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UNDERSTANDING THE REVISED REVERSE FALSE CLAIMS PROVISION OF THE FALSE CLAIMS ACT AND WHY NO PROOF OF A FALSE CLAIM IS REQUIRED

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Abstract

Ten percent of all spending by the federal government is lost due to fraud. As a result, in 1986, Congress began a course of strengthening the False Claims Act ("FCA") in order to wage war on fraud committed against the government. However, certain loopholes existed that allowed companies to retain government funds they knew they were not entitled to keep because they still did not fall within one of the FCA's liability provisions. Although

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the FCA contained a so-called "reverse false claim" provision to require the repayment of wrongfully retained government funds, it fell short in reaching all instances of fraudulently retained funds because it still mandated proof of the use of false statements or records to retain the funds. In 2009, Congress sought to close this loophole by adding a new provision that did away entirely with the use of any false claim, record, or statement. This amendment was designed to be a game-changer because its purpose was to ensure that all fraudulent schemes are covered by the FCA.

This Article analyzes the effectiveness of this amendment by conducting a systematic and comprehensive analysis of its treatment by the United States Circuit Courts of Appeals that have addressed it so far. Next, this Article identifies inconsistencies and areas where there is a strong need for a uniform framework in order to ensure that the government's most important anti-fraud tool is given its full and proper meaning. In addition, this Article tackles the hot button topic of statistical sampling and explains why it is permitted under this amendment. This Article also ties everything together by providing an example of applying the revised provision to a common Medicare fraud scheme. Finally, this Article includes a section restating the entire practice and procedure for the revised reverse false claims provision in order to guide the courts and practitioners in applying it.

I. INTRODUCTION

Ten percent of all government spending is lost due to fraud.[1] As a result, in 1986, Congress began a course of strengthening the False Claims Act ("FCA") to wage war on fraud against the government.[2] Although the Supreme Court proclaimed that the FCA is intended "to reach all types of fraud, without qualification, that might result in financial loss to the Government,"[3] courts also recognized that the plaintiff must allege and prove a specific violation of the FCA (instead of simply alleging a fraudulent scheme).[4] Because each of the liability provisions included in the

1. Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments*, 51 U. RICH. L. REV. 991 (2017) ("As much as 10 percent of every dollar spent on government programs is lost to fraud."). *Accord* William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care,* 99 COLUM. L. REV. 1701, 1829 (1999) ("The General Accounting Office estimated in 1992 that Medicare fraud represented nearly ten percent of program expenditures." (citing U.S. GENERAL ACCOUNTING OFFICE, HEALTH INSURANCE: VULNERABLE PAYERS LOSE BILLIONS TO FRAUD AND ABUSE 1 (1992))).

2. The False Claims Act (FCA), 31 U.S.C. §§ 3729-33 (2018), is the government's most important anti-fraud tool. Avco Corp. v. U.S. Dep't of Justice, 884 F.2d 621, 622 (D.C. Cir. 1989).

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

4. United States. *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220,

1986 modernized version of the FCA required some form of the presentment or use of a *false claim, record or statement*,[5] judges started pronouncing that "an actual false claim is the *sine qua non* of an FCA violation."[6] Thus, courts were reluctant to allow the government to use this powerful tool in every instance of fraud; instead, they required the government to tie fraudulently-obtained funds to specific false claims or records.[7] Therefore, from 1986 through 2009, certain loopholes existed whereby companies could retain government funds they were not entitled to keep because they did not fall within one of the FCA's liability provisions.[8]

In 2009, Congress closed a major loophole by introducing the first liability provision that no longer required proof of any type of a false claim, record, or statement.[9] Thus, the adage that a false claim is the *sine qua non* of an FCA violation is no longer true, at least with respect to the 2009 version of the so-called reverse false claim provision. Today, the 2009 version of § 3729(a)(1)(G) reaches every kind of fraud scheme, provided that the plaintiff can establish the defendant knows it is retaining government funds it is not entitled to keep *regardless* of how it *obtained* them. Now, any fraudulent scheme resulting in a company knowingly *retaining* funds is covered by the FCA, and there is no need to tie the funds to any initial claim for payment or the use of any false record or statement to retain them. Thus, the government can use its most powerful anti-fraud tool (the FCA) to recoup federal funds lost to any fraudulent scheme resulting in a person retaining government funds. Examples of this include seeking treble damages and relying

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225 (1st Cir. 2004) ("Not all fraudulent conduct gives rise to liability under the FCA. '[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.' Evidence of an actual false claim is 'the *sine qua non* of a False Claims Act violation.'" (citation omitted)). Such cases were based on the 1986 version of the FCA.

5. *Id.*

6. Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1055 (9th Cir. 2011).

7. United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2004) ("Therefore, a defendant violates the FCA only when he or she has presented to the government a false or fraudulent claim, defined as 'any request or demand . . . for money or property' where the government provides or will reimburse any part of the money or property requested. 31 U.S.C. § 3729(c); *see also* [*Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785(4th Cir. 1999)] ('The False Claims Act at least requires the presence of a claim—a call upon the government fisc—for liability to attach.').").

8. *Id.*

9. 31 U.S.C. § 3729(a)(1)(G). Kane *ex rel.* United States v. Healthfirst, Inc., 120 F. Supp. 3d 370, 380 (S.D.N.Y. 2015) ("Prior to the 2009 amendments, the reverse false claims provision left a 'loophole' that excused from liability the concealment, avoidance, or decreasing of an obligation to return to the Government 'money or property that is knowingly retained by a person even though they have no right to it.' S. Rep. 111–10, 13–14, 2009 U.S.C.C.A.N. 430, 441.").

upon statistical sampling.[10]

This Article addresses each of the legal and procedural principles applicable to the 2009 amendment to § 3729(a)(1)(G), often addressed as either "the reverse false claim provision" or "Subsection G." Section I introduces the issues. Section II outlines the pertinent FCA provisions. Section III addresses the meaning of the 2009 version of Subsection G, including why it does not require proof of any false claim, record, or statement, and why it reaches all types of fraud schemes whenever the plaintiff can show that the defendant knows it is not entitled to retain the government funds. It also includes a discussion and analysis of each of the United States Circuit Courts of Appeals ("Circuit Courts") that have addressed this provision. Section IV argues why statistical sampling can be used to prove both liability and the amount of damages. Section V contains a common example of Medicare overpayment and applies the 2009 version of Subsection G to this situation. Section VI restates the practices and procedures of Subsection G to guide the courts and practitioners. Section VII consists of the conclusion.

II. THE FALSE CLAIMS ACT

The False Claims Act was enacted by President Abraham Lincoln in 1863 to combat rampant fraud against the military during the Civil War.[11] "Overnight, the *qui tam*[12] provisions of the FCA became the government's best weapon for combating fraud against the government."[13] Unfortunately, in 1943, Congress tinkered with the FCA in the wrong direction, to the point where the FCA became seldom used and sat idle for four decades.[14] In 1986, due to rising fraud, Congress revitalized and modernized the FCA; as a result, once again it became the government's most

10. *See infra* Sections V(B)(providing an example of obtaining treble damages under the FCA for Medicare fraud), IV (discussing the need for sampling and why it is permitted under the FCA).

11. S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. "The False Claims Act of 1863 was adopted during the Civil War in order to combat fraud and price-gouging in war procurement contracts." United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994). The FCA is codified at 31 U.S.C. §§ 3729-33.

12. The FCA permits a private individual to bring an action on behalf of the federal government and share in the recovery. 31 U.S.C. § 3730(b)(1).

13. Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Act*, 38 SEATTLE U. L. REV. 901, 904 (2015).

14. *Id.* ("One of the biggest mistakes occurred in 1943 when Congress limited the filing of *qui tam* suits if they were 'based upon information in the possession of the government.' Because this restricted the availability of recoveries, the number of *qui tam* suits dried up immediately and fraud against the government flourished. In fact, from 1943 until 1986, there were only six *qui tam* suits brought per year.").

important anti-fraud tool.[15] The four most commonly used FCA liability provisions contained in the 1986 version of the FCA that render a person liable are as follows:[16]

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
>
> (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or
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> *****
>
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, ...[17]

Subsection G was first added to the FCA in 1986.[18] It became known by the courts as a *reverse false claim* because liability is based upon an obligation to return government funds.[19] At the time of enactment, each of these provisions required both knowledge and some form of a false claim, record, or statement.[20] The FCA defines "knowing" as follows:

> (1) the terms 'knowing' and 'knowingly'—
>
> (A) mean that a person, with respect to information—
>
> (i) has actual knowledge of the information;
>
> (ii) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (iii) acts in reckless disregard of the truth or falsity of the information;

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15. *Avco,* 884 F.2d at 622 ("The False Claims Act is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government.").

16. *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:1 (3rd ed. 2016) (discussing that only four of the provisions are regularly used). Subsection G was first added in 2009. *Id.*

17. 31 U.S.C. §§ 3729(a)(1)(A)-(G) (1986). If there is a violation, the FCA provides that such person "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Pub. L. No. 104-410 (codified at 28 U.S.C. 2461 note), plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* When the FCA was amended in 2009, the liability sections were renumbered from (a)(1)-(7) to (a)(1)(A)-(G).

18. SYLVIA, *supra* note 16. Subsection G was first added in 2009. *Id. See also supra* note 17 (describing the statute's renumbering).

19. The so-called "reverse false claims" got its name because "[t]hese claims reverse the typical claim under the Act: instead of creating liability for wrongfully obtaining money from the government, the reverse-false-claims provision creates liability for wrongfully avoiding payments that should have been made to the government." United States *ex rel.* Barrick v. Parker-Migliorini Int'l, LLC, 878 F.3d 1224, 1226 (10th Cir. 2017).

20. *See infra* notes 25-26.

and

(B) require no proof of specific intent to defraud.[21]

The FCA was amended in 2009 as part of an effort to broaden its reach and close certain loopholes. One significant change was the inclusion of a new liability provision tucked into Subsection G. This amendment created a separate way of establishing liability, whenever a person "knowingly conceals or knowingly and improperly avoids or decreases an *obligation* to pay or transmit money or property to the Government."[22] Congress included a definition of the term obligation in the 2009 amendment as follows:

> For purposes of this section— . . . the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment[.][23]

The 2010 Affordable Care Act ("ACA") also stated that a violation of the Medicare repayment provision—requiring repayment of Medicare overpayments within sixty days—constitutes an "obligation" under the FCA.[24]

The next section fully explores the meaning and application of the 2009 version of § 3729(a)(1)(G).

III. UNDERSTANDING § 3729(A)(1)(G)

Section § 3729(a)(1)(G) is unique and has a far different approach and reach than the other FCA liability sections. In 1986, Congress first included the so-called "reverse false claim" provision in Subsection G.[25] In its initial form, it allowed the government to collect treble damages if a person used a false record or statement material to an obligation to pay the government.[26] Because of this understanding, courts ruled that the 1986 version of the reverse false claim provision required the submission of a false claim.[27] This meant that all of the liability provisions included in the 1986 version of the FCA were tied to a false claim, record, or statement, and this interpretation gave rise to general statements such as "an

21. 31 U.S.C. §§ 3729(b)(1)(A)-(B).

22. *Id*. § 3729(a)(1)(G) (2009) (emphasis added).

23. *Id.* § 3729(b)(3) (2009) (adding a definition of the term obligation).

24. 42 U.S.C. § 1320a-7k(d)(2) (2018). The ACA also defined the term overpayment for purposes of recovery under that statute, as follows: "The term 'overpayment' means any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter." 42 U.S.C. § 1320a-7k(d)(4)(B) (2018).

25. *E.g., Kane*, 120 F. Supp. 3d at 379-80 (discussing history of the FCA and ACA).

26. *Id.*

27. *Supra* notes 4-7.

actual false claim is the *sine qua non* of an FCA violation."[28] Therefore, the 1986 version of the FCA left a loophole with respect to FCA liability. The FCA seemingly missed extending liability to cover the concealment of an obligation to return funds to the government when no false claim, record, or statement could otherwise be established.[29] For instance, a company may not have been aware at the time that it was not entitled to government funds. Thus, the *knowing* element may be missing; however, later the company may realize that it should not have obtained the funds. In those settings, the company's retention of funds may not technically fall within any of the 1986 FCA liability provisions, despite the company knowing that it was not entitled to keep the funds.[30]

In 2009, Congress closed this loophole in order to permit the FCA to be a tool in recovering all funds that are knowingly retained by the defendant.[31] When Congress passed the Fraud Enforcement and Recovery Act ("FERA"), it added a new liability provision to Subsection G of the FCA.[32] This new provision extends FCA liability to the concealment of obligations to return funds without the need to prove a false claim to obtain the funds or the use of a false record to retain them.[33] The 2009 amendment imposes liability if a person "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the [g]overnment."[34]

As of 2009, there are now two separate liability provisions within § 3729(a)(1)(G). Each provision requires its own analysis. The first liability provision within § 3729(a)(1)(G), added in 1986, renders a person liable if she "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government."[35] Thus, this provision requires a false record or statement, much like the requirements of § 3729(a)(1)(B). The second liability provision within § 3729(a)(1)(G), added in 2009, specifically did away with the tying of a violation to any false claim, record, or statement to obtain or retain the funds. As more fully

28. *Cafasso*, 637 F.3d at 1055.

29. *Kane,* 120 F. Supp. 3d at, 379-80.

30. SYLVIA, *supra* note 16, § 4:16 ("The new language was intended to express the Committee's view that since 1986, the term obligation has included a range of obligations, from fixed obligations to pay to situations where the relationship between the Government and the person gives rise to a duty to pay, regardless of whether the amount is fixed."). That does not mean it can keep the funds, but simply that the FCA may not be the vehicle to require repayment. The government may still recoup the funds but not seek treble damages under the FCA.

31. *See supra* notes 9 and 30.

32. *See infra* note 43.

33. *See infra* Section III(A).

34. § 3729(a)(1)(G)(1986).

35. § 3729(a)(1)(G)(2009).

addressed below, merely knowingly retaining funds gives rise to FCA liability under the 2009 amendment. There is no added requirement of tying guilty knowledge to a false claim, record, or statement.

A. The 2009 Amendment Removed any False Claim Requirement

In conjunction with the full FCA, the 2009 version of § 3729(a)(1)(G) reads:

> any person who . . . knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.[36]
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> *****
>
> For purposes of this section—. . . the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment[.][37]

Just one year later, Subsection G was referred to and modified by another statute enacted by Congress in the area of Medicare fraud. In 2010, Congress passed the Affordable Care Act ("ACA"),[38] which requires a person who has received an overpayment of Medicare or Medicaid to report and return the overpayment within sixty days.[39] The pertinent portion of the ACA reads:

> If a person has received an overpayment, the person shall—
>
> (A) report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and
>
> (B) notify the Secretary, State, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment.
>
> (2) Deadline for reporting and returning overpayments
>
> An overpayment must be reported and returned under paragraph (1) by the later of—
>
> (A) the date which is 60 days after the date on which the overpayment was identified; or

36. *Id.* (emphasis added).
37. *Id.* § 3729(b)(3)(2009).
38. *See infra* note 43.
39. 42 U.S.C. § 1320a-7k(d)(2) (2020).

(B) the date any corresponding cost report is due, if applicable.[40]

In short, Congress enacted a law that created a duty for those receiving an overpayment of Medicare or Medicaid to report and return the overpayment within sixty days. Thus, the government could recoup overpayments. Moreover, the ACA specifically stated that this duty also constitutes an "obligation" under the 2009 version of § 3729(a)(1)(G).[41] This allows FCA liability to attach if FCA knowledge is proven. The ACA specifically provides:

> Any overpayment retained by a person after the deadline for reporting and returning the overpayment under paragraph (2) is an obligation (as defined in section 3729(b)(3) of Title 31) for purposes of section 3729 of such title.[42]

Thus, as of at least May 22, 2010,[43] the ACA and FCA work in tandem to create a duty to repay Medicare overpayments within sixty days and ensure that FCA liability exists for knowingly retaining overpayments without needing to establish that the defendant submitted a false claim or used a false record or statement.[44] It is sufficient for a FCA violation that the person knowingly retained Medicare or Medicaid funds once he or she knew that he or she had an obligation to return them.[45]

B. The Circuit Courts of Appeals' Treatment of § 3729(a)(1)(G)

This section discusses the Circuit Courts' treatment of the 2009

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40. *See supra* note 24.

41. 42 U.S.C. § 1320a-7k(d)(3) (2020).

42. *Id.* The ACA also defined the term overpayment for purposes of recovery under that statute, as follows: "The term 'overpayment' means any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter." *Id.* § 1320a-7k(d)(4)(B) (2020).

43. *See* U.S. v. San Bernardino Mountains Cmty. Hosp. Dist., No. EDCV 17-00002 JGB (KKx), 2018 WL 5266866, at *8 (C.D. Cal. 2018) ("Section 3729 was amended on May 20, 2009 by the Fraud Enforcement and Recovery Act ('FERA') of 2009. However, the 60-day deadline for reporting and returning overpayments went into effect on March 23, 2010 under the Patient Protection and Affordable Care Act of 2009 ('PPACA')."). Accordingly, the ACA applies to "alleged misconduct prior to May 22, 2010 as grounds for his reverse false claim." *Id.*

44. Joel D. Hesch & Mia Yugo, *Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?*, 41 AM. J. TRIAL ADVOC. 335, 363–64 (2017). As far as timing goes, "Section 3729 was amended on May 20, 2009 by the Fraud Enforcement and Recovery Act ("FERA") of 2009. However, the 60-day deadline for reporting and returning overpayments went into effect on March 23, 2010 under the Patient Protection and Affordable Care Act of 2009 ('PPACA')." *San Bernardino*, 2018 WL 5266866 at *8. Accordingly, the ACA applies to "alleged misconduct prior to May 22, 2010 as grounds for his reverse false claim." *Id.*

45. *See supra* notes 9 and 30 and surrounding text.

version of § 3729(a)(1)(G). Before jumping into the Circuit Courts cases, however, a 2015 United States District Court for the Southern District of New York case is instructive.[46] In *Kane ex rel. United States. v. Healthfirst, Inc.*, the defendant discovered a computer glitch that made it clear that it had overbilled Medicare.[47] The discovery of this glitch occurred long after the defendant submitted claims for reimbursement under Medicare.[48] At the time of the payment requests, however, the defendant did not possess the requisite scienter to establish a FCA claim under § 3729(a)(1)(A) or (B).[49] The ACA required that, once the defendant discovered the overpayment, it return the funds within sixty days.[50] After conducting an exhaustive analysis of the 2009 FCA and 2010 ACA, the court held that once the defendant learned of the computer glitch, it had an obligation to return the funds under both the ACA and the FCA.[51] There was no need for the plaintiff to allege a false claim or false record or statement to satisfy the 2009 version of § 3729(a)(1)(G).[52] Thus, although the defendant may not have had the requisite intent to violate § 3729(a)(1)(A) or (B) at the time it submitted claims for payment, it would be liable under § 3729(a)(1)(G) for knowingly retaining funds it was obligated to return.[53] This is because, under the 2009 FCA and the 2010 ACA, once the defendant knew it was not entitled to keep the funds, it was obligated to return them.

Several Circuit Courts have addressed the 2009 version of § 3729(a)(1)(G). As discussed below, those courts that have conducted a detailed analysis of § 3729(a)(1)(G) have concluded that it contains two separate liability provisions, and the provision added in 2009 does not require the submission of a false claim, record, or statement. Unfortunately, in a case without much discussion or analysis, the United States Circuit Court of Appeals for the Ninth Circuit ("Ninth Circuit") simply lumped together both of the 1986 and 2009 liability provisions within § 3729(a)(1)(G) and held that Subsection G requires a false claim, record, or statement.[54] The court failed to conduct a detailed analysis of the

46. *Kane*, 120 F. Supp. 3d at 370 (S.D.N.Y. 2015).

47. *Id.*

48. *Id.* at 377-78.

49. *Id.* at 390

50. *Id.* at 381 ("More simply stated, the ACA provides that any person who has received an overpayment from Medicare or Medicaid and knowingly fails to report and return it within sixty days after the date on which it was identified has violated the FCA.").

51. *Id.* at 388 ("Here, after the Comptroller alerted Defendants to the software glitch and approached them with specific wrongful claims, and after Kane put Defendants on notice of a set of claims likely to contain numerous overpayments, Defendants had an established duty to report and return wrongly collected money.").

52. *Id.* at 377-78

53. *Id.*

54. United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325, 333 (9th Cir.

2009 amendment, which clearly eliminated the requirement of establishing a false claim, record, or statement.[55] This created confusion within the Ninth Circuit as to whether the alternative provision within the 2009 amendment somehow requires a false claim, record, or statement simply because the alternative 1986 provision still requires a false claim, record, or statement.[56]

In 2016, the United States Circuit Court of Appeals for the Sixth Circuit ("Sixth Circuit") faced the issue of whether the 2009 version of § 3729(a)(1)(G) requires a false claim.[57] The court undertook a detailed analysis of the 2009 FCA amendment and held that the new provision does not require a false claim or any proof of a false record or statement.[58] The court described it this way:

> In 2009, Congress passed the Fraud Enforcement and Recovery Act ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009), which omitted the requirement that a defendant "mak[e], us[e], or caus[e] to be made or used, a false record or statement" from the relevant part of the reverse-false-claim provision. Under the current version of the FCA, anyone who "knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government" is civilly liable.[59]

The same court in another case also stated: "An obligation includes 'the retention of any overpayment,' 31 U.S.C. § 3729(b)(3), and the current version of the statute makes clear that 'there is no longer a need to show the affirmative use of a false record or statement in connection to the avoidance of an obligation to pay money to the United States,' . . . so the knowing retention of an overpayment is enough."[60]

2017) (quoting simply older cases, including *Cafasso*, and applying the prior version of the statute that required an actual false claim, without discussion or acknowledgement of the 2009 amendments). This case is discussed in detail *infra* notes 62-64, 66-72, and accompanying text.

55. *Id.* at 335–36

56. *Id*. This case is discussed in detail infra notes 62-64, 66-72 and accompanying text.

57. United States *ex rel.* Harper v. Muskingum Watershed Conservancy Dist. (*Harper I*), 842 F.3d 430, 436 (6th Cir. 2016) (quoting Fraud Enforcement and Recovery Act, 31 U.S.C. § 3729(a)(1)(G) (2012)). In 2018, the court revisited the case in United States *ex rel.* Harper v. Muskingum Watershed Conservancy Dist. (*Harper II*), 739 F. App'x 330, 333 (6th Cir. 2018) (reiterating that the 2009 version of the "reverse-false-claim provision of the FCA subjects to liability any person who 'knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.'"), *cert. denied,* 139 S. Ct. 798, 202 L. Ed. 2d 572 (2019). In *Harper II*, the Ninth Circuit also reiterated that "knowing" under this provision, "must be interpreted to refer to a defendant's awareness of both an obligation to the United States and his violation of that obligation" and that the relator failed to allege the defendants had requisite knowledge that its leases violated the deed restrictions. *Id.*

58. *Harper I*, 842 F.3d at 436.

59. *Id.*

60. United States *ex rel.* Prather v. Brookdale Senior Living Cmtys., Inc.,

Other Circuit Courts agreed. In 2016, three other Circuit Courts reached similar conclusions. The United States Circuit Court of Appeals for the Fifth Circuit held that the 2009 provision simply requires that the person "knowingly and improperly avoids an obligation to pay the United States."[61] The United States Circuit Court of Appeals for the Third Circuit similarly stated, "[t]he plain text of the [2009] FCA's reverse claims provision is clear: any individual who 'knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government' may be subject to liability."[62] The United States Circuit Court of Appeals for the Eighth Circuit also acknowledged that there is no claim requirement and stated that "subsection (a)(1)(G) at issue prohibits persons from knowingly concealing an obligation to pay money to the government."[63]

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838 F.3d 750, 774 (6th Cir. 2016). *Cf.* United States *ex rel.* Crockett v. Complete Fitness Rehab., Inc., 721 F. App'x 451, 459 (6th Cir. 2018) ("In a reverse-false-claims case, a relator must show 'an obligation to pay or transmit money or property to the Government' that is 'avoid[ed] or decrease[d]' through 'a false record or statement.' 31 U.S.C. § 3729(a)(1)(G)."). The *Crockett* court focused its attention to the lack of any factual specificity in finding that the entire complaint should be dismissed under Rule 9(b). *Id.* Thus, courts should not treat this case as replacing the specific ruling in *Harper II* that the 2009 FCA did away with any requirement of proving a false claim, record, or statement under the 2009 version of Subsection G. Indeed, the *Crockett* court did not even cite *Harper II* in its decision.

61. United States *ex rel.* Simoneaux v. E.I. duPont de Nemours & Co., 843 F.3d 1033, 1035-36 (5th Cir. 2016) (Although "a person is liable under the reverse-FCA provision if he knowingly and improperly avoids an obligation to pay the United States," it is not sufficient that the defendant avoided a potential fine by not reporting to the EPA an environmental violation.). In a prior case, the Fifth Circuit dismissed the claim because the plaintiff did not prove that the defendant had an obligation to refund the money. United States *ex rel.* Guth v. Roedel Parsons Koch Blache Balhoff & McCollister, 626 F. App'x 528, 534 (5th Cir. 2015). *See also* United States *ex rel.* Kasowitz Benson Torres LLP v. BASF Corp., 929 F.3d 721, 727 (D.C. Cir. 2019) (concluding that contingent exposure to penalties for environmental violations does not amount to an obligation under the reverse false claim provision).

62. United States *ex rel.* Customs Fraud Investigations v. Victaulic Co., 839 F.3d 242, 254 (3d Cir. 2016). The court also stated, "In the pre-FERA FCA, a false statement or record was a necessary element for reverse FCA liability to attach. A false statement is no longer a required element, since the post-FERA FCA specifies that mere knowledge and avoidance of an obligation is sufficient, without the submission of a false record, to give rise to liability." *Id*. at 255. The Third Circuit issued three other decisions. Although not affirmatively stating that there was not a claim requirement, it never once suggested that it was a requirement. United States *ex rel.* Spay v. CVS Caremark Corp., 875 F.3d 746, 764 (3d Cir. 2017) (alleged violation not material); United States *ex rel.* Petras v. Simparel, Inc., 857 F.3d 497, 506–07 (3d Cir. 2017) (plaintiff unable to satisfy the obligation requirement); United States *ex rel.* Petratos v. Genentech Inc., 855 F.3d 481, 492 (3d Cir. 2017) (dismissing all FCA claims because the fraud was against a third party, not the government).

63. Olson v. Fairview Health Servs. of Minnesota, 831 F.3d 1063, 1074 (8th Cir. 2016). The court affirmed dismissal of the case because there was no showing that the defendant knew it owed the money back to the government.

In December 2017, the United States Circuit Court of Appeals for the Tenth Circuit held that there is no false claim requirement in the 2009 amendment and referred to this new provision as follows:

> The reverse-false-claims provision now imposes liability on any person who: [1] knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or [2] knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government. 31 U.S.C. § 3729(a)(1)(G) (bracketed numbers added for clarity). This second route to liability expands on the first by not requiring a "false record or statement." Simply "knowingly and improperly avoid[ing] . . . an obligation to pay or transmit money or property to the Government" is enough.[64]

In 2017, the First Circuit also referred to the 2009 provision as one which "imposes liability on anyone who 'knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay . . . money . . . to the Government.' 31 U.S.C. § 3729(a)(1)(G). The term 'obligation' is defined by the statute as 'an established duty, whether or not fixed, arising from an express or implied contractual . . . relationship.' *Id.* § 3729(b)(3)."[65]

The only Circuit Court case that created confusion was the Ninth Circuit's in *Kelly*. In *Kelly*, the court dismissed all FCA claims, including the reverse false claim allegations, because the relator did not allege a false claim or have proper support for the FCA violations alleged in her Complaint.[66] In dismissing the reverse false claim allegations, the Ninth Circuit simply quoted the full language of § 3729(a)(1)(G) without making a distinction between the two separate liability components (i.e., the 1986 liability provision and the 2009 liability provision both contained within Subsection G). According to the court:

> That FCA provision, known as the "reverse false claims" provision, creates liability for one who "knowingly makes, uses, or causes to be

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Simply because the government ultimately determined that the defendant's children's unit did not qualify as a children's hospital did not automatically render it a FCA violation. *Id.* at 1072. Instead, the relator needed to allege and prove that the defendant knew that its hospital did not qualify to satisfy the knowing requirement of the FCA. *Id.* The court ruled that the defendant lacked the required scienter to establish concealment of an obligation. *Id.* at 1074.

64. *Barrick*, 878 F.3d at 1230 (quoting 31 U.S.C. § 3729(a)(1)(G) (2012)). However, the court noted that the FCA still required "an obligation to pay . . . money . . . to the government," which was not met simply by alleging that the defendant illegally imported meat into the country. *Id.* at 1230-31.

65. United States *ex rel.* Booker v. Pfizer, Inc., 847 F.3d 52, 56-57 (1st Cir. 2017). The court affirmed dismissal because the CIA did not impose an "obligation" under the FCA. *Id.*

66. United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325, 335–36 (9th Cir. 2017).

> made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." *Id.* "The 'reverse false claims' provision does not eliminate or supplant the FCA's false claim requirement . . . ." *Cafasso*, 637 F.3d at 1056.[67]

The problem with lumping together both alternative provisions contained within § 3729(a)(1)(G) is that the pre-existing 1986 reverse false claim provision required proof of a false claim, whereas the alternative liability provision added in 2009 does not. Unfortunately, the *Kelly* court simply cited to a prior Ninth Circuit case (*Cafasso*) that addressed pre-2009 conduct under the 1986 version of the FCA.[68] In the *Cafasso* case, there were only allegations for misconduct occurring prior to 2009; therefore, for all of those allegations, the 1986 FCA applied.[69] This helps explain why *Kelly* quoted *Cafasso* for the old proposition that "an actual false claim is the *sine qua non* of an FCA violation."[70] This adage is no longer true in the context of Subsection G because the 2009 amendment to Subsection G did away with a false claim requirement. Thus, the sparsely worded opinion did not differentiate between the pre and post-2009 alleged misconduct or whether it was specifically addressing the 1986 or 2009 version of Subsection G in its opinion. Further, the court's reference to *Cafasso* was misplaced because it related only to the 1986 FCA, and the *Kelly* decision failed to explain whether it was interpreting the 1986 FCA or the 2009 FCA.

Accordingly, the *Kelly* decision created confusion for United States District Courts ("District Courts") within the Ninth Circuit.[71]

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67. *Id.*

68. *Kelly*, 846 F.3d at 336 ("The 'reverse false claims' provision does not eliminate or supplant the FCA's false claim requirement . . . .").

69. *Cafasso,* 637 F.3d at 1053 ("In early 2004, Cafasso became aware of what she believed was a scheme to deprive the United States of its ATIRP rights to a new invention.").

70. *Id.* at 1055. Courts either applying the 1986 version of Subsection G or misreading *Cafasso* post-2009 amendment have stated, "[i]n cases where a plaintiff alleges a reverse false claim by claiming that the defendant fraudulently overcharged the government and then failed to repay the government, courts have consistently dismissed the [reverse FCA] claim as redundant." United States v. Kinetic Concepts, Inc., No. CV 08-1885 BRO (AGRx), 2017 WL 2713730, at *13 (C.D. Cal. Mar. 6, 2017). However, this proposition is no longer true. The 2009 version of Subsection G is a standalone provision that does not require a false claim, record, or statement and therefore can be the only FCA provision that applies to a person's conduct.

71. Unfortunately, the lower courts within the Ninth Circuit are divided as to whether to interpret *Kelly* as requiring a claim for the 2009 amendment. At least one District Court has ruled that *Kelly* somehow imputes a false claim requirement into all FCA claims, including the 2009 version of § 3729(a)(1)(G). Scott v. Ariz. Ctr. for Hematology & Oncology PLC, No. CV-16-03703-PHX-DGC, 2018 WL 1210903, at *7 (D. Ariz. Mar. 8, 2018) (interpreting *Kelly* as

At no point, however, did the *Kelly* court acknowledge that there are two liability provisions within Subsection G or that each provision has different elements. In fact, the *Kelly* court did not even mention the decisions by other Circuit Courts addressing the 2009 amendment. Specifically, the *Kelly* court failed to acknowledge that the 1986 provisions require a false claim, while the 2009 amendment does not have any language suggesting—let alone requiring—a false claim, record, or statement. Without even any discussion of the second liability provision within § 3729(a)(1)(G), the court summarily dismissed the relator's entire suit which contained allegations occurring both before and after 2009.[72]

It is hard to imagine that the court in *Kelly* really intended to rule (without any discussion) that the 2009 FCA amendment to § 3729(a)(1)(G) somehow requires a false claim when this language does not appear in the amended version of the statute. Indeed, the *Kelly* court was also dismissing the *entire* suit for *other* reasons, which explains why the *Kelly* court may not have been focused upon the impact of lumping the entire set of allegations together and the effect this could have upon the lower courts facing the 2009 amendment.[73] The majority in *Kelly* determined that the plaintiff was unable to satisfy the "materiality" requirement for *any* of its FCA allegations; this was a significant reason for why the entire case fell short.[74] In dismissing the reverse false claims allegations, the court said that, because the plaintiff's other claims failed as a matter of law, "so too does his 'reverse false claims' cause of action."[75] Thus, *Kelly* can be understood as dismissing the entire case because the plaintiff neither established "materiality" nor proved the existence of a legal duty to return the funds—not because the 2009 version of Subsection G required a false claim.[76]

In 2018, the Ninth Circuit was again presented with a reverse false claims issue.[77] This time, it went a step further and actually recognized that Congress added a new liability provision to the FCA in 2009.[78] The Ninth Circuit in *Anita Silingo* stated that this new

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adopting *Cafasso's* false claim requirement under the pre-2009 version of the FCA to apply also to the 2009 amendment). However, other District Courts within the circuit appear to have read *Kelly* as limiting any false claim requirement to pre-2009 conduct and to have adopted the reasoning of sister circuits that have fully evaluated the issue and held that no claim is required under the 2009 version of § 3729(a)(1)(G). United States *ex rel.* Poehling v. UnitedHealth Grp., No. CV1608697MWFSSX, 2018 WL 1363487, at *12 (C.D. Cal. Feb. 12, 2018).

72. *Kelly*, 846 F.3d at 328.

73. *Id.* at 333-34 (relator having failed to establish materiality).

74. *Id.*

75. *Id.* at 336.

76. Arguably, then, the language referring to the reverse false claim provisions is *dicta* and not controlling within the Ninth Circuit.

77. United States *ex rel.* Anita Silingo v. WellPoint, Inc., 904 F.3d 667, 676 (9th Cir. 2018).

78. *Id.*

version of Subsection G "is designed to cover Government money or property that is knowingly retained by a person even though they have no right to it."[79]

Unfortunately, just as in *Kelly*, the Ninth Circuit did not need to discuss § 3729(a)(1)(G) in more detail because of other fatal flaws in the relator's Complaint. However, *Anita Silingo* is still instructive and provides a basis for arguing that *Kelly* did not intend to require a false claim, record, or statement for the 2009 amendment to § 3729(a)(1)(G). Indeed, in dismissing the allegations under the 2009 amended reverse false claim provision, *Anita Silingo* did not hint that a false claim is required under the second liability provision within § 3729(a)(1)(G). In fact, *Anita Silingo* did not even cite to *Kelly*. Unfortunately, the context of the *Anita Silingo* case kept the discussion limited because the relator's complaint was deficient in other ways. Specifically, the *Anita Silingo* court affirmed the dismissal of the reverse false claim because the relator, having earlier abandoned the claim under § 3729(a)(1)(G), was unable to revive it on appeal.[80] In short, it does not appear that *Kelly* is controlling law in the Ninth Circuit on the issue of whether a false claim is required under the post-2009 amendment. At worst, some lower courts misunderstood *Kelly*; at most, the language is *dicta*.

In sum and substance, each of the Circuit Courts that have undertaken an in-depth analysis of the 2009 amendment to § 3729(a)(1)(G) have consistently held that there is no false claim, record, or statement requirement for liability to attach for knowingly retaining overpayments.[81] "All that is required is evidence that there is a duty to repay overpayments and the

79. *Id.* at 13–14 (citing S. REP. NO. 111-10 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 441).

80. *Id.*

81. As far as other circuits, the United States Circuit Court of Appeals for the District of Columbia has not specifically addressed whether the 2009 version of the FCA or 2010 ACA eliminated the claim requirement because the plaintiff could not establish an obligation. United States *ex rel.* Schneider v. JPMorgan Chase Bank, 878 F.3d 309, 314–15 (D.C. Cir. 2017). The United States Circuit Court of Appeals for the Second Circuit also faced the reverse false claim issue several times but, in each instance, did not need to reach the issue of whether a claim was required because of other defects. United States *ex rel.* Gelbman v. City of New York, 970 F. App'x 244, 249-50 (2d Cir. 2019) (The complaint "does not plausibly allege that Defendants-Appellees had any obligation to repay to the federal government any funds it received."); Grabcheski v. Am. Int'l Grp., 687 F. App'x 84, 87–88 (2d Cir. 2017) (not needing to address the claim issue because the allegations did not satisfy the "materiality" requirement); United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 86 (2d Cir. 2017) (not needing to address the claim issue because dismissal was warranted under the first to file rule); United States *ex rel.* Takemoto v. Nationwide Mut. Ins. Co., 674 F. App'x 92, 96 (2d Cir. 2017) (not needing to address the claim issue because complaint did not meet Rule 8 pleading requirements).

defendant had requisite scienter."[82] Although the Ninth Circuit in *Kelly* did not find that there were two liability provisions, the Court's holding in *Poehling* showed that the court did not tie liability to a specific false claim, and the case was dismissed for other reasons.[83] Thus, *Kelly* is not controlling on the issue of whether the 2009 amendment somehow requires a false claim, record, or statement when the statute itself is devoid of any such requirement.

C. The Two Elements of the 2009 Version of § 3729(a)(1)(G)

Even though a plaintiff does not need to identify or prove that the defendant used a false claim, record, or statement, there are still two elements that must be met. The 2009 version of § 3729(a)(1)(G) renders a person liable if she "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the [g]overnment."[84] In short, the 2009 reverse false claim provision requires proof of two elements: (1) an obligation to return government funds; and (2) requisite knowledge that they must return such funds.[85] Each element is discussed below.

With respect to an obligation, the 2009 version of § 3729(a)(1)(G) contains a specific definition. According to the FCA,

> the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment[.][86]

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82. Hesch & Yugo, *supra* note 44, at 354-55 (2017). *See also id.* ("it is clear from both a plain reading of the statute and circuit decisions that there is no requirement that a plaintiff establish FCA liability under subsection (a)(1)(G) by introducing proof of individual false statements or claims. All that is required is evidence that there is a duty to repay overpayments and the defendant had requisite scienter.").

83. *See supra* note 79 and surrounding text.

84. § 3729(a)(1)(G) (2009).

85. *See Gelbman*, No. 18-3162, 2019 WL 5242326 at *4 ("[A] claim under § 3729(a)(l)(G) requires the plaintiff to establish that the defendant had a financial obligation to the federal government."); *Kasowitz*, 929 F.3d at 727 (D.C. Cir. 2019) (Section 3729(a)(1)(G) makes "liable anyone who 'knowingly conceals or knowingly and improperly avoids or decreases *an obligation to pay or transmit money or property* to the Government.'"); *Harper II*, 739 F. App'x at 333 ("[Section 3729(a)(1)(G)] must be interpreted to refer to a defendant's awareness of *both* an obligation to the United States *and* his violation of that obligation.") (citation omitted); United States *ex rel.* Roycroft v. Geo Grp., 722 F. App'x 404, 408 (6th Cir. 2018) ("A claim under § 3729(a)(1)(G) requires a relator to 'allege facts that show defendants received overpayments from the government and failed to refund those payments.'").

86. § 3729(b)(3) (2009).

Thus, the plaintiff must show that the defendant was not legally entitled to receive or retain the funds. Common ways of establishing an obligation include contract provisions, statutes, and regulations. One example of a statute creating a duty is the 2010 ACA, in which Congress created a legal duty for all Medicare providers to report and return any Medicare overpayment within sixty days.[87] In this instance, Congress went a step further by specifically stating that this duty also constitutes an "obligation" under the 2009 version of § 3729(a)(1)(G).[88]

Again, however, the FCA's definition is broadly written to include any duty (expressed or implied) under the circumstances or flowing from the relationship a person receiving funds has with the government or an agent thereof. Thus, an obligation is not limited to the Medicare context but includes any obligation to return overpayments of any government funds wrongfully retained.[89] Under the plain language of the FCA, it is sufficient if a person knowingly retains overpayments. In short, any retention of funds under any government contract or program is covered by the 2009 version of subsection G.[90]

With respect to the second element, the person must *knowingly* conceal or avoid repaying some or all of the funds. The FCA itself defines knowing or knowingly as follows:

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

87. § 1320a-7k(d)(2) (2009).

88. § 1320a-7k(d)(1)-(3) (2009). The ACA also defined the term overpayment for purposes of recovery under that statute, as follows: "The term 'overpayment' means any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter." § 1320a-7k(d)(4)(B).

89. Long before the 2009 amendment, the 1986 reverse false claim provision has been applied in a variety of non-Medicare cases. For instance, the contract required military contractor to return excessive parts to the government and retention or private sale of such parts constituted a reverse false claim. United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1237 (11th Cir. 1999). It also applies when someone uses a false statement to secure services from the government at a reduced rate, United States v. Am. Heart Research Found., 996 F.2d 7, 9 (1st Cir. 1993), and underpaying mineral royalties to the government, Kennard v. Comstock Res., 363 F.3d 1039, 1048 (10th Cir. 2004).

90. At the same time, courts have ruled that an obligation must be fixed and certain, not contingent. Thus, courts have held that potential civil or criminal fines that may have been imposed if the defendant had reported violations of environmental laws violations do not constitute an obligation under this provision. *See Simoneaux*, 843 F.3d at 1035-36 (Although "a person is liable under the reverse-FCA provision if he knowingly and improperly avoids an obligation to pay the United States," it is not sufficient that the defendant avoided a potential fine by not reporting to the EPA an environmental violation.); *Kasowitz*, 929 F.3d at 727 (holding that contingent exposure to penalties for environmental violations does not amount to an obligation under the reverse false claim provision).

(i) has actual knowledge of the information;

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

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

(B) require no proof of specific intent to defraud.[91]

Thus, the plaintiff must prove that the defendant either had actual knowledge or acted with deliberate ignorance or reckless disregard of the truth, that it had an obligation to repay funds in its possession. In simplest terms, the defendant meets the FCA knowledge element once it becomes aware that it is not entitled to retain the funds, even if at the time it obtained the funds it was unaware or lacked knowledge that it was not entitled to them in the first place. Because the focus is on the knowledge of the defendant at any moment in time while retaining overpayments (instead of knowledge when it first received the funds or efforts to use false records to retain them), the plaintiff need not tie knowledge to a particular claim for payment or any false record to keep from repaying the funds.[92] Rather, the plaintiff need only establish that, within the statute of limitations period, the defendant had FCA knowledge that it is in possession of funds of which it has an obligation to return.

The next section addresses how to determine the amount of funds that must be returned, which includes relying upon statistical sampling.

IV. STATISTICAL SAMPLING IS PERMITTED TO PROVE THE AMOUNT OF OVERPAYMENTS UNDER THE 2009 VERSION OF § 3729(A)(1)(G)

The use of statistical sampling in the context of Medicare was borne out of necessity.[93] To ensure that Medicare patients receive prompt medical services, Congress chose a mechanism whereby Medicare healthcare providers are reimbursed prior to the government reviewing claimed expenses.[94] To expedite the

91. §§ 3729(b)(1)(A)-(B) (2009).

92. *See* Hesch & Yugo, *supra* note 44, at 350–51 ("There is no language in the statute requiring 'specific knowledge' or 'specific proof.' For instance, the statute does not say, 'The relator must provide individual proofs for each and every alleged claim,' nor does it say, 'Proof of knowledge requires proof of specific knowledge of specific claims.' In fact, it is already well-established law that neither specific intent, nor specific knowledge is required under the FCA.").

93. *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046 (2016) (recognizing "[i]n many cases, a representative sample is the only practicable means to collect and present relevant data establishing a defendant's liability"). The same is true for large scale fraud cases outside of the Medicare context.

94. Rio Home Care, LLC v. Azar, No. 7:17-CV-116, 2019 WL 1411805, at *2

processing of claims, Medicare contractors generally reimburse providers for services before reviewing the medical records related to the claims and verifying that the claims are valid.[95] People often refer to this practice as *pay and chase*.[96] Because CMS pays all claims and then evaluates if the claims are valid, there are "huge amounts of Medicare overpayments."[97] After payments are made, Medicare engages in a process of identifying and demanding repayment of overpayments.[98] An integral part of the process of recouping overpayments is the use of statistical sampling. Indeed, in 1986, CMS formally adopted and approved the use of statistical sampling for determining the existence and amount of Medicare overpayments.[99] To ensure effectiveness, statutes and regulations address the methodology used to ensure that the sampling plans are reliable.[100] Today, it is now settled law that the government may

(S.D. Tex. Mar. 11, 2019), *report and recommendation adopted*, No. CV M-17-116, 2019 WL 1409733 (S.D. Tex. Mar. 28, 2019) ("Enormous numbers of Medicare claims are submitted each year.").

95. *See* John Balko & Assocs. v. Sec'y U.S. Dep't of Health & Human Servs., 555 F. App'x 188, 190 (3d Cir. 2014); *see also* 42 C.F.R. § 405.922 (2014) (explaining time frame for processing initial determinations).

96. *Kinetic Concepts*, 2017 WL 2713730, at *1 ("This system is referred to as a 'pay and chase' system because Medicare accepts claims as being true representations that the claim qualifies for reimbursement and later follows up with the claimant if it is determined that the claim was not reimbursable.").

97. *John Balko*, 555 F. App'x at 190 ("While this process provides faster payments to providers, it also results in huge amounts of Medicare overpayments.").

98. *Id.* at 192; Maxmed Healthcare, Inc. v. Price, 860 F.3d 335, 337 ("Congress created the Medicare Integrity Program through which the Secretary contracts with private entities 'for the purpose of identifying underpayments and overpayments and recouping overpayments[.]' *See* 42 U.S.C. § 1395ddd(a), (h)(1)."); *see also Rio Home Care,* 2019 WL 1411805, at *2 ("The Medicare Integrity Program established a procedure to review payments made to providers to 'increase the effectiveness of the [Medicare Program] through cost avoidance, savings, and recoupments of fraudulent, wasteful, or abusive expenditures.' 42 U.S.C. § 1395ddd(g)(1)(A)(iii). Payments initially made by Medicare contractors 'may then be audited by Zone Program Integrity Contractors ('ZPICs'). When a ZPIC identifies an overpayment, it notifies the relevant [Medicare Administrative Contractor], which then issues a demand letter to the provider.' Family Rehab., Inc. v. Azar, 886 F.3d 496, 499 (5th Cir. 2018) (footnote omitted); *see* 42 U.S.C. § 1395ddd(g), (h).").

99. *Rio Home Care,* 2019 WL 1411805, at *3 ("In a 1986 administrative ruling, CMS approved the use of statistical sampling and extrapolation in determining whether there has been an overpayment and in calculating the total amount of any overpayment.").

100. *Id.* ("It is now well-settled that '[e]xtrapolation is one permissible method of calculating overpayments. In particular, Congress authorized Medicare contractors to use extrapolation to determine overpayment amounts if the Secretary determines that there is a sustained or high level of payment error.'")(quoting *Maxmed,* 860 F.3d at 337 (citing 42 U.S.C. § 1395ddd(f)(3)(A) (2012)). CMS has developed guidelines for the use of statistical sampling and extrapolation in estimating overpayments, which are found in its Medicare Program Integrity Manual ('MPIM')."), *report and recommendation adopted*, No. CV M-17-116, 2019 WL 1409733 (S.D. Tex. Mar. 28, 2019).

rely upon statistical sampling to determine the amount of an overpayment when recouping Medicare overpayments.[101] Moreover, there is a presumption that statistical sampling is valid,[102] and courts have rejected arguments that statistical sampling violates due process.[103]

The following is an example scenario using statistical sampling to determine the amount of an overpayment. Assume there is an allegation that a hospital had a practice of upcoding certain procedures whereby it treated Medicare patients for a cold but used the higher billing code of pneumonia.[104] Further, assume that the hospital used the pneumonia billing code 10,000 times over the past few years. To determine the amount of overpayment for patients that were actually treated for a cold instead of pneumonia, CMS would select a statistically valid subset of the 10,000 cases and conduct an analysis of that sample to determine an error rate and extrapolate it to the 10,000 claims.[105] The hospital would be required to repay overpayments based on this sampling.[106]

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101. *See* Hesch & Yugo, *supra* note 44, at 357 n.99 (citing Ill. Physicians Union v. Miller, 675 F.2d 151, 155 (7th Cir. 1982) ("[T]he use of statistical samples has been recognized as a valid basis for findings of fact in the context of Medicaid reimbursement")); Chaves Cty. Home Health Servs. v. Sullivan, 732 F. Supp. 188, 190 (D.D.C. 1990), *aff'd sub nom.* Chaves Cty. Home Health Serv. v. Sullivan, 931 F.2d 914 (D.C. Cir. 1991).

102. *See* Hesch & Yugo, *supra* note 44, at 357 (citing *Maxmed*, 860 F.3d at 339).

103. *See id.* at 364 n.101 (citing *Chaves*, 931 F.2d at 919-22; Ratanasen v. Cal. Dep't of Health Servs., 11 F.3d 1467 (9th Cir. 1993); *Ill. Physicians Union*, 675 F.2d at 157 ("[I]n view of the enormous logistical problems of Medicaid enforcement, statistical sampling is the only feasible method available."); Bend v. Sebelius, No. 09-3250, 2010 WL 4852230, at *4-6 (C.D. Cal. Nov. 19, 2010) ("The sample taken by the Carrier met the requirements of the Medicare program and when combined with the inherently low risk of error and the substantial government interest in statistical sampling, [plaintiff] has not suffered a procedural due process violation in this case.")).

104. This example is taken from Hesch & Yugo, *supra* note 44, at 339–41.

105. "The calculation of the amount of the overpayment could be conducted two ways: by reviewing all 10,000 Medicare patient charts, or through statistical sampling, which requires reviewing a subset based upon a sampling plan. When using sampling, the exact same analysis of a patient's file would be conducted. For instance, a medical expert would review each of the selected samples and determine if the notes had sufficient evidence to prove that each patient was actually being treated for pneumonia, such as if X-rays were done or certain pills prescribed. Once a rate of erroneous billing is set for the sample, that ratio is applied to all 10,000 files. For example, if the sampling reveals that 80% of the billings were improper for pneumonia, that figure would correlate to 80% of the 10,000 billings being fraudulent." *Id.* at 340 (footnotes omitted).

106. Again, it is settled that this use of sampling is appropriate when CMS performs an audit and is seeking overpayments. *See supra* notes 95-96; *see also* Hesch & Yugo, *supra* note 44, at 341–42 ("Because of the wide acceptance of sampling and the impossibility of conducting claim-by-claim analysis in large Medicare overpayment cases, courts have routinely endorsed relying upon statistical sampling to recover Medicare overpayments, as well as in calculating

Within the FCA, courts similarly accept that damages may be calculated through statistical sampling.[107] Recently, however, some commentators have argued that sampling is not permissible to prove *liability* under the FCA.[108] One of the principle arguments against the use of statistical sampling is "[b]ecause the [FCA] attaches liability to each individual claim, the FCA requires individual proof for each false claim."[109] With respect to at least the 2009 version of Subpart G, there are two reasons why this argument is unavailing.

First, and foremost, the amended version of Subpart G does not require proof of any false claim. As established above, in 2009, Congress changed the landscape of the FCA by adding a new liability provision that did away with any requirement to prove that a defendant obtained funds through a false claim or the use of a false statement or record to retain them.[110] Under the 2009 version of § 3729(a)(1)(G), a defendant is liable if it "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the [g]overnment."[111] Thus, under the 2009 version of Subpart G, determining the amount of

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damages under the FCA."). *See also id.* ("The only requirement is that the sample must be fairly representative and statistically valid, which is a factual issue determined in each case.").

107. "[S]ampling has been widely recognized as legally permissible for calculating damages under all provisions of the FCA." *Id.* at 355 (citing United States *ex rel.* Michaels v. Agape Senior Cmty., No. CA 0:12-3466-JFA, 2015 WL 3903675, at *7–8 (D.S.C. June 25, 2015), *order corrected*, No. CA 0:12-3466-JFA, 2015 WL 4128919 (D.S.C. July 6, 2015), *and aff'd in part, appeal dismissed in part*, 848 F.3d 330 (4th Cir. 2017) (gathering and discussing cases that permit or reject sampling in FCA cases and rejecting sampling based upon the factual difficulties in this particular case); U.S. v. Cabrera-Diaz, 106 F. Supp. 2d 234, 240 (D.P.R. 2000) (establishing that statistical sampling is generally permitted for establishing damages and providing an overview of cases that have permitted it); United States *ex rel.* Doe v. DeGregorio, 510 F. Supp. 2d 877, 890 (M.D. Fla. 2007); United States *ex rel.* Harris v. Bernad, 275 F. Supp. 2d 1, 8 (D.D.C. 2003) (allowing use of statistical sampling to determine damages caused by the overpayment of Medicare reimbursements in FCA case)).

108. *See* e.g., Peter T. Thomas, *Trial by Formula: The Use of Statistical Sampling and Extrapolation in Establishing Liability Under the False Claims Act*, 74 WASH. & LEE L. REV. ONLINE 215, 249-50 (2017) ("[S]tatistical sampling cannot establish liability under the FCA."); Patrick Kennedy, *Lies and Statistics: Statistical Sampling in Liability Determinations Under the False Claims Act*, 71 STAN. L. REV. 1353, 1359 (2019) ("While this Note largely focuses on the constitutional due process challenges of sampling, there remains some doubt whether the FCA bars statistical sampling as a statutory matter.").

109. Thomas, *supra* note 108, at 249-50 ("Because the FCA requires an individualized examination of each false claim, the FCA's liability requirements 'cannot be replaced [with a] 'Trial by Formula.'" (citations omitted)).

110. § 3729(a)(1)(G) (2009). *See also supra* Section III(A).

111. § 3729(a)(1)(G) (2009).

overpayments is merely a function of damages.[112] There is no need to show that a person wrongfully requested or received the funds at the time. There is similarly no need to tie the retention of the funds to any particular false record or statement to conceal the wrongful retention of the funds. Rather, all that is needed for FCA liability under § 3729(a)(1)(G) is a showing that the person in possession of government funds is not entitled to keep them — not that she submitted a false claim to obtain them.[113] Because the government need not tie such duty to a particular false claim, record, or statement, there is no need to rely upon any specific invoice or record to determine liability.[114] Accordingly, statistical sampling may be used to determine the amount of overpayments under the 2009 version of §3729(a)(1)(G) because the sampling and extrapolation is merely determining the amount of funds that must be returned.[115]

Second, statistical sampling may be used to prove liability under each provision of the FCA because the Act does not require individual proofs. Although the FCA is often referred to as a fraud

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112. The issue of whether sampling can be used to establish liability under the FCA need not be resolved for determining the amount of a Medicare overpayment under the 2009 version of § 3729(a)(1)(G) because, in this context, it is merely a function of calculating damages. Hesch & Yugo, *supra* note 44, at 348, 355. *See also id.* at 337, 348, 355 (arguing that sampling can be used to establish FCA liability, but also noting that it is not necessary to reach that determination regarding the 2009 amendment to Subsection G).

113. *Id.* at 363 ("This subpart did away with requiring the use of a false statement and, with it, any argument that individual proof is required. Under the 2009 version, all that is required is to show that there existed a duty or obligation to repay funds.").

114. Proof of liability is not established through any invoice, but by testimony and other evidence of the defendant's guilty knowledge, plus the basis for the legal duty to return overpayments. *Id.* at 352 ("Thus, the proof of the FCA's level of intent to create a false claim does not come from the invoices or even the statistical sampling itself; rather, the proof of the fraud scheme is established through testimony of individuals together with memos, emails, or other documents implementing the scheme itself. Once the scheme is established, the role of sampling is to measure how far the scheme extended and to approximate the harm and thus the amount to be repaid. There is neither a requirement in the FCA nor, more importantly, a need for the government to analyze each particular invoice or submitted claim. So long as the allegedly fraudulent claims arise from the same scheme, the government need only prove liability for the overall scheme, not the individual claim, in order to meet its burden. [These authors] proffer that statistical sampling is the tool enabling it to do so.").

115. *Id*. at 358-59 ("[S]tatistical sampling is clearly allowed under subsection (a)(1)(G) because there is no requirement that a false statement be used. Rather, all that is required is that a defendant knowingly and improperly avoids an obligation to pay money to the Government. The determination of the amount of overpayments is considered a damages issue, for which calculation the FCA permits the use of statistical sampling. Thus, the plaintiff may use statistical sampling under (a)(1)(G)"). Again, it is well settled that recouping of Medicare overpayments may be accomplished through statistical sampling. See supra notes 87-88.

statute, "[t]here is no language in the statute requiring 'specific knowledge' or 'specific proof.'"[116] While it is true that most FCA liability provisions contain some form of a false claim requirement, i.e. § 3729(a)(1)(A)&(B),[117] "the plaintiff need not prove the defendant specifically intended to defraud the government in *each and every* alleged instance of presenting or using a false claim for payment. The absence of a specific intent requirement also means the absence of a specific proof requirement."[118] Rather, the evidence of a violation of the FCA is produced through testimony and other evidence of the scheme itself.[119] "The role of statistical sampling is to determine the efficiency of the fraudulent scheme and serve as the vehicle for measuring the extent of overpayments due to the fraudulent scheme."[120] "So long as the allegedly fraudulent claims arise from the same scheme, the government need only prove liability for the overall scheme, not the individual claim, in order to meet its burden."[121] In short, none of the liability provisions require proof of specific claims.[122] Thus, "the plaintiff need not show intent for each and every alleged claim, but intent for the *entire scheme*." Accordingly, sampling is proper under Subpart G (as well as § 3729(a)(1)(A)&(B)), because "neither specific intent nor specific knowledge is required under the FCA and the proof of the fraudulent scheme is established through testimony of individuals together with memos, emails, or other documents implementing the scheme itself."[123]

In sum, statistical sampling is appropriate in cases alleging

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116. See *id.* at 350 ("To establish liability, the plaintiff must prove only: "falsity, causation, knowledge, and materiality.").

117. "The FCA provides for liability if a person 'knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,', or 'knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.' United States ex rel. Tracy Schutte v. Supervalue, Inc. et al., No. 11-3290, 2020 WL 3577996, at *6 (C.D. Ill. July 1, 2020) (citation omitted).

118. Hesch & Yugo, *supra* note 44, at 351.

119. *Id.* at 352 ("Thus, the proof of the FCA's level of intent to create a false claim does not come from the invoices or even the statistical sampling itself; rather, the proof of the fraudulent scheme is established through testimony of individuals together with memos, emails, or other documents implementing the scheme."). *See also id.* ("In short, the invoices themselves are not the fraud, but simply a byproduct of containing the overpayment due to the scheme. Thus, the proof of the FCA's level of intent to create a false claim does not come from the invoices or even the statistical sampling itself; rather, the proof of the fraudulent scheme is established through testimony of individuals together with memos, emails, or other documents implementing the scheme.").

120. *Id.*

121. *Id. See also id.* ("Because there is no "specific intent" requirement, however, statistical sampling clearly satisfies the burden of proof because the plaintiff need not show intent for each and every alleged claim, but intent for the *entire scheme*.").

122. *Id.* at 350.

123. *Id.* at 353.

violations of the 2009 version of § 3729(a)(1)(G) because (1) Congress totally eliminated the false claim requirement for Subpart G, and thereby eliminated the argument that sampling is not permissible based upon the need to prove particular false claims,[124] and (2) there is no requirement under any of the FCA liability provisions for individualized proof of specific intent or specific knowledge.

V. A MEDICARE OVERPAYMENT EXAMPLE APPLYING § 3729(A)(1)(G)

Here is a hypothetical Medicare overpayment example to show how to apply the 2009 version of § 3729(a)(1)(G):

> Big Homecare, Inc. provides skilled care to those considered homebound and seeks reimbursement under Medicare for eligible patients. Jane Doe, an employee of Big Homecare, Inc., attends a meeting in which the company instructs employees to bill Medicare for services, regardless of whether patients are homebound, and instructs employees to lie in the medical records about mobility to give the false impression that patients were homebound. One-half of the patients are not actually homebound and not eligible for skilled care under Medicare, but the company bills Medicare for all Medicare patients. The company was reimbursed by Medicare in the amount of $100 million over the past 5 years for treating thousands of patients.
>
> Jane Doe files a *qui tam* complaint. The government intervenes and files its own complaint. The first count seeks recoupment under the ACA for failing to report and return any Medicare overpayment within sixty days. The second count alleges a violation of the 2009 version of § 3729(a)(1)(G) of the FCA because the defendant had knowledge that it knowingly concealed or knowingly and improperly avoided returning or repaying funds for patients that were not homebound.

In this example, the government may recover the overpayments from Big Homecare, Inc. under both the ACA and FCA. Below is an explanation as to how a court should rule upon each count in the complaint, beginning with count one seeking recoupment under the ACA and followed by count two alleging a violation of the 2009 version of § 3729(a)(1)(G) under the FCA.

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124. None of the commentators listed in *supra* note 108 even address the 2009 Subpart G liability provision, let alone argue that this provision requires individual proof or that sampling would be impermissible. In addition, there are no reported decisions denying the use of statistical sampling in cases alleging violations of the 2009 version of § 3729(a)(1)(G).

A. The Government May Recoup Overpayments Under the ACA.

To recoup the Medicare funds, the government must show that there exists an obligation to return or repay the government funds. Here, the government is relying upon a statutory duty under the ACA requiring Big Homecare to report and return any Medicare overpayment within sixty days.[125] When recouping Medicare overpayments, there is no requirement that the company had knowledge that it was not entitled to either obtain or retain the funds. Rather, the company must return funds if there was an overpayment. Under the ACA, "[t]he term 'overpayment' means any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter."[126]

Here, proof of an overpayment flows from several federal statutes and regulations. First, to participate in Medicare, a provider must sign and file a Provider Agreement with the government promising compliance with applicable statutes, regulations, and guidance.[127] Second, Medicare only pays home healthcare for patients who require skilled care if the patient is certified as "homebound."[128] Third, Medicare only provides benefits for medically necessary services rendered by eligible and appropriately licensed providers. [129]Therefore, Big Homecare received overpayments because it received payment for patients that were not homebound.

It is settled that the government may use statistical sampling to determine the amount of overpayments under the ACA.[130] Therefore, if a reliable sampling plan is implemented, courts will order the company to repay the funds in an amount determined by the sampling. In this case, the defendant was reimbursed by Medicare for $100 million for treating thousands of patients. Assume that the sampling plan confirmed the relator's estimate that half of the patients were not homebound by specifically estimating under a valid sampling plan that 52% of the patients in the sample were not homebound. Using extrapolation, the defendant has an obligation to return 52% of the $100 million or $52

125. 42 U.S.C. § 1320a-7k(d)(2) (2020).

126. § 1320a-7k(d)(4)(B) (2020).

127. 42 U.S.C. § 1395cc (2018).

128. 42 C.F.R. § 412.23(e)(1) (2020).

129. 42 U.S.C. § 1395y(a)(1)(A) (2018).

130. Hesch & Yugo, *supra* note 44, at 357 ("[I]t is well settled that when the government seeks the return of overpayments, such as under the ACA, it is allowed to use statistical sampling to calculate the overpayments."); *Maxmed*, 860 F.3d at 339 (allowing statistical sampling in Medicare cases); *Ratanasen*, 11 F.3d at 1471 (approving the use of random sampling in audits regarding Medicare).

million. Because statistical sampling is acceptable for recouping Medicare overpayments, a court would rule in favor of the government and order Big Homecare to pay $52 million.

B. The Government May Recover Treble Damages Under the FCA.

To recover treble damages under § 3729(a)(1)(G) of the 2009 version of the FCA with respect to the overpayments, the government must establish two elements: (1) an obligation to return the government funds; and (2) the person knowingly conceals or knowingly and improperly avoids returning some or all of the funds.

The first element is the exact same element as recouping overpayments under the ACA; therefore, this element is met in the same manner. Under the 2009 amendment to Subsection G, the relator may establish an obligation by relying upon,

> an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.[131]

Thus, the obligation may flow from any duty within a statute or regulation, and specifically includes retention of an overpayment.[132] Congress also mandated in the ACA that the same duty existing under the ACA for reporting and returning Medicare overpayments within sixty days also constitutes an obligation under the FCA.[133] To satisfy the first element under the FCA, all that is required is that the defendant currently possess funds to which it has an obligation to return. The government would rely on the same statutes and regulations as it did to establish an obligation under the ACA.

Evidence that the first element is identical to proving an obligation under the ACA is also found in the FCA. Indeed, Congress amended § 3729(a)(1)(G) in 2009 to do away with any requirement that the government prove a false claim for payment to obtain the funds or use of any false record or statement to retain the funds.[134] All that is required under the first element is that the defendant currently possesses funds it has an obligation to return.[135] Thus, there is no requirement to tie the obligation to any particular invoice or claim to receive the funds in the first instance.[136] Instead, the first element is met if there is an obligation

131. § 3729(b)(3) (2009).
132. *Id.*
133. § 1320a-7k(d)(1)-(3) (2009).
134. *See supra* notes 9, 23, 34-35.
135. *See supra* notes 31-32, 73.
136. *Id.* Just like under the ACA discussed above, it is sufficient that the government identify a scheme or procedure by which the defendant received

to return any funds presently in the possession of a defendant.

The second FCA element requires the government to establish that the person knowingly concealed or knowingly and improperly avoided returning or repaying some or all of the funds.[137] Thus, the only difference between the ACA and FCA in recovering Medicare overpayments is that the FCA also requires FCA scienter (i.e. proof of knowledge that the defendant was improperly retaining the funds or that it knew it had an obligation to return the funds and retained them anyway).

The FCA allows the government to establish knowing or knowingly in one of three ways: (1) actual knowledge of the information; (2) deliberate ignorance of the truth or falsity of the information; or (3) reckless disregard of the truth or falsity of the information.[138] Again, the FCA specifically did away with requiring proof of any specific false claim (or any use of a false record or statement). Thus, Congress did away with requiring any knowledge of falsity on a claim-by-claim (or invoice-by-invoice) basis. Instead, FCA knowledge may be established for the scheme or device used to retain the overpayments.

In this example, there is evidence that the defendant had guilty knowledge that it was improperly retaining the funds for patients that were not homebound. This evidence is found in testimony by employees of the company regarding the scheme as well as documents showing knowledge. This element of FCA knowledge is met if the government can show that the defendant knew that patients were not homebound or acted with deliberate ignorance or reckless disregard for the truth regarding their homebound status. The government need only prove that the defendant knew it was retaining overpayments, but not necessarily that it knew of each individual overpayment at the time the defendant received the payments. As articulated in another law review article by the author:

> Because 'deliberate ignorance' or 'reckless disregard' are enough, a defendant can be found liable for fraud even if all they did was recklessly ignore the entire situation or bury their head in the sand.[71] Applying this standard to the issue of statistical sampling, we can see that the plaintiff need not prove the defendant specifically intended to defraud the government in *each and every* alleged instance of presenting or using a false claim for payment. The absence of a specific intent requirement, in other words, also means the

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funds for services not entitled for Medicare reimbursement. Accordingly, by proving that the defendant engaged in a pattern or practice of obtaining or retaining funds to which it is not entitled to keep, the first element is met without tying the amount of overpayment to a particular claim. Therefore, the same analysis for establishing an obligation discussed above applies equally here, and the government has met its burden of establishing an obligation to return the funds.

137. *See supra* Section III(C).

138. §§ 3729(b)(1)(A)-(B) (2009).

> absence of a specific proof requirement.[139]
>
> *****
>
> If a particular liability provision does not require individual proofs, then statistical sampling–assuming it was done properly–is always permissible to show liability. Why? Because liability lies in the fraudulent *scheme*, not the individual proofs.[140]

Because Congress did away completely with any requirement to establish a false claim, record, or statement under the 2009 version of Subsection G, "statistical sampling clearly satisfies the burden of proof because the plaintiff need not show intent for each and every alleged claim, but intent for the *entire scheme*. Extrapolation, when done properly, satisfies the burden because it demonstrates the defendant's general intent to defraud the government."[141]

The previously mentioned law review article by the author aptly articulates why sampling can be used to aid in proving liability as well as establishing damages under the FCA, and in particular the 2009 version of § 3729(a)(1)(G):

> The role of statistical sampling is to determine the efficiency of the fraudulent scheme and serve as the vehicle for measuring the extent of overpayments due to the fraudulent scheme; . . . the proof of the fraudulent scheme is established through testimony of individuals together with memos, emails, or other documents implementing the scheme . . . . So long as the allegedly fraudulent claims arise from the same scheme, the government need only prove liability for the overall scheme, not the individual claim, in order to meet its burden.[142]

Here, there is ample evidence of knowledge—both actual knowledge and deliberate ignorance. The defendant had actual knowledge of the fraud scheme itself, which set into motion the retention of government funds for patients that were not homebound. The fact that the defendant also may have known, at the time it sought payment, that a large portion of the patients were not homebound does not alter the fact that the defendant similarly had knowledge that it was retaining funds it was not entitled to due to patients not being homebound. Under the 2009 version of Subsection G, the government must only prove that the defendant knows that it is currently retaining funds it is not entitled to keep. Thus, with respect to the second FCA element, once knowledge is established, the only issue is the amount of the overpayments. Because sampling may be used to establish damages, the government should be awarded single damages of $52 million, based upon the sampling. Under the FCA, this amount is then trebled and the defendant would be required to pay $156 million.

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139. Hesch & Yugo, *supra* note 44, at 351–52.
140. *Id.* at 342.
141. *Id.* at 352.
142. *Id.*

VI. RESTATING § 3729(A)(1)(G)

Based on the authority and analysis cited in this Article, the following is a restatement of the law and procedures pertaining to the two liability provisions within § 3729(a)(1)(G) of the False Claims Act (FCA).[143]

A. Section 3729(a)(1)(G)

Section 3729(a)(1)(G) of the False Claims Act, which has been coined the "reverse false claim" provision, contains two separate liability provisions.

First, under the 1986 version of § 3729(a)(1)(G), which is still in existence, a person is liable if he or she "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government."[144] This provision requires proof of a submission of a false record or statement, similar to the requirements of § 3729(a)(1)(B).

Second, a person is liable under the 2009 amendment if she "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the [g]overnment."[145] In conjunction with the full FCA, the 2009 version of § 3729(a)(1)(G) reads:

> any person who . . . knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty . . ., plus 3 times the amount of damages which the Government sustains because of the act of that person.[146]
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> ***
>
> For purposes of this section—. . . the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment[.][147]

Under the 2009 amendment to § 3729(a)(1)(G), there is no requirement of the submission of a false claim and no requirement that a plaintiff establish any false record or statement.[148] Liability

143. § 3729(a)(1)(G) (2009).
144. *Id.*
145. *Id.*
146. *Id.* (emphasis added).
147. § 3729(b)(3) (2009).
148. *See supra* notes 9, 22-23, 34-35. The 2009 version of Subsection G is not redundant to any other FCA liability provisions. It applies even if no other FCA

under the 2009 amendment to § 3729(a)(1)(G) requires proof of two elements: (1) an obligation to return government funds, and (2) requisite knowledge that they must return such funds.

With respect to the first element, an obligation to return overpayments, the FCA contains a specific definition of the term "obligation." According to the FCA,

> the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment[.][149]

A person is liable if they are not legally entitled to retain the funds at the time of the suit. Common ways of establishing an obligation include contract provisions, statutes and regulations.

With respect to the second element, a person knowingly conceals or avoids repaying some or all of the funds, the FCA defines knowing or knowingly, as follows:

> (1) the terms 'knowing" and 'knowingly'—
>
> (A) mean that a person, with respect to information—
>
> (i) has actual knowledge of the information;
>
> (ii) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (iii) acts in reckless disregard of the truth or falsity of the information; and
>
> (B) require no proof of specific intent to defraud.[150]

The plaintiff must prove that the defendant either had actual knowledge or acted with deliberate ignorance or reckless disregard of the truth that it had an obligation to repay funds currently within its possession. A defendant has requisite knowledge once it becomes aware that it is not entitled to retain the funds, even if at the time it obtained them it lacked knowledge that it was not entitled to them. The plaintiff need not tie knowledge to a particular claim for payment. The plaintiff need only establish that, within the statute of limitation period, the defendant had knowledge that it was currently in possession of funds it was not entitled to retain.

B. Medicare Overpayments

In the Medicare context, in 2010, Congress passed the Affordable Care Act (ACA), which requires a person who has received an overpayment of Medicare or Medicaid to report and

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liability provision applies, because, unlike other provisions, it does not require proof of any false claim, record, or statement.

149. *Id.*

150. §§ 3729(b)(1)(A)-(B) (2009).

return the overpayment within sixty days.[151] The pertinent portion of the ACA reads:

> If a person has received an overpayment, the person shall–
>
> (A) report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and
>
> (B) notify the Secretary, State, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment.
>
> (2) Deadline for reporting and returning overpayments
>
> An overpayment must be reported and returned under paragraph (1) by the later of–
>
> (A) the date which is 60 days after the date on which the overpayment was identified; or
>
> (B) the date any corresponding cost report is due, if applicable.[152]

The ACA creates a duty for those receiving an overpayment of Medicare or Medicaid to report and return the overpayment within sixty days. The ACA also provides that this duty constitutes an "obligation" under the FCA.[153] The ACA reads:

> Any overpayment retained by a person after the deadline for reporting and returning the overpayment under paragraph (2) is an obligation (as defined in section 3729(b)(3) of Title 31) for purposes of section 3729 of such title.[154]

As of at least May 22, 2010,[155] the ACA and FCA jointly create a duty to repay Medicare or Medicaid overpayments within sixty days, and a knowing failure to repay overpayments is a FCA violation under § 3729(a)(1)(G).

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151. § 1320a-7k(d)(2) (2010).

152. §§ 1320a-7k(d)(1)-(3) (2010). The ACA also defined the term overpayment for purposes of recovery under that statute, as follows: "The term 'overpayment' means any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter." 42 U.S.C. § 1320a-7k(d)(4)(B) (2010).

153. § 1320a-7k(d)(1)-(3) (2010).

154. *Id.* The ACA also defined the term overpayment for purposes of recover under that statute, as follows: "The term 'overpayment' means any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter." § 1320a-7k(d)(4)(B) (2010).

155. *See San Bernardino*, 2018 WL 5266866 at *8 ("Section 3729 was amended on May 20, 2009 by the Fraud Enforcement and Recovery Act ('FERA') of 2009. However, the 60-day deadline for reporting and returning overpayments went into effect on March 23, 2010 under the Patient Protection and Affordable Care Act of 2009 ('PPACA')."). Accordingly, the ACA applies to "alleged misconduct prior to May 22, 2010 as grounds for his reverse false claim." *Id.*

C. Non-Medicare Overpayments

The 2009 amendment is not limited to Medicare overpayments. Section 3729(a)(1)(G) also applies to knowingly retaining overpayments, of any government funds, under any government program. Regardless of the government program or funds, under the 2009 amendment, the plaintiff must prove two elements: (1) an obligation to return government funds; and (2) requisite knowledge that it must return such funds.

D. Statistical Sampling is Permitted

Because there is no requirement to establish a false claim for payment under the 2009 amendment to § 3729(a)(1)(G), it is not necessary to tie an obligation to return overpayments to a particular claim. Once a person has knowledge that she is not entitled to retain the funds, FCA liability attaches. The plaintiff need not prove an individual false claim as a part of liability. The amount of repayment of the obligation is a function of damages. Statistical sampling may be used to determine the amount of any overpayment.

VII. CONCLUSION

This Article analyzed and explained why the 2009 version of § 3729(a)(1)(G) of the FCA does not require proof of any false claim, record, or statement. It also argued that this subsection now reaches all types of fraud schemes whenever the plaintiff can show the defendant knows it is not entitled to retain government funds, regardless of whether it had FCA knowledge at the time it received the funds or used any false record or statement to retain the funds. This Article also discussed each of the few Circuit Courts that have addressed Subsection G, and it distinguished the lone circuit court of appeals case that contained language in one opinion that a few lower courts incorrectly interpreted as requiring proof of a false claim. This Article argued that plaintiffs can rely upon the use of statistical sampling to recover the funds wrongfully retained because Subsection G no longer contains a requirement tying retention of funds to any initial false claim to obtain the funds in the first instance or to use any false record or statement to retain them. It also provided an example of how this provision works, followed by a restatement of the law and procedures for the 2009 amendment to Subsection G. In sum, Congress not only closed a significant loophole, but it also gave the government a new tool to help win the war on fraud against the government. This Article provides a comprehensive framework to guide courts and practitioners when applying the 2009 version of Section 3729(a)(1)(G) to the cases before them.