rejected:

228. See *supra* note 222–226 and accompanying text (explaining this reconciliation).

229. Using two standards might be especially important when two cases involve the same conduct, are based on the same erroneous interpretation, but involve two defendants: one who was aware of warnings and one who was not. If a court applied the same standard to both, without a mechanism for distinguishing the one with knowledge, one case might come out incorrectly.

230. See *supra* notes 102–112 and accompanying text (explaining the totality of the circumstances analysis employed by courts).

231. See *supra* note 183 and accompanying text (considering how the objective standard includes some subjective factors as relevant to assessing the defendant’s situation).

Narrowing reckless disregard fails to consider the entire statutory scheme and its express inclusion of subjective factors.²³²

CONCLUSION

The strongest policy justification in favor of the *Safeco-Hixson* interpretation of reckless disregard is that as a rule, it categorically protects defendants who rely in good faith on reasonable interpretations of statutes at an early stage in the litigation. As the government stated in its brief in *Safeco*:

Resolving the objective recklessness of the defendant's non-compliance with the law at the outset will (i) help to develop the contours of [the] law, thereby providing prospective guidance concerning the law's requirements and reducing violations; (ii) "permit the resolution of many insubstantial claims on summary judgment;" and (iii) minimize the significant intrusions on attorney-client privilege that often attend inquiries into subjective good faith compliance with the law.²³³

These policy justifications, however, do not justify closing the door to potentially meritorious claims. First, the objectively reasonable test of *Hixson* does not necessarily "develop the contours of [the] law."²³⁴ For instance, in *Hixson* itself, the court chose not to reach the issue of whether the defendant's interpretation of its statutory obligation was correct precisely because the court held that a reasonable interpretation precluded the necessity of that inquiry.²³⁵ Thus, other actors were free to adopt the same advantageous interpretation, at the continuing expense of the government, without concerns of FCA liability, even though that interpretation may have been wrong. Second, many, if not most, claims involving reasonable interpretations of the law will be dismissed on summary judgment based on the traditional totality of the circumstances test.²³⁶ Third, while there may be concerns about intruding on attorney-

232. One may reasonably argue, however, that *Hixson* and *Safeco* are incurably wrong for excluding consideration of subjective factors under nearly any legal regime given that objective culpability standards are designed to ease the burden of proof, not change the type of evidence that may be relevant. See *supra* notes 183–187 and accompanying text (explaining the hierarchy of culpable states of mind). The FCA is simply more explicit in recognizing that more culpable states of mind are always enough to satisfy scienter.

233. Brief for the United States as Amicus Curiae in Support of Vacatur in No. 06-84 and Reversal in No. 06-100 at 23–24, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3336481 (citations omitted).

234. *Id.*

235. *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (“[W]e need not decide whether the defendants correctly interpreted . . . [the statute] since a statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA . . .”).

236. See *supra* notes 25–27 (considering the net effect of the *Hixson* test); *supra* notes 102–112 and accompanying text (explaining the totality of the circumstances analysis).

client privilege, courts typically infer scienter without engaging in such intrusions.²³⁷ Thus, for these reasons, and the reasons outlined above, *Hixson's* reasonableness test should be rejected and the traditional test, considering the totality of the circumstances, maintained.

employed by courts). Of course, any time the interpretive issue is resolved in favor of the defendant, the claim fails under falsity. See *United States ex rel. Chilcott v. KBR, Inc.*, No. 09-cv-4018, 2013 WL 5781660, at *6 (C.D. Ill. Oct. 25, 2013) (noting reasonableness is relevant to the question of scienter and falsity and that the court should answer the falsity question first); *supra* notes 55–65 (discussing the relationship of scienter and falsity).

237. For instance, in most pre-1986 cases in circuits where *specific intent* was required, courts found such intent without resorting to privileged information. See, e.g., *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1008 (5th Cir. 1972) (finding FCA liability for intent to deceive without intrusion on attorney-client privilege); *Fleming v. United States*, 336 F.2d 475, 479 (10th Cir. 1964) (same).

