The Most Important Government Contracts Related Decisions of 2018

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*United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081 (11th Cir. 2018), cert. granted, 2018 WL 4385694 (U.S. Nov. 16, 2018) (No. 18-315)

In the events leading to the decision in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (June 16, 2016), commentators and amici urged the Supreme Court to mark boundaries on the implied certification theory of liability under the False Claims Act (“FCA”), 31 U.S.C. § 3729 et seq. Proponents for restricting FCA liability urged the Court to strictly enforce the FCA’s materiality and scintent requirements. Justice Thomas in *Escobar* followed this approach. Based on the FCA’s text, the Court imposed rigorous requirements on scintent, materiality, and specificity of pleading fraud. As a result, courts have constrained FCA liability, dismissing spurious claims and granting summary judgment to defendants.

Now, FCA defendants urge the Supreme Court to interpret the FCA statute of limitations to include restrictions not found in the text. On November 16, 2018, the Supreme Court granted certiorari to address conflicting decisions on the FCA statute of limitations. Under the FCA, the government or a *qui tam* relator can file suit within six years of an alleged violation. The FCA also includes a tolling provision if a defendant conceals fraudulent activity, delaying the government’s opportunity to learn of the wrongdoing. In *U.S. ex rel. Hunt v. Cochise Consultancy, Inc.*, the Court will address two issues: (a) whether the tolling provision, based on the government’s knowledge, applies when the government declines to intervene in a *qui tam* action, and (b) whether a *qui tam* relator is an “official of the United States” entitled to the benefit of a government official’s lack of knowledge under the tolling provision due to the defendant’s concealment of fraudulent activity.

I. The False Claims Act

The FCA imposes civil liability for false claims involving government funds or property. *Escobar*, 136 S. Ct. at 1996. The FCA is the primary means by which the U.S. government combats and deters fraud. *Sanders v. Allison Engine Co.*, 703 F.3d 930, 946 (6th Cir. 2012). In 2018, the federal government recovered more than $2.8 billion from FCA settlements and judgments. Under the FCA, liability is imposed where any person “knowingly presents, or

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causes to be presented” to the federal government “a false or fraudulent claim for payment or approval.” 31 U.S.C. 3729(a)(1)(A); U.S. ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 898 (9th Cir. 2017). Violators are liable for civil penalties plus three times the amount of the government’s damages. 31 U.S.C. 3729(a)(1); U.S. ex rel. Drakeford v. Tuomey, 792 F.3d 364, 384 (4th Cir. 2015).4

FCA actions may be brought by the Attorney General or private parties known as relators. State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby, 137 S. Ct. 436, 440 (2016); 31 U.S.C. 3730(a), (b)(1). When the relator files the complaint, it is known as a qui tam action. See Rockwell Int’l Corp. v. United States, 549 U.S. 457, 463 (2007).5 In a qui tam action, the relator brings the FCA suit on behalf of the United States as well as the relator. U.S. ex rel. Hanks v. U.S. Oncology Speciality, LLP, 2018 WL 4409832, at *10 (E.D.N.Y. Sept. 17, 2018). The Attorney General may intervene in a qui tam action and proceed with the suit. United States v. CSL Behring, LLC, 855 F.3d 935, 940 (8th Cir. 2017). Or the government can decline to intervene, providing the relator with “the exclusive right to conduct the action.” Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 769 (2000). The government intervenes in approximately 25% of qui tam actions.6

A. The False Claims Act Includes a Two-Tiered Statute of Limitations

The FCA has a two-tiered statute of limitations. An FCA action may not be brought:

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

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

whichever occurs last.


4 The FCA sets the civil penalty range at $5,000 to $10,000. 31 U.S.C. § 3729(a)(1). The FCA includes a provision adjusting the range for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 104–410. The current penalty range is $11,181 to $22,363. 28 C.F.R. § 85.5.

5 “Qui tam is short for ‘qui tam pro domino rege quam pro se ipso in hac parte sequitur,’ which means ‘who pursues this action on our Lord the King’s behalf as well as his own.” United States v. Quest Diagnostics Inc., 734 F.3d 154, 158 (2d Cir. 2013).


The second tier -- section (b)(2) -- provides a tolling period. If defendant conceals fraudulent activity, delaying the government’s knowledge of the wrongdoing, the tolling period permits suit within three years after a government official knew or had reason to know of the violation, but not to exceed ten years from the date of the false claim. U.S. ex rel. Shemesh v. CA, Inc., 89 F. Supp. 3d 36, 53-54 (D.D.C. 2015).

B. The Circuit Split Regarding Whether the Tolling Provision Applies if the Government Declines to Intervene


7 See also e.g., U.S. ex rel. Griffith v. Conn, 117 F. Supp. 3d 961, 985 (E.D. Ky. 2015) (“The Court follows the majority rule that § 3731(b)(2) does not apply to relators. The language of § 3731(b)(2) applies solely to the United States”); U.S. ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674, 693-94 (E.D. Pa. 2009) (“the three-year tolling period in § 3731(b)(2) does not apply in cases where the government does not intervene.”).
Some courts that apply section 3731(b)(2) in non-intervened cases hold that the relator steps into the shoes of “the official of the United States” for purposes of determining when the statute of limitations begins to run. Under that view, the cause of action accrues when relator reasonably should have known of the material facts. U.S. ex rel. Hyatt, 91 F.3d at 1218. Because section 3731(b)(2) references an “official of the United States,” the Ninth Circuit concludes that if the government declines to intervene, “the *qui tam* plaintiff is the only person ‘charged with responsibility to act in the circumstances.’” Id. at 1217 (quoting 31 U.S.C. § 3731(b)(2)). The relator’s knowledge triggers the statute of limitations in non-intervened actions, even though the tolling provision is based on government knowledge, because relators “sue on behalf of the government as agents of the government.” Id. at 1217 n.8. The Ninth Circuit correctly notes that relators sue on behalf of the government, acting as “private attorneys general.” United Seniors Ass’n, Inc. v. Philip Morris USA, 500 F.3d 19, 24 (1st Cir. 2007). But that does not mean relators are the government. U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994) (“Although a relator may sue in the government’s name, the relator is not vested with governmental power.”).

II. **In *Hunt*, the Eleventh Circuit Held that Section 3731(b)(2) Applies When the Government Declines to Intervene in a *Qui Tam* Action**

*Hunt* involved allegations that two contractors violated the FCA while performing a contract to clean up excess munitions in Iraq. The relator, Billy Joe Hunt, alleged defendants engaged in a kickback scheme from February through September 2006. On November 30, 2010, the FBI interviewed Hunt about his role in a separate kickback scheme under a different contract. During that interview, Hunt informed the FBI about the alleged fraud involving the contract to remediate munitions in Iraq. The FBI charged Hunt for his role in the separate kickback scheme. Hunt pleaded guilty and served ten months in prison.

After his release, Hunt filed a complaint on November 27, 2013, more than six years after the alleged fraud. But he filed his complaint within three years after he disclosed the fraud to the FBI during his interview on November 30, 2010. The district court held that the three-year tolling period in section 3731(b)(2) of the FCA’s statute of limitations, based on the government’s knowledge, does not apply when the government declines to intervene. The district court dismissed Hunt’s complaint as time barred.

The Eleventh Circuit held that section 3731(b)(2)’s “three year limitations period applies to an FCA claim brought by a relator even when the United States declines to intervene.” Applying the FCA’s text, the court determined that nothing in section 3731(b)(2) “says that its limitations period is unavailable to relators when the government declines to intervene.” According to the Eleventh Circuit, absent express language limiting section 3731(b)(2) to cases in which the government intervenes, relators can rely on the provision. The court also interpreted the provision in the FCA’s “broader statutory context.”
A. Rejecting the Majority Approach, the Eleventh Circuit in Hunt Held the Tolling Provision in Section 3731(b)(2) Applies Even if the Government Declines to Intervene

The Eleventh Circuit in Hunt rejected defendants’ argument that applying section 3731(b)(2) to non-intervened cases would lead to absurd results. The three-year tolling provision in section 3731(b)(2) is triggered by a federal official’s knowledge. Applying the provision to non-intervened cases would mean the statute of limitations is based on the knowledge of a non-party. The Eleventh Circuit acknowledged that “it is generally the case that a discovery-based limitations period begins to run when a party—the plaintiff—knew or should have known about the fraud or claim.” See, e.g., Merck & Co. v. Reynolds, 559 U.S. 633, 637 (2010). But qui tam actions present a “unique context.” Even if the United States is not a party, it remains the real party in interest and retains significant control over the action.

The court also rejected defendants’ argument that Supreme Court precedent holds the United States is not a party to non-intervened qui tam suits. In U.S. ex rel. Eisenstein v. City of New York, 556 U.S. 928 (2009), relators in a non-intervened action filed a notice of appeal 54 days after a district court dismissed their complaint. Private litigants have 30 days to file a notice of appeal. The United States has 60 days. In Eisenstein, the Court affirmed dismissal, holding the United States is not a party to a non-intervened qui tam action. According to the Eleventh Circuit, Eisenstein did not address whether the United States’ non-party status means section 3731(b)(2) is available in non-intervened cases.

Nor does application of section 3731(b)(2) to non-intervened cases render the six-year limitations period superfluous. According to the Eleventh Circuit in Hunt, the FCA ensures relators will promptly report fraud rather than rely on the three-year tolling provision to delay filing suit. The FCA’s first-to-file bar requires dismissal of qui tam complaints based on previously filed claims with the same facts. See 31 U.S.C. § 3730(b)(5). The FCA public disclosure bar prevents claims based on allegations disclosed in a federal hearing or in a news report. Relators who delay bringing suit risk the government learning about fraud from another source, meaning the three-year period will expire before relator files suit.

B. The Eleventh Circuit Also Held that the Tolling Provision in Section 3731(b)(2) is Based on the Government’s Knowledge, Not Relator’s Knowledge, if Defendant Conceals the Fraudulent Activity

The three-year tolling provision in section 3731(b)(2) begins when material facts “are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances.” Despite the reference to “the official of the United States,” the Ninth Circuit adopted the approach that the statute of limitations in section 3731(b)(2) is triggered by relator’s knowledge. U.S. ex rel Hyatt, 91 F.3d at 1217. In Hunt, the Eleventh Circuit rejected the approach as a “legal fiction” inconsistent with the FCA’s text. Other courts have similarly noted that although relators stand in the government’s shoes, relators are not vested with governmental authority. See, e.g., Nasuti ex rel U.S. v. Savage Farms, Inc., 2014 WL 1327015 (D. Mass. Mar. 27, 2014) (rejecting argument that relator serves as “attorney for the United States”); U.S. ex rel. Phillips v. Pediatric Servs. of Am., Inc., 123 F. Supp. 2d 990,
994 (W.D.N.C. 2000) (“The *qui tam* provision of the FCA does not vest relators with governmental authority and, therefore, they are not Article II ‘officers.’”).

The court in *Hunt* held that relator’s knowledge does not affect when the three-year period begins. Thus “when the relator learned of the fraud is immaterial for statute of limitations purposes” under section 3731(b)(2). Instead “it is the knowledge of a government official, not the relator, that triggers the limitations period” in section 3731(b)(2). The Eleventh Circuit held that nothing in the FCA “or broader context suggests that the limitations period is triggered by the relator’s knowledge.” The court considered the statutory language to be “plain,” and refused to extend it. *See also U.S. ex rel. Pogue*, 474 F. Supp. 2d at 85 (section 3731(b)(2) includes specific phrase “official of the United States charged with responsibility to act in the circumstances,” and these “precise words must be given their precise meaning”).

### III. Conclusion

As written, the statute of limitations in section 3731(b)(2) appears to apply even if the government declines to intervene in a *qui tam* action. The FCA, however, does “not reflect careful drafting or a precise use of language.” *U.S. ex rel Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999). In a previous case, the Supreme Court determined the statute of limitations is ambiguous, holding the six-year period in section 3731(b)(1) does not apply to retaliation actions under section 3730(h), even though the provision as written appears to address all actions under section 3730. *Graham Cty. Soil and Water Conserv. Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005).

The Supreme Court in *Escobar* followed the approach to statutory interpretation championed by the late Justice Antonin Scalia, “remaining largely faithful to the text of the FCA.” Justice Thomas, author of the *Escobar* decision, also wrote decisions for the Court in *Eisenstein* and *Graham County*. If we follow the logic of those decisions, the result would likely be that section 3731(b)(2) applies only if the government intervenes. In its most recent decision addressing the FCA’s statute of limitations, the Supreme Court found the provision to be “more complex” than appears under a straightforward reading, and thus “ambiguous, rather than clear.” *Graham Cty.*, 545 U.S. at 415. According to the Court, the provision includes an “implicit limitation” because Congress used terms “imprecisely.” *Id.* at 418. Under the Court’s reasoning in *Graham County*, section 3731(b)(2) similarly includes an “implicit limitation,” and thus applies only when the government files suit or intervenes in a *qui tam* action. By basing the limitations period on a responsible government official’s knowledge, Congress implicitly intended for section 3731(b)(2) to apply only when the government prosecutes a claim as a party to the lawsuit.

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Nevertheless, the lack of clarity in the statute of limitations makes any forecast difficult. Courts that have applied section 3731(b)(2) to non-intervened cases, and courts that have declined to do so, based their decisions on the FCA’s text. For example, the Fourth Circuit declined to extend section 3731(b)(2) to non-intervened cases based on “the specific language in the statute.” *U.S. ex rel. Sanders*, 546 F.3d at 293. Courts reaching the opposite conclusion have similarly done so based on FCA language the courts consider to be clear. *See, e.g.*, *U.S. ex rel. Hunt*, 887 F.3d at 1096 (basing its decision on “the statutory text”); *U.S. ex rel. Pogue*, 474 F. Supp. 2d at 85 (extending section 3731(b)(2) to non-intervened actions based on “the words Congress” used, which the court determined to be “unambiguous”).

There is the additional question whether a holding that section 3731(b)(2) is based only on the government’s knowledge will lead the Department of Justice (“DOJ”) to move to dismiss more *qui tam* actions. Under *Escobar*, government knowledge may disprove that fraud is material because “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.” *Escobar*, 136 S. Ct. at 2003. As a result, FCA defendants increasingly seek discovery to determine if government agencies continued to pay after learning of the purported fraud. On January 10, 2018, Michael Granston, Director of the DOJ Commercial Litigation Branch, Fraud Section, issued a memorandum identifying factors to use in evaluating whether to dismiss FCA cases under 31 U.S.C. § 3730(c)(2)(A), which provides: “The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.” In deciding whether *qui tam* actions should be dismissed, DOJ considers the burden to government agencies. Consistent with the Granston memorandum, on December 17, 2018 DOJ moved to dismiss ten FCA cases. DOJ determined, in part, that the suits would unduly burden the government, including costs of monitoring the litigation and placing additional burdens on the courts.

If the Supreme Court agrees with the Eleventh Circuit -- that “it is the knowledge of a government official, not relator, that triggers the limitations period” in section 3731(b)(2) in non-intervened cases -- DOJ will have a difficult time arguing that discovery of government knowledge should be prohibited.

Similarly, the Solicitor General urged the Supreme Court to decline to grant *certiorari* in *U.S. ex rel. Campie v. Gilead Sciences., Inc.*, 862 F.3d 890 (9th Cir. 2017). In *Campie*, relators accused Gilead of fraud related to the FDA’s process for approving drugs for which the company sought reimbursement. Relators alleged Gilead used ingredients from unapproved Chinese facilities and obscured and augmented labeling and paperwork to obtain approval. The Ninth Circuit held relators’ complaint stated a claim that Gilead provided “nonconforming goods” by misrepresenting the goods it provided. *Id.* at 900. On November 30, 2018, the government filed its *amicus curiae* brief informing the Court that DOJ will move to dismiss relators’ *qui tam*

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complaint if the case is remanded to the district court. DOJ expressed concern that “both parties might file burdensome discovery and *Touhy* requests” for government documents and “employee discovery (and potentially trial testimony), in order to establish exactly what the government knew and when.” These requests, according to the Solicitor General, would distract from the agency’s day-to-day mission.\(^\text{10}\)

At the same time, Congress has amended the FCA to overcome court decisions limiting the Act’s reach.\(^\text{11}\) Before the Supreme Court issued its *Escobar* decision, Senator Charles Grassley (R-Iowa), Judiciary Committee chairman, made implied threats of legislative reversal in his *amicus* brief submitted to the Court. On February 13, 2018, in response to lower court decision’s following *Escobar*, Senator Grassley addressed what he described as “troubling developments in the courts’ interpretation of the False Claims Act,” noting his disagreement with how lower courts have interpreted the decision. Senator Grassley described his efforts in the mid-1980s to eliminate the “government knowledge bar,” under which *qui tam* suits were barred if the government was aware of the fraud. In Senator Grassley’s view, lower courts are applying *Escobar* “inappropriately or as strictly as possible -- to the point of absurdity,” the practical effect of which is to revive the “government knowledge bar” that he had worked to remove. A decision limiting section 3731(b)(2) to cases in which the government intervenes could prompt Senator Grassley to seek further amendments to the FCA.

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\(^{10}\) *Touhy* requests arise under regulations addressing when agencies will produce documents or agency employees for testimony. Agencies promulgate *Touhy* regulations “to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business.” *Agility Pub. Warehousing Co. K.S.C.P. v. U.S. Dep’t of Def.*, 246 F. Supp. 3d 34, 41 (D.D.C. 2017).

**ADDENDUM**

Summary of Issues to be Addressed by the Supreme Court in *Hunt*

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<tr>
<th>Statutory Text</th>
<th>Issue One</th>
<th>Issue Two</th>
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<tr>
<td>(b) A civil action under section 3730 may not be brought--</td>
<td>Does section 3731(b)(2)’s three-year tolling provision apply when the government declines to intervene in a <em>qui tam</em> action?</td>
<td>If section 3731(b)(2) applies to non-intervened <em>qui tam</em> actions, is the three-year limitations period measured by relator’s knowledge of the fraud or the government’s knowledge of the fraud?</td>
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<tr>
<td>(1) more than 6 years after the date on which the violation of section 3729 is committed, or</td>
<td><strong>Majority Approach:</strong> (Fourth, Fifth, and Tenth circuits) Section 3731(b)(2) applies only if the government intervenes. <em>Reasoning:</em> The provision refers to an “official of the United States,” implicitly excluding relators.</td>
<td><strong>Ninth Circuit Approach:</strong> Section 3731(b)(2)’s tolling provision is measured by relator’s knowledge. <em>Reasoning:</em> Relators step into the shoes of the government, suing on its behalf as agents of the government. <em>U.S. ex rel. Hyatt v. Northrop Corp.</em>, 91 F.3d 1211 (9th Cir. 1996).</td>
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<td>(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.</td>
<td><strong>Minority Approach:</strong> (Ninth and Eleventh circuits) Section 3731(b)(2) applies regardless whether the government intervenes. <em>Reasoning:</em> Section 3731’s introductory clause refers to section 3730, which applies to actions brought by relators and the United States. Nothing in subsection (b)(2) differentiates or excludes <em>qui tam</em> actions. The closing clause, “whichever occurs last,” indicates sections (b)(1) and (b)(2) should be read together.</td>
<td><strong>Eleventh Circuit Approach:</strong> The tolling provision is measured by the government’s knowledge. <em>Reasoning:</em> the term “official of the United States charged with responsibility” uses precise words that must be given their precise meaning. Nothing in subsection (b)(2) measures the statute of limitations by relator’s knowledge. <em>U.S. ex rel. Hunt v. Cochise Consultancy, Inc.</em>, 887 F.3d 1081 (11th Cir. 2018).</td>
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MEMORANDUM OPINION

This matter is before the court on (1) Defendant Cochise Consultancy, Inc.’s Motion to Dismiss (Doc. # 35), and (2) Defendant The Parsons Corporation’s Motion to Dismiss (Doc. # 50). In their Motions, Defendants have moved to dismiss Billy Joe Hunt’s (“Relator Hunt”) Complaint under the statute of limitations applicable to the federal False Claims Act found at 31 U.S.C. § 3731(b). The Motions have been fully briefed. (Docs. # 48, 49, 51, 59 and 60).  

I. Background

Relator Hunt’s Complaint alleges that Parsons and Cochise fraudulently agreed for a government subcontract to be awarded to Cochise on February 21, 2006. The Complaint alleges that, as a result of that fraudulent scheme, Parsons and Cochise caused the United States Government to pay false claims between February 2006 and September 2006. The Complaint

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1 Defendants also move to dismiss on the basis that, they argue, Relator Hunt has failed to allege his claims with sufficient particularity. Relator Hunt is correct that dismissal on this basis would be inappropriate without allowing him an opportunity to replead. (Doc. # 59 at 2).

2 On January 29, 2015, the United States notified the court of its election to decline intervention. (Doc. # 9).
further alleges that Parsons and Cochise continued the same fraudulent conduct to continue receiving subcontracts until early 2007. (Doc. # 1).

II. The Applicable Statute of Limitations

The FCA provides that:

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

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

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


Relator Hunt’s Complaint was filed on November 27, 2013, over six years after the occurrence of the conduct that Relator Hunt claims is fraudulent. (Doc. # 1). Defendants have moved to dismiss Relator Hunt’s Complaint as barred by the applicable statute of limitations found at 31 U.S.C. § 3731(b). Relator Hunt concedes that his Complaint is barred under the six-year statute of limitations found in § 3731(b)(1), but argues that the Complaint should still be deemed viable under the alternative three-year statute of limitations provided for in section 3731(b)(2). (Docs. # 48 and 59).

Relator Hunt’s Response to Cochise’s Motion makes clear that he first notified officials of the United States of the fraud allegations discussed in his Complaint on November 30, 2010. (Doc. # 48 at 3). However, his Response to both Motions avoids discussing in any detail the undisputed allegation that he was at least aware of, if not involved in, the fraudulent scheme as it

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was occurring in 2006. (Doc. # 48-1 at 25). Indeed, he reported as much to the Federal Bureau of Investigations on or about November 30, 2010. (“On February 14, 2006, Hunt was called into Army Corps of Engineers Program Manager Wayne Shaw’s (Shaw) office. Shaw told Hunt to make sure the security contract was awarded to Cochise or Hunt could get out of Kuwait.”)\(^4\) (Doc. # 48-1 at 25).

Defendants’ statute of limitations arguments require this court to interpret the relevant limitations provisions of the FCA. Federal courts have three differing interpretations of the FCA’s statute of limitations. The first interpretation holds that section 3731(b)(2) simply does not apply to relators. See, e.g., U.S. ex rel. Griffith v. Conn, 117 F. Supp. 3d 961, 985 (E.D. Ky. 2015); U.S. ex rel. Bauchwitz v. Holloman, 671 F.Supp. 2d 674, 693-94 (E.D. Pa. 2009). The second provides that section 3731(b)(2) applies to qui tam relators/plaintiffs, but the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action. See, e.g., U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1218 (9th Cir. 1996). And, under the third interpretation, relators are entitled to the ten-year outer limit of section 3731(b)(2), and the tolling clock does not begin to run until the government knew or should know about the right of action. See, e.g., U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC, 659 F. Supp. 2d 262, 274 (D. Mass. 2009).

The Eleventh Circuit has not weighed in on whether a Relator is entitled to take advantage of the FCA’s three-year statutory tolling provision in a published decision.\(^5\) But other Circuits have addressed the issue. In a case involving the FCA’s statute of limitations, the Third

\(^4\) In another matter around this same time, Hunt reported to the FBI that he “received approximately $300,000 in kickbacks” from another contractor. (Doc. # 48-1 at 15). On or about May 8, 2012, Relator Hunt pleaded guilty to one violation of 18 U.S.C. § 371 (Conspiracy to Commit Wire Fraud, Mail Fraud and to Engage in Unlawful Kickbacks) and one violation of 26 U.S.C. § 7206(1) (Filing a False Tax Return). (Case No. 5:11-cr-00382-AKK-TMP, Docs. # 13, 21).

\(^5\) But see Foster v. Savannah Commc’n, 140 Fed.App’x. 905, 907 (11th Cir. 2005) (applying only the six-year statute of limitations to the relator’s claim without discussing § 3731(b)(2)).
Circuit in *U.S. ex rel. Malloy v. Telephonics Corp.*, stated (in dicta) that the point in time when the relator became aware of the defendant’s alleged fraud “is important, because it determines whether we apply the six year statute of limitations in § 3731(b)(1), or the three year limitation in § 3731(b)(2).” 68 Fed.App’x. 270, 273 (3d Cir. 2003). After *Malloy*, the Supreme Court considered an issue in the FCA context involving different appellate filing deadlines when the government is a “party” versus when the government is not involved. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009). The Court found that the United States is not a party to a privately initiated FCA suit when it declines to intervene, and that private relators are therefore not entitled to a longer appellate filing deadline. *Eisenstein*, 556 U.S. at 937. District courts in the Third Circuit have applied *Eisenstein*’s reasoning to the FCA’s statute of limitations provision and found that section 3731(b)(2) does not apply when the United States has declined to intervene. *See, e.g., U.S. ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 693–94 (E.D. Pa. 2009) (analyzing *Malloy* and *Eisenstein* to conclude that a private relator cannot “take advantage of a tolling provision applicable only to the government”).

There is a split among the Circuit courts which have decided that particular issue. *Compare U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008) (holding that the statute of limitations in section 3731(b)(2) only applies in cases where the United States is a party); *U.S. ex rel. Sikkenga v. Regence Bluescross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) (same); *U.S. ex rel Erskine v. Baker*, 213 F.3d 638 (5th Cir. 2000) (unpublished table opinion) (same) *with U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) (“[W]e conclude that Congress did not intend to restrict the tolling provisions of the Act to apply to suits brought by the Attorney General alone, but intended the tolling provision to apply to qui tam plaintiffs as well.”).
For obvious reasons, Relator Hunt argues, as he must, that the third interpretation should prevail here. Under the first interpretation, Relator Hunt is right out. And if this court adopted the second interpretation -- that relators are entitled to take advantage of the longer limitations period provided under section 3731(b)(2), but that the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action -- his claim would be time-barred. According to his own Complaint, Relator Hunt had knowledge of the alleged fraudulent scheme more than six years before his Complaint was filed.

In hanging his hat on the third interpretation of section 3731(b)(2), Relator Hunt argues that the three-year statute of limitations begins to run when the requisite government official knew (or should have known) of the FCA violation. He contends this analysis should apply regardless of (1) when the violation occurred and (2) his (i.e., the relator’s) knowledge, so long as the complaint is ultimately filed within ten years of the violation. Notably, however, no Circuit has accepted this tortured interpretation of section 3731(b)(2). After all, it would extend the limitations period in qui tam actions regardless of how long the relator has known of the material facts. To be sure, at least one court has held that such a rule is indefensible:

A statute of limitations that allows the allegedly bound party to extend that period at its whim creates another bizarre result. In every case in which the government’s knowledge comes from the relator, the relator would have an extra three years, up to ten years after the violation, to file suit. Thus, the relator could always wait until year seven to alert the government (assuming the government’s knowledge comes only from the relator) and then file suit in year ten. As the Fourth Circuit explained, such a resolution would render the six-year limitations period “superfluous in nearly all FCA cases”—violating the “duty to give effect, if possible, to every clause and word of a statute.” [*United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008)] (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L.Ed.2d 251 (2001)).

*Griffith*, 117 F. Supp. 3d at 986; *see also Hyatt*, 91 F.3d at 1218 (“Hyatt cannot have it both ways. If he accepts the benefits of the tolling statute, he must be subject to its restrictions. His duty to act must be triggered by his own knowledge, not the knowledge of others. This
interpretation comports with the legislative scheme of the Act, the purposes of statutes of limitations and the FCA tolling provisions.”).

This court finds this reasoning persuasive and for similar reasons rejects Relator Hunt’s proposal that this court adopt the third interpretation of section 3731(b). The court need not decide which of the other two interpretations applies here because Relator Hunt’s claim is barred under either interpretation.

III. Conclusion

For the foregoing reasons, the court holds that Relator Hunt’s claims are barred by the FCA’s statute of limitations. 31 U.S.C. § 3731(b).

A separate order will be entered.

DONE and ORDERED this April 28, 2016.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

6 The court also finds the reasoning of those courts which have held that the plain text of the FCA supports limiting section 3731(b)(2) to cases in which the government has intervened to be well-founded. See United States v. Cephalon, Inc., 2016 WL 398014, at *6 (E.D. Pa. Feb. 2, 2016); United States ex rel. Shemesh v. CA, Inc., 89 F. Supp. 3d 36, 53 (D. D.C. 2015) (“the Court will follow the majority view that the tolling provision of 31 U.S.C. § 3731(b)(2) does not apply to qui tam relators.”); United States ex rel. Silver v. Omnicare, 2014 WL 4827410, at *8 (D. N.J. Sept. 29, 2014) (“A plain reading of the statute compels the conclusion that a FCA claim must be filed within six years, or if the U.S. government intervenes, the limitations period is extended for three years”); United States ex rel. Simpson v. Bayer Corp., 2014 WL 1418293, at *12 (D. N.J. April 11, 2014) (applying only the six year limitation period to qui tam action); United States ex rel. Bauchwitz v. Holloman, 671 F.Supp.2d 674, 694–95 (E.D. Pa. 2009) (“we conclude that the three-year tolling period in § 3731(b)(2) does not apply in cases where the government does not intervene.”). These cases have followed the logic of the Supreme Court in Eisenstein, which held that, for the purposes of Federal Rule of Appellate Procedure 4, the United States is not a party to a qui tam FCA action unless it chooses to intervene. Eisenstein, 556 U.S. at 937.
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12836

D.C. Docket No. 5:13-cv-02168-RDP

UNITED STATES OF AMERICA,
ex rel. Billy Joe Hunt,

Plaintiff - Appellant,

versus

COCHISE CONSULTANCY, INC.,
doing business as Cochise Security,
THE PARSONS CORPORATION,
doing business as Parsons Infrastructure & Technology,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(April 11, 2018)

Before WILSON and JILL PRYOR, Circuit Judges, and BARTLE,* District Judge.

JILL PRYOR, Circuit Judge:

* Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.
Relator Billy Joe Hunt filed a *qui tam* action alleging that his employer The Parsons Corporation and another entity, Cochise Consultancy, Inc., violated the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-33, by submitting to the United States false or fraudulent claims for payment. Hunt filed his action more than six years after the alleged fraud occurred but within three years of when he disclosed the fraud to the government. In this appeal, we are called upon to decide whether Hunt’s FCA claim is time barred. To answer this question, we must construe the FCA’s statutory provision that requires a civil action alleging an FCA violation to be brought within the later of:

- “6 years after the date on which the violation . . . is committed,” 31 U.S.C. § 3731(b)(1), or
- “3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,” *id.* § 3731(b)(2).

The question we answer today, which is one of first impression, is whether § 3731(b)(2)’s three year limitations period applies to a relator’s FCA claim when the United States declines to intervene in the *qui tam* action.

The district court concluded that the limitations period in § 3731(b)(2) is inapplicable in such cases and thus Hunt’s claim is time barred. After careful consideration of the statutory scheme, we hold that § 3731(b)(2)’s three year limitations period applies to an FCA claim brought by a relator even when the
United States declines to intervene. Further, because the FCA provides that this period begins to run when the relevant federal government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations purposes. Here, it is not apparent from the face of Hunt’s complaint that his claim is untimely because his allegations show that he filed suit within three years of the date when he disclosed facts material to the right of action to United States officials and within ten years of when the fraud occurred. The district court therefore erred in dismissing his complaint. We reverse and remand to the district court for further proceedings.

I. FACTUAL BACKGROUND

A. The Fraudulent Scheme

Hunt alleges that Parsons and Cochise (the “contractors”) defrauded the United States Department of Defense for work they performed as defense contractors in Iraq. The Department of Defense awarded Parsons a $60 million contract to clean up excess munitions in Iraq left behind by retreating or defeated enemy forces. Hunt worked for Parsons in Iraq on the munitions clearing contract, managing the project’s day-to-day operations. One facet of the contract required Parsons to provide adequate security to its employees, its subcontractors, and

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1 In deciding whether the district court erroneously dismissed the complaint as untimely, we accept as true the well-pleaded allegations in the complaint. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004). We thus recite the facts as Hunt has alleged them.
others who were working on the munitions clearing project. Parsons relied on a subcontractor to provide the security services.

After seeking bids for the security subcontract, a Parsons committee awarded it to ArmorGroup. But an Army Corps of Engineers contracting officer in Iraq whom Cochise had bribed with trips and gifts, Wayne Shaw, was determined to override this decision and have the subcontract awarded to Cochise. Shaw directed Hunt to have Hoyt Runnels, another Parsons employee who served on the committee that selected ArmorGroup, issue a directive awarding Cochise the subcontract. When Hunt did so, Runnels refused to issue the directive, explaining that such a directive had to come from the Corps.

Shaw then created a forged directive rescinding the award to ArmorGroup and awarding the subcontract to Cochise. The directive had to be signed by Steven Hamilton, another Corps contracting officer. Hamilton, who was legally blind, relied on Shaw to describe the document he was signing. Shaw did not disclose that the directive rescinded the award to ArmorGroup so that the subcontract could be awarded to Cochise.

After Hamilton signed the directive, Shaw directed Runnels to execute it. Runnels again refused because he believed the award to Cochise had been made in violation of government regulations. Shaw threatened to have Runnels fired. Two days later, Hamilton learned that the directive Shaw had him sign rescinded the
award to ArmorGroup and awarded Cochise the subcontract. Hamilton
immediately rescinded his directive awarding the subcontract to Cochise.

After Runnels refused to follow Shaw’s directive to award the subcontract to
Cochise, another Parsons employee, Dwight Hill, replaced Runnels and was given
responsibility for awarding the security subcontract. Rather than give the
subcontract to ArmorGroup, Hill awarded it to Cochise through a no-bid process.
Hill justified using a no-bid process by claiming there was an urgent and
immediate need for convoy services and then defended the choice of Cochise to fill
this immediate need by asserting that Cochise had experience that other security
providers lacked. But Hunt alleges that Hill selected Cochise because he was its
partner in the fraudulent scheme.

From February through September 2006, Cochise provided security services
under the subcontract. Each month the United States government paid Cochise at
least $1 million more than it would have paid ArmorGroup had ArmorGroup been
awarded the subcontract. The government incurred other additional expenses as
well. For example, armored vehicles were needed to provide the security services,
and because Cochise had no such vehicles, the government paid more than $2.9
million to secure the vehicles. In contrast, ArmorGroup would have supplied its
own armored vehicles, saving the government millions of dollars. In September
2006, when Shaw rotated out of Iraq, Parsons immediately reopened the subcontract for bidding and awarded it to ArmorGroup.

Several years later, Hunt reported the fraud to the United States government. On November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. During the interview, Hunt told the agents about the contractors’ fraudulent scheme involving the subcontract for security services. For his role in the separate kickback scheme, Hunt was charged with federal crimes, pled guilty, and served ten months in federal prison.

B. Procedural History

After his release from prison, on November 27, 2013, Hunt filed under seal in federal district court an FCA complaint against the contractors. Hunt set forth two theories why the claims the contractors submitted for payment qualified as false claims under the FCA. First, he alleged that Cochise fraudulently induced the government to enter into the subcontract to purchase Cochise’s services by providing illegal gifts to Shaw and his team. He alleged that Parsons, through Hill, conspired with Cochise and Shaw to rig the bidding process for the subcontract. Second, Hunt alleged that the contractors had a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so.
After the United States declined to intervene, Hunt’s complaint was unsealed. The contractors moved to dismiss, arguing that the claim was time barred under the six year limitations period in 31 U.S.C. § 3731(b)(1), and Hunt had waited more than seven years after the fraud occurred to file suit. Hunt responded that his claim was timely under the limitations period in § 3731(b)(2) because he had filed suit within three years of when the government learned of the fraud at his FBI interview and ten years of when the fraud occurred. The district court disagreed, concluding that § 3731(b)(2)’s limitations period was either (1) unavailable to Hunt because the United States had declined to intervene or (2) expired because it began to run when Hunt learned of the fraud. The district court then granted the motions to dismiss, finding Hunt’s claim untimely under § 3731(b)(1)’s limitation period because it was apparent from the face of Hunt’s complaint that he failed to file suit within six years of when the fraud occurred. This is Hunt’s appeal.

II. STANDARD OF REVIEW

We review de novo a district court’s dismissal of a complaint for failure to state a claim upon which relief can be granted. Am. Dental Ass’n v. Cigna Corp., 605 F.3d 1283, 1288 (11th Cir. 2010). A dismissal for failure to state a claim on statute of limitations grounds is appropriate “only if it is apparent from the face of the complaint that the claim is time-barred.” La Grasta v. First Union Sec., Inc.,
358 F.3d 840, 845 (11th Cir. 2004) (internal quotation marks omitted). “We review the district court’s interpretation and application of statutes of limitations de novo.” Ctr. for Biological Diversity v. Hamilton, 453 F.3d 1331, 1334 (11th Cir. 2006).

III. BACKGROUND ON THE FCA

Before addressing whether Hunt’s claim is timely, we pause to provide some necessary background information about the roles of the government and the private plaintiff in a qui tam suit and to discuss the relevant FCA provisions. The FCA was enacted in 1863 to “stop[] the massive frauds perpetrated by large contractors during the Civil War.” Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). These contractors billed the United States “for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.” Id. (internal quotation marks omitted). In response, Congress passed the original FCA, which imposed civil and criminal liability for fraud on the government, subjecting violators to double damages, forfeiture, and imprisonment. Id.

Since 1863, Congress repeatedly has amended the FCA. Today, the FCA continues to prohibit making false claims for payment to the United States. See 31 U.S.C. § 3729(a). But unlike the original FCA that provided for both civil and
criminal liability, violators today face only civil liability, which subjects them to treble damages and civil penalties.\textsuperscript{2} \textit{Id.}

Section 3730 of the FCA sets forth three different enforcement mechanisms for a violation of the Act. Section 3730(a) provides that the Attorney General may sue a violator in a civil lawsuit. Section 3730(b) allows a private plaintiff, known as a relator, to bring a \textit{qui tam} action in the name of the United States against a violator. Section 3730(h) creates a private right of action for an individual whose employer retaliated against him for assisting an FCA investigation or proceeding.

This appeal concerns the second mechanism, a \textit{qui tam} action brought by a relator under § 3730(b). In a \textit{qui tam} action, the relator “pursues the government’s claim against the defendant, and asserts the injury in fact suffered by the government.” \textit{Stalley ex rel. United States v. Orlando Reg’l Healthcare Sys., Inc.}, 524 F.3d 1229, 1233 (11th Cir. 2008).\textsuperscript{3} In bringing a \textit{qui tam} action, the relator “in effect, sue[es] as a partial assignee of the United States.” \textit{Vt. Agency of Nat. Res. v. United States ex rel. Stevens}, 529 U.S. 765, 773 n.4 (2000) (emphasis omitted).

Special procedures apply when a relator brings an FCA action; these procedures afford the government the opportunity to intervene and assume primary

\textsuperscript{2} The FCA imposes a civil penalty of up to $11,000 for each violation occurring on or before November 2, 2015 and up to $21,563 for each violation occurring after that date. \textit{See} 31 U.S.C. § 3729(a); 28 C.F.R. §§ 85.3(a)(9), 85.5.

\textsuperscript{3} The FCA is one of only a handful of federal laws still in effect that may be enforced through a \textit{qui tam} action. \textit{See Vt. Agency of Nat. Res. v. United States ex rel. Stevens}, 529 U.S. 765, 768 n.1 (2000) (identifying four federal statutes that authorize \textit{qui tam} actions).
control over the litigation. A relator who initiates an FCA action must file her complaint under seal and serve it only on the United States. 31 U.S.C. § 3730(b)(2). While the lawsuit remains under seal, the United States has the opportunity to investigate and decide whether to intervene as a party.\textsuperscript{4} Id. During this period, the United States may serve a civil investigative demand upon any person believed to be in possession of documents or information relevant to an investigation of false claims, requiring that person to produce documents, answer interrogatories, or give oral testimony. Id. § 3733(a)(1). In addition, the United States may meet with the relator and her attorney, giving the government an opportunity to ask questions to assess the strengths and weaknesses of the case and the relator a chance to assist the government’s investigation.\textsuperscript{5}


\textsuperscript{5} Relators often provide such assistance while the government is deciding whether to intervene. \textit{See, e.g., United States ex rel. Shea v. Verizon Commc’ns, Inc.}, 844 F. Supp. 2d 78, 86-87 (D.D.C. 2012) (explaining that the relator worked closely with the government while the case was under seal by identifying potential witnesses, proposing categories of documents to be subpoenaed, and making presentations about the merits of the case); \textit{United States ex rel. Rille v. Hewlett-Packard Co.}, 784 F. Supp. 2d 1097, 1099 (E.D. Ark. 2011) (discussing actions taken by the relator while the case was under seal including meeting with government lawyers, reviewing documents for the government, and maintaining a database of subpoenaed documents); \textit{United States ex rel. Alderson v. Quorum Health Grp., Inc.}, 171 F. Supp. 2d 1323, 1326 (M.D. Fla. 2001) (explaining that while the complaint was under seal the relator was interviewed by the government multiple times, identified categories of documents for the government to subpoena, and reviewed subpoenaed documents for the government); \textit{see also} Robert Fabrikant & Nkechinyem Nwabuzor, \textit{In the Shadow of the False Claims Act: “Outsourcing” the Investigation by Government Counsel to Relator Counsel During the Seal Period}, 83 N.D. L.
If the United States decides to intervene, the government acquires “primary responsibility for prosecuting the action,” although the relator remains a party. Id. § 3730(c)(1). In contrast, if the United States declines to intervene, the relator may proceed with the action alone on behalf of the government, but the United States is not a party to the action. Id. § 3730(c)(3).

Although the United States is not a party to a non-intervened case, it nevertheless retains a significant role in the litigation. The government may request to be served with copies of all pleadings and deposition transcripts, seek to stay discovery if it “would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts,” and veto a relator’s decision to voluntarily dismiss the action. Id. § 3730(b)(1), (c)(3), (c)(4). Additionally, the court may permit the government to intervene later “upon a showing of good cause.” Id. § 3730(c)(3).

Any recovery obtained from a defendant in an FCA *qui tam* action belongs to the United States, regardless of whether the government has intervened. The relator is entitled to a portion of the recovery, however. Id. § 3730(d). Because the relator receives a share of the government’s proceeds, he “is essentially a self-appointed private attorney general, and his recovery is analogous to a lawyer’s

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Rev. 837, 843 (2007) (summarizing the types of support a relator’s counsel may give to the government while a complaint is under seal).
contingent fee.” United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992); see Cook Cty. v. United States ex rel. Chandler, 538 U.S. 119, 122 (2003) (explaining that a relator sues in the name of the government “with the hope of sharing in any recovery”). By allowing a relator to bring a qui tam action and share in the government’s recovery, the FCA creates an economic incentive to encourage “citizens to come forward with knowledge of frauds against the government.” Milam, 961 F.2d at 49.

The size of the relator’s share depends upon whether the United States intervenes. In an intervened case, the relator usually is entitled to between 15 and 25 percent of the proceeds, as well as reasonable expenses, attorney’s fees, and costs. 31 U.S.C. § 3730(d)(1). In a non-intervened case, the relator’s share usually is greater: between 25 and 30 percent of the proceeds, as well as reasonable expenses, attorney’s fees, and costs. Id. § 3730(d)(2).

Even though the relator receives a smaller share in an intervened case, relators generally try to persuade the United States to intervene because the government’s intervention makes it far more likely that there will be a recovery. When the United States elects to intervene, about 90 percent of the time the case generates a recovery, either through settlement or a final judgment. But only about
10 percent of non-intervened cases result in recovery. See David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013). Indeed, when the government declines to intervene, more than 50 percent of the time the relator decides not to proceed and voluntarily dismisses the action. See *id.* at 1717-18.

**IV. ANALYSIS**

With this general background in mind, we now turn to the issue in this case: whether it is apparent from the face of Hunt’s complaint that his FCA claim is time barred. To answer this question, we must interpret the FCA’s statute of limitations provision, which creates two limitations periods that potentially apply:

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

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

6 To be clear, we do not take the dramatically different success rates for intervened cases and non-intervened cases to mean that if the government declines to intervene, the case necessarily is meritless. The government may decline to intervene based on its evaluation of factors other than the merits of the claim, such as the likely size of the recovery, available agency resources, or whether the relator and his counsel have resources to prosecute the action on their own. See Engstrom, *supra*, at 1714. Conversely, the fact that most intervened cases generate a recovery does not necessarily mean that every intervened case has merit. The involvement of the Department of Justice in an intervened case may create a strong incentive for a defendant to settle an FCA claim regardless of its relative merit to avoid things like increased publicity of the fraud because the defendant cannot cast the litigation solely as the product of an overzealous relator; the disadvantages of litigating against the government with its considerable resources and ability to coordinate with officials at the affected agency; or the risk that the defendant may be barred from federal contracting, a sanction that is unavailable in non-intervened cases. *Id.* at 1713.
(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b). Because it is apparent from the face of Hunt’s complaint that he failed to file his action within the six year limitations period of § 3731(b)(1), this case turns on whether Hunt can avail himself of § 3731(b)(2). To determine whether § 3731(b)(2) applies, we must address whether its limitations period is available when the United States declines to intervene and, if so, whether the limitations period is triggered when the relator knew or should have known facts material to his claim.

A. **Section 3731(b)(2) Applies When the United States Declines to Intervene.**

The primary question before us is whether Congress intended to allow relators in non-intervened cases to rely on § 3731(b)(2)’s limitations period. We must begin “where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.” *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). In considering the text, we bear in mind that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory
scheme.” Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004) (internal quotation marks omitted). We look to “the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006). As part of this inquiry, we also consider the canons of statutory construction. CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1225 (11th Cir. 2001). Legislative history may prove helpful when the statutory language remains ambiguous after considering “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

We conclude that the phrase “civil action under section 3730” in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) qui tam actions when the government declines to intervene. Section § 3731(b) begins by providing that its limitations periods apply to “[a] civil action under section 3730.” 31 U.S.C. § 3731(b). A non-intervened cases is a type of civil action under § 3730. See id. § 3730(b)(1) (permitting any person to bring a civil action alleging a violation of § 3729); id. § 3730(c)(3) (allowing a relator to continue to conduct a qui tam action after the United States declines to intervene). And nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene. In the
absence of such language, we conclude that the text supports allowing relators in non-intervened cases to rely on § 3731(b)(2)’s limitations period.

To ascertain its meaning, we must, of course, view § 3731(b)(2) in the broader statutory context. Looking to the statutory context, the Supreme Court has recognized that the phrase “[a] civil action under section 3730” did not refer to all types of § 3730 civil actions because it excluded retaliation actions brought under § 3730(h). *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). In *Graham County*, the Supreme Court considered whether § 3731(b)(1)’s six year limitations period—which begins to run when the defendant submits a false claim—applied to an employee’s § 3730(h) retaliation claim alleging that her employer forced her to resign after she assisted federal officials investigating her employer for submitting false claims to the United States. *Id.* at 413-14. On its face, § 3731(b) appeared to apply to § 3730(h) retaliation actions, which were a type of civil action under § 3730. *Id.* at 415. Relying on statutory context, the Court nonetheless concluded that § 3731(b)’s literal text was ambiguous as to whether the phrase “[a] civil action under section

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7 Section 3730(h) creates a cause of action for an employee, contractor, or agent who “is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and condition of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.” 31 U.S.C. § 3730(h)(1). Although the FCA now expressly provides a three year statute of limitations for retaliation claims, *id.* § 3730(h)(3), this provision was added after the Supreme Court decided *Graham County*. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(c), 124 Stat. 1376, 2079 (2010).
3730” included § 3730(h) retaliation actions.  *Id.* at 417.  The Court observed that § 3731(b)(1)’s limitations period was triggered by the defendant’s submission of a false claim.  *Id.* at 415.  But a plaintiff bringing a retaliation claim under § 3730(h) did not need to allege or prove that the defendant actually submitted a false claim because an employer can be liable for retaliating against an employee who assists with an investigation or civil action even if the employer is innocent.  *Id.* at 416.

This tension in applying § 3731(b)(1)’s limitation period to retaliation actions led the Court to find the statute ambiguous as to whether “action under section 3730” referred to “all actions under § 3730, or only §§ 3730(a) and (b) actions.”  *Id.*

The Supreme Court resolved this ambiguity by concluding that § 3731(b)(1)’s limitations period did not apply to retaliation claims under § 3730(h).  The Court recognized that Congress generally drafted statutes of limitations to begin to run when a cause of action accrues.  *Id.* at 418.  Applying § 3731(b)(1)’s limitations period to an FCA retaliation action would violate this general rule because the limitations period would begin to run when the employer committed the actual or suspected FCA violation, not when it retaliated against the employee.  This interpretation could lead to the odd result that a plaintiff’s retaliation claim was time barred before the employer took any retaliatory action.  *Id.* at 420-21.  To “avoid[] these counterintuitive results,” the Court construed “civil action under section 3730” to “mean[] only those civil actions under § 3730
that have as an element a violation of section 3729, that is, §§3730(a) and (b) actions.” Id. at 421-22 (internal quotation marks omitted). Graham County thus made clear that to determine whether § 3731(b)(2) includes qui tam actions where the United States declines to intervene, we must consider the text of § 3731(b)(2) in the relevant statutory context. But nothing in Graham County directly addressed whether the statutory context shows that § 3731(b)(2)’s limitations period is available only when the government is a party.

Here, the contractors raise several arguments contending that the statutory context and the canons of statutory construction show that Congress intended for § 3731(b)(2) to be unavailable to relators in non-intervened cases. They claim that allowing a relator in a non-intervened action to rely on a limitations period that is triggered by a government official’s knowledge would lead to absurd results and

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8 The Court also considered that Congress used the phrase “action under section 3730” imprecisely throughout § 3731 “to refer only to a subset of § 3730 actions.” Graham Cty., 545 U.S. at 417-18. In § 3731(d), Congress used similar language to provide that “[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.” 31 U.S.C. § 3731(d). Despite the broad reference to civil actions under § 3730, the Court explained that Congress intended for this provision to apply only to § 3730(a) actions brought by the United States or § 3730(b) actions when the United States intervened because Congress could not have intended for the United States to bear the burden of proof when it was not participating in the action. Graham Cty., 545 U.S. at 417-18.

Acknowledging that imprecision permeates § 3731, the Court in Graham County accepted that the similar language in § 3731(b) and § 3731(d) referred to different categories of § 3730 actions. That is, the phrase “[a] civil action under section 3730” as used in § 3731(b) referred to any civil action that has as an element a violation of § 3729, including non-intervened actions brought under § 3730(b), while the phrase “action brought under section 3730” as used in § 3731(d) referred only to those civil actions where the United States was a party. Id. at 421-22.
render a portion of § 3731(b) superfluous. We reject each of these arguments. The
text of § 3731(b)(2), when viewed in context, shows that § 3731(b)(2) is available
to relators when the government declines to intervene. But even if we were to
conclude that § 3731(b)(2) is ambiguous making it appropriate to consider
legislative history, as the contractors urge us to do, we still would conclude that
§ 3731(b)(2) is available to relators when the government declines to intervene.

1. We Reject that Allowing a Relator in a Non-Intervened Case to
Rely on § 3731(b)(2)’s Limitations Period Is Absurd.

The contractors’ primary argument is that the statutory context shows that
§ 3731(b)(2) is available only when the United States is a party to the case because
the limitations period is triggered by a federal official’s knowledge. They argue
that Congress must have intended such a limitations period to be available only
when the government is a party to the case because to apply a limitations period
triggered by a federal official’s knowledge when the United States is not a party
would create a “bizarre scenario.” Parsons’ Br. at 12 (quoting United States ex rel.
Sanders v. N. Am. Bus Indus., Inc., 546 F.3d 288, 293 (4th Cir. 2008)). Put
differently, they argue that reading § 3731(b)(2) to apply to non-intervened actions
would lead to an absurd result. Of course, we should refrain from interpreting a
statute in a way that “produces a result that is not just unwise but is clearly
absurd.” CBS, 245 F.3d at 1228 (internal quotation marks omitted). But we have
cautioned that the absurdity doctrine is “rarely applied” to avoid having “clearly
expressed legislative decisions . . . be subject to the policy predilections of judges.”

*Id.* (internal quotation marks omitted).

This case presents no such rare instance when the absurdity doctrine applies. Certainly, it is generally the case that a discovery-based limitations period begins to run when a *party*—the plaintiff—knew or should have known about the fraud or claim. *See, e.g.,* *Merck & Co. v. Reynolds*, 559 U.S. 633, 637 (2010) (recognizing that a securities fraud claim accrued when the plaintiff knew or should have known the facts constituting the violation); *see also* Restatement (Second) of Torts § 899(e) (statute of limitations begins to run when “the injured person has knowledge or reason to know of the facts”). We cannot say that in the unique context of an FCA *qui tam* action, however, it would be absurd to peg a limitations period to a federal official’s knowledge unless the United States brings the action or chooses to intervene. We reject the contractors’ absurdity argument because even though the United States is not a party to a non-intervened *qui tam* action, the United States remains the real party in interest and retains significant control over the case.

Even in a non-intervened case, the relator brings the suit as the partial assignee of the United States and asserts a claim based on injury suffered by the United States as the victim of the fraud. *United States ex rel. Eisenstein v. City of* 

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9 See *Stevens*, 529 U.S. at 768 n.1 (explaining that the FCA is one of only four statutes authorizing *qui tam* action that remain in effect).
New York, 556 U.S. 928, 934-35 (2009). Importantly, as the victim of the fraud, the United States—not the relator—is entitled to the bulk of the recovery. See 31 U.S.C. § 3730(d)(2). Given the government’s primary interest in a non-intervened qui tam action, Congress carved out for it a formal role, allowing it to intervene at any time upon a showing of good cause, request service of pleadings and deposition transcripts, seek to stay discovery if it “would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts,” and veto a relator’s decision to voluntarily dismiss the action. Id. § 3730(b)(1), (c)(3), (c)(4). Given this unique role, we cannot say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene.

The contractors argue that allowing a relator in a non-intervened case to rely on § 3731(b)(2)’s limitations period conflicts with the Supreme Court’s decision in Eisenstein. In Eisenstein, the relators in a non-intervened case filed a notice of appeal 54 days after the district court entered a final judgment dismissing their claims. 556 U.S. at 930. Although parties normally have 30 days to file a notice of appeal, the relators argued that they could avail themselves of the 60 day deadline that applies when the United States is a party to the action. Id. at 930-31. The Supreme Court rejected this argument and affirmed the dismissal of the appeal, holding that the United States is not a party to a qui tam action when it
declines to intervene. *Id.* at 937. But our decision today in no way relies on the United States being a party to the non-intervened case, and nothing in *Eisenstein* addressed whether the United States’ non-party status means that the limitations period in § 3731(b)(2) is unavailable to relators in non-intervened cases.

We recognize that our decision to reject the absurdity doctrine is at odds with the published decisions of two other circuits. *See Sanders*, 546 F.3d at 293 (“Congress intended Section 3731(b)(2) to extend the FCA’s default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator’s action depends on the knowledge of a nonparty to the action.”); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006) (“Surely, Congress could not have intended to base a statute of limitations on the knowledge of a non-party.”).

These cases do not persuade us. They reflexively applied the general rule that a limitations period is triggered by the knowledge of a party. They failed to consider the unique role that the United States plays even in a non-intervened *qui tam* case. In light of this role, we cannot say that it would be absurd or “bizarre” to peg the limitations period to the knowledge of a government official when the government declines to intervene. We disagree that Congress, by specifying that § 3731(b)(2)’s limitations period is triggered by the knowledge of a United States
official, necessarily intended that this limitations period be available only in § 3730 civil actions where the United States is a party and not in non-intervened *qui tam* actions.\(^\text{10}\) We thus cannot say that the statutory context shows that § 3731(b)(2)’s limitations period is unavailable to relators in non-intervened *qui tam* actions.

2. **Our Interpretation Does Not Render a Portion of § 3731(b) Superfluous.**

The contractors, relying on a canon of construction, next argue that to give meaning to the entirety of § 3731(b), we must construe § 3731(b)(2) to exclude non-intervened cases. Certainly, “a statute ought, upon the whole, to be so

\(^{10}\) In *Sanders*, the Fourth Circuit also asserted that allowing a relator in a non-intervened case to rely on the limitations period in § 3731(b)(2) would place an inappropriate burden on the defendant and government by expanding the litigation into the issue of government knowledge. 546 F.3d at 295. The Fourth Circuit was concerned about allowing discovery into government knowledge when the United States declined to intervene as a party. *Id.* We agree that allowing a relator to rely on § 3731(b)(2)’s limitations period means that the parties may engage in discovery about government knowledge, but we think the Fourth Circuit’s concerns about the burden associated with this discovery were overstated because the court ignored that government knowledge may be relevant to the merits of the relator’s FCA claim even in a non-intervened *qui tam* action.

To prevail on the merits of her FCA claim, the relator must show, among other things, that the defendant made a misstatement that was material and that the defendant “knowingly” submitted a false claim. *See* 31 U.S.C. § 3729(a)(1); *Universal Health*, 136 S. Ct. at 2003. A defendant may rely on evidence of government knowledge to negate both of these elements. Government knowledge may disprove materiality because “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.” *Universal Health*, 136 S. Ct. at 2003. Evidence that the government knew the relevant facts at the time that the defendant submitted its claim may also show that the defendant understood its conduct to be lawful. *See* *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012) (“[T]he extent and the nature of government knowledge may show that the defendant did not ‘knowingly’ submit a false claim and so did not have the intent required by the . . . FCA.” (internal quotation marks omitted)); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002) (“[T]he government’s knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation.”).
construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). But this canon does not apply when a statutory provision would remain operative under the interpretation in question in at least some situations. See Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc., 734 F.3d 1297, 1304 (11th Cir. 2013).

The contractors assert that if relators have three years from the date when the government learned of the fraud to file suit under § 3731(b)(2), relators will always delay telling the government about the fraud to increase the damages in the case. Therefore, they say, the limitations period in § 3731(b)(1), which expires six years after the date when the violation occurred, will never apply, rendering the provision meaningless. We disagree. The contractors overlook that other provisions of the FCA create strong incentives to ensure that relators promptly report fraud.

A relator who waits to report a fraud risks recovering nothing or having his relator’s share decreased. The relator’s claim may be barred if another relator beats him to the courthouse with an FCA claim based on the same facts, 31 U.S.C. § 3730(b)(5), or if the allegations or transactions are publicly disclosed either in a federal hearing where the government was a party or in a news report, unless the relator was the original source of the information, id. § 3730(e)(4). And because
§ 3731(b)(2)’s limitations period begins to run when the relevant government officials learns about the fraud from any source, a relator who delays reporting the fraud to the government also runs the risk that the government will learn about the fraud from another source and thus that § 3731(b)(2)’s three year period will expire before the relator files suit. But even if there were no risk that the government could learn of the fraud from another source, a relator still would have an incentive to report fraud promptly because the court in setting the relator’s share may consider whether he “substantially delayed in reporting the fraud or filing the complaint.” *United States ex rel. Shea v. Verizon Commc’ns, Inc.*, 844 F. Supp. 2d 78, 89 (D.D.C. 2012).

Looking at the FCA as a whole, we conclude that relators who can rely on the limitations period in § 3731(b)(2) will still have sufficient incentive to report fraud promptly. Because relators will continue to report fraud promptly and under § 3731(b)(2) suit must be filed within three years of the fraud being reported, there will be cases in which § 3731(b)(1)’s six year limitations period will expire later. We thus reject the contractors’ argument that our reading of the FCA would render superfluous one of its provisions.

3. **To the Extent that Legislative History is Relevant, It Bolsters Our Conclusion.**

The contractors argue that the legislative history shows that § 3731(b)(2)’s limitations period is unavailable to a relator when the United States declines to
intervene. Assuming that the statutory language, after viewing it in light of the statutory context and the canons of construction, remains ambiguous such that a resort to legislative history is appropriate, see United States v. Alabama, 778 F.3d 926, 939 (11th Cir. 2015), we cannot agree that the relevant Congressional records undermine our interpretation of § 3731(b)(2).

Congress added the limitations period in § 3731(b)(2) to the FCA in 1986. False Claims Amendments Act of 1986 (“1986 FCA Amendments”), Pub. L. No. 99-562, 100 Stat. 3153 (1986). The legislative history reveals that one of the broad purposes of the 1986 FCA Amendments was to “encourage more private enforcement suits.” S. Rep. No. 99-345 at 23-24 (1986). This purpose is consistent with Congress’s historical use of qui tam rights of action to create incentives for private individuals to help root out fraud against the government. See United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1497 (11th Cir. 1991). Allowing relators to continue to pursue FCA claims even after the government declines to intervene is consistent with the broad underlying purpose of the FCA because it creates the potential for “more fraud [to] be discovered, more litigation [to] be maintained, and more funds [to] flow back into the Treasury.” Milam, 961 F.2d at 49.

The contractors argue that we should not infer Congressional intent to extend the limitations period for non-intervened cases because in the legislative
history for the 1986 FCA Amendments Congress indicated that \textit{qui tam} actions must be brought shortly after the fraud occurred. To support their position, the contractors point to the following portion of the Senate Committee Report, which quotes from the reasoning in a Supreme Court decision:

\begin{quote}
\[\text{[The FCA] is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.}\]
\end{quote}


The contractors argue this language shows that Congress allowed relators to bring \textit{qui tam} actions under the FCA because relators are able to expose fraud more rapidly than the United States can discover it, from which they infer that Congress intended for a shorter limitations period to apply when the United States was not a party to the case. But nothing in this statement addresses the length of time that a relator should have to bring a \textit{qui tam} action or whether the limitations period should depend on the government’s decision to intervene. And so we fail to see how this legislative history supports the contractors’ position that a shorter limitations period should apply when the government declines to intervene.
All told, there is little legislative history for § 3731(b)(2). And the few references there are do not directly address the question before us. The contractors point to a floor statement from Senator Charles Grassley and testimony from Assistant Attorney General Richard K. Willard before a House subcommittee. But neither piece of legislative history is particularly helpful.

Senator Grassley said in a floor statement that Congress borrowed the language in § 3731(b)(2) from 28 U.S.C. § 2416, which sets forth the limitations period that generally applies to other actions brought by the United States. See 132 Cong. Rec. 20,536 (1986) (statement of Sen. Grassley). Senator Grassley’s statement reflects that Congress borrowed the language “facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act” from 28 U.S.C. § 2416. See 28 U.S.C. § 2416(c); 31 U.S.C. § 3731(b)(2). But we disagree with the inference the contractors draw from this fact: that Congress intended to make the statute of limitations in § 3731(b) available only when the United States was a party.

To understand 28 U.S.C. § 2416, we must also look to § 2415. Section 2415 establishes various limitations periods for certain categories of claims “brought by the United States or an officer or agency thereof,” such as contract or tort claims. 28 U.S.C. § 2415(a), (b). Section 2416 tolls the limitations period for the United States to bring such claims when “facts material to the right of action are not
known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances.” *Id.* § 2416(c). The duplicate language in § 2416 is not what specifies that a limitations period in § 2415 applies only when the United States is a party. Instead, § 2415 itself dictates that the United States must be a party for its limitations period to apply. *See id.* § 2415(a), (b) (stating limitations period applies only to claims “brought by the United States or an officer or agency thereof”). There is no similar language in any FCA provision expressly restricting § 3731(b)(2)’s limitations period to actions where the United States is a party. So we cannot say that by borrowing the description of the trigger for the limitations period from § 2416 Congress evinced an intent that the United States must be a party for the limitations period in § 3731(b)(2) to apply.

Turning to the committee testimony from Assistant Attorney General Willard, he explained that the purpose of § 3731(b)(2)’s limitations period was to give “us a little more flexibility in bringing some cases that otherwise would be barred.”11 The contractors construe Willard’s testimony to mean that § 3731(b)(2) was intended to give the government—but not relators—more flexibility to bring FCA claims. Certainly, Willard testified that § 3731(b)(2) would extend the time

period for the Attorney General to sue under the FCA. But Willard offered nothing about the intended effect of § 3731(b)(2) on *qui tam* actions or, more specifically, whether § 3731(b)(2) was intended to apply to *qui tam* actions when the government declined to intervene. Willard’s testimony does not advance the ball for the contractors. *See also Regan v. Wald,* 468 U.S. 222, 237 (1984) (discussing limited usefulness of testimony of witnesses to ascertain meaning of statutory language given the risk that relying on such colloquies “would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President”). Because the legislative history does not squarely address whether Congress intended to make § 3731(b)(2)’s limitations period available to relators in non-intervened cases, we cannot agree with the contractors that the legislative history undermines our interpretation.

To wrap up, we conclude that Congress intended for § 3731(b)(2)’s limitations period to be available to relators even when the United States declines to intervene. The statutory text reflects that this limitations period applies to “[a] civil action under section 3730,” and nothing in § 3731(b)(2) makes the limitations period unavailable in *qui tam* actions under § 3730 simply because the United States decides not to intervene. The contractors argue that because § 3731(b)(2)’s limitations period is triggered by government knowledge, Congress must have
intended for it to apply only when the United States is a party to avoid absurd results. But in the unique context of a non-intervened *qui tam* action, we cannot say that it is absurd to apply a limitations period triggered by government knowledge. And even if the contractors are correct that we may consider legislative history, the legislative history provides no convincing support for their position.

B. The Statute of Limitations in § 3731(b)(2) Depends on the Government’s Knowledge, Not the Relator’s Knowledge.

Having concluded that the statute of limitations in § 3731(b)(2) is available to a relator in a non-intervened case, we must now address whether that limitations period is triggered by the knowledge of a government official or of the relator. We hold that it is the knowledge of a government official, not the relator, that triggers the limitations period.

Section 3731(b)(2) is clear that the time period begins to run when “the official of the United States charged with responsibility to act in the circumstances” knew or reasonably should have known the material facts about the fraud. 31 U.S.C. § 3731(b)(2). Nothing in the statutory text or broader context suggests that the limitations period is triggered by the relator’s knowledge. Given that the language is plain, we cannot rewrite the statute to say that the limitations period is triggered when the *relator* knew or should have known about the facts material to the fraud.
The Ninth Circuit nonetheless adopted such an approach, concluding that the statute of limitations is triggered by the relator’s knowledge. See United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1217 (9th Cir. 1996). The Ninth Circuit created a new legal fiction that because the relator “sue[d] on behalf of the government,” the relator became a government agent and the government official charged with responsibility to act. Id. at 1217 n.8. Again, we find nothing in the text of § 3731(b)(2) or the statutory context to support this legal fiction. Because the text unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run, we must reject the Ninth Circuit’s interpretation as inconsistent with that text.

Applying our conclusions that § 3731(b)(2) applies in non-intervened cases and is triggered by the knowledge of a government official, not of the relator, we hold that it is not apparent from the face of Hunt’s complaint that his FCA claim is untimely. Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure.12 The district court therefore erred in dismissing his complaint on statute of limitations grounds.

12 To be clear, if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, Hunt’s claims could still be barred by the statute of limitations. We hold only that at the motion to dismiss stage it was error to dismiss the complaint on statute of limitations grounds.
V. CONCLUSION

For the reasons set forth above, we reverse the district court’s order dismissing Hunt’s FCA claim as time barred and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.
The authors argue that the Supreme Court’s recent Universal Health decision is a balanced and sensible result that clarifies the law and provides a useful road map for trial courts and litigants.

BNA INSIGHTS: A Sensible Outcome for False Claims in Universal Health Services

BY JOHN S. PACHTER AND TODD M. GARLAND

In the events leading up to the Supreme Court’s decision in Universal Health Services, Inc. v. U.S. ex rel. Escobar, commentators and amici supporting Universal Health predicted dire consequences if the Court were to hold that the implied certification theory can be a basis for liability under the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq. Universal Health and amici urged the Court to reject implied certification altogether as a viable theory for establishing FCA liability. See, e.g., Brief for Petitioner at 23, Universal Health Servs., Inc. v. U.S. ex rel. Escobar, No. 15-7 (U.S. Jan. 19, 2016).

Some opponents of implied certification argued that an FCA defendant’s obligation should be explicitly designated a payment condition for liability to attach. Id. at 41; see also Universal Health Servs., Inc., slip op. at 13 (discussing argument). Otherwise, according to this view, FCA defendants could be exposed to virtually unlimited liability.

On June 16, the Supreme Court in Universal Health accepted the notion of implied certification that is not tied to violation of an express condition of payment. Universal Health Servs., Inc., No. 15-7 (U.S. June 16, 2016). As discussed below, given the implied threat by Sen. Charles Grassley (R-Iowa) of legislative reversal in his amicus brief, it was too much to expect the Court to reject implied certification outright. The opinion by Justice Clarence Thomas nevertheless marks boundaries on liability for implied certification by imposing rigorous requirements on scienter, materiality and specificity of pleading fraud. This balanced decision should serve to curb congressional appetite for legislative action, but at the same time restrict expansive theories of FCA liability urged by the Department of Justice (DOJ) and qui tam relators.

In previous articles, we observed that implied certification had caused confusion, and we suggested that the court should focus on strict enforcement of the FCA’s materiality and scienter requirements, and on the re-
requirement of Fed. R. CIV. P. 9(b) for specificity in pleading fraud. The court essentially adopted the view we advanced. We also noted that Justice Antonin Scalia would likely have rejected more elaborate approaches to implied certification. In fact, Universal Health follows the Scalia approach to statutory interpretation by remaining largely faithful to the text of the FCA. Similarly, as repeatedly urged by Justice Scalia, Universal Health avoids complicated, multifactor tests and distinctions such as those between “factually” and “legally” false claims or between “conditions of payment” and “conditions of participation” that led lower courts astray, including the district court in Universal Health. 2014 BL 82774, at *5-6. In short, the court swept away the clutter and confusion surrounding these concepts, leaving a better guide for lower courts and litigants.

**Universal Health Is Couched in Cautionary Terms That Should Avoid Misguided or Excessive Outcomes**

The court in Universal Health held that “in certain circumstances the implied false certification theory can be a basis for liability” under the FCA. Universal Health Servs., Inc., slip op. at 1, 8. To rein in potential excesses, the court mandated several requirements:

- FCA plaintiffs must demonstrate that the allegedly false claim failed to disclose noncompliance with contractual, regulatory or statutory obligations resulting in misrepresentations. Id. at 8.
- It is not enough for the allegedly false claim to request payment; the claim must also make specific representations about the goods or services provided. Id. at 11. These two features alone should go far to allay concerns about the twin evils of loose pleading combined with a “fishing expedition” in discovery.
- FCA plaintiffs must also prove the defendant had knowledge (scienter) that the contractual, regulatory or statutory requirements allegedly violated were material to the government’s decision to pay the claim. Id. at 14.
- Regarding the FCA’s materiality requirement, 31 U.S.C. § 3729(b)(4), the court placed a high burden on the government and qui tam relators. Universal Health imposes a “rigorous materiality requirement,” id. at 2, describing this burden as “demanding.” Id. at 14, 15. To drive home the point, Universal Health requires “strict enforcement” of the FCA’s materiality requirement. Id. at 13-14.
- Similarly, Universal Health mandates strict enforcement of the FCA’s scienter requirement, 31 U.S.C. § 3729(a)(1), (b)(1). Id. at 13-14. The decision requires FCA plaintiffs to prove the defendant knew the provision violated was material to the government’s payment decision. Universal Health Servs., Inc., slip op. at 2.

These heightened demands, in effect, could serve to elevate the “preponderance of the evidence” burden of proof in FCA cases. 31 U.S.C. § 3731(d); U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 714 (7th Cir. 2014). This standard includes the requirement to prove materiality. United States v. Sci. Applications Int’l Corp., 626 F.3d 1257, 1271 (D.C. Cir. 2010). Given the court’s emphasis in Universal Health that the materiality requirement is “rigorous” and “demanding,” and must be strictly enforced, FCA plaintiffs now have a higher bar to clear.

Universal Health further restricts expansive theories of FCA liability advocated by DOJ and qui tam relators by holding the government accountable for its part in making payment with knowledge of the facts in question. For example, the court stated that where the government pays a claim despite actual knowledge of a violation, or has “signaled no change in position” while continuing to pay a claim knowing that certain requirements were violated, this is “strong evidence that the requirements are not material.” The court stated:

> [If] the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Universal Health Servs., Inc., slip op. at 16 (emphasis added.) The court used the word “actual” twice in this part of its opinion. Nevertheless, deliberate ignorance or reckless disregard might also suffice. See, U.S. ex rel. Drakeford v. Tuomey, 792 F.3d 364, 380 (4th Cir. 2015).

**An Implied Threat of Legislative Reversal Imposed a Practical Limitation on the Court**

To restrict FCA liability to violations of provisions expressly designated as payment conditions, as urged by Universal Health and amici, would invite the government to attempt to tie every obligation to payment. The court foreclosed this unwelcome possibility. Id. at 13.

Justice Thomas cautioned against any government attempt to designate all obligations as payment conditions, countering the government’s contention that all violations could be material. Id.; id. at 17.


In addition, an excursio into areas outside the facts of the case would have weakened the decision by rendering parts of the opinion nonbinding dicta. F.E.C. v. Wis. Right to Life, Inc., 551 U.S. 449, 476 n.8 (2007). The court wisely avoided improvisation. See Universal Health Servs., Inc., slip op. at 9.2

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2 In Universal Health, the court did not, for example, address whether implied certification applies to fraudulent in-
Above all, the court knew Congress was looking over its shoulder, alert to an opportunity to amend the FCA to reverse a Supreme Court decision that strayed too far. Grassley, the Senate Judiciary Committee chairman, submitted an amicus brief forcefully arguing in favor of implied certification. See generally Brief for U.S. Senator Charles E. Grassley as Amicus Curiae in Support of Respondents.

Not mincing words, he reminded the court that Congress has reacted swiftly to overrule Supreme Court decisions in response to what Congress deems “narrowing interpretations” of the FCA. Id. at 2. According to Grassley, implied certification had been “congressionally reaffirmed” as a FCA theory of liability. Id. at 10. Although Grassley did not express an opinion whether implied certification should apply to the facts in Universal Health, he warned against “the Court den[y]ing the theory altogether.” Id.

Grassley’s cautionary remarks are backed by congressional action. Recent amendments to the FCA reflected disapproval of court decisions limiting the FCA’s reach. In United States ex rel. Totten v. Bombardier Corp., the D.C. Circuit affirmed dismissal of FCA charges, holding that the FCA’s plain language required actual presentment of a claim to the government. 380 F.3d 488 (D.C. Cir. 2004). Specifically, the court in Totten held that then-sections 3729(a)(1) and (a)(2) required presentation of a claim to the U.S. government, rejecting the contention that FCA liability attached to a claim provided to Amtrak, not a federal government entity. Id. at 490.

Similarly, in Allison Engine Co. v. United States ex rel. Sanders, the court held that FCA plaintiffs “must prove that the defendant intended that the false record or statement be material to the Government’s decision to pay or approve the false claim.” 553 U.S. 662, 665 (2008). That case involved purportedly false claims by Allison Engine, a subcontractor under a prime contract to construct destroyers for the U.S. Navy. Id. at 665-66.

The subcontractor submitted its claims to the prime contractor, which was not a party to the case. Id. at 666. The U.S. Navy, however, had paid the prime contractor for Allison Engine’s work. Id. at 666-67. According to the court, then-section 3729(a)(2) required that FCA defendants intended for the government itself to pay the allegedly false or fraudulent claim. Id. at 668-69. Under the holding in Allison Engine, FCA liability did not attach merely because a defendant’s false statement resulted in use of government funds to pay the claim. Id.

In response to these decisions, Congress passed the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. FERA responded to the D.C. Circuit’s Totten decision by amending section 3729(a)(1), which no longer requires that a false claim be presented directly to the federal government.

Under FERA, FCA liability attaches for the submission of a false claim to any entity that is reimbursed with federal funds (where the government is the ultimate payor). Similarly, Congress removed language from section 3729(a)(2) upon which the holding in Allison Engine relied. As a result of FERA, the law requires that false statements be material to the government’s payment decision, regardless of the defendant’s intent. Stated otherwise, relators no longer “must prove that the defendant intended that the false record or statement be material to the Government’s decision to pay or approve the false claim.”


Earlier, 1986 amendments to the FCA responded to the Seventh Circuit’s decision in United States ex rel. Sanders v. Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984), which held that the state of Wisconsin could not be a qui tam relator because the suit was based on information in the U.S. government’s possession when the suit was filed, notwithstanding that Wisconsin was the source of the information.

In response, Congress amended the FCA to permit qui tam suits brought by relators whose independent investigation uncovered the alleged fraud. Specifically, Congress added the “original source” exception to the act’s qui tam provisions, 31 U.S.C. § 3730(e)(4)(A). Minnesota Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1046 (8th Cir. 2002); id. at 1047-48 (same).3

In short, a decision nullifying implied certification would have been an invitation to Congress to amend the FCA and strengthen the hand of DOJ and qui tam relators. See ACLU v. Holder, 673 F.3d 245, 251 n.4 (4th Cir. 2011); id. at 247.4

**Universal Health Should Rein in Excesses of DOJ and Relators**

It is unlikely that the court’s carefully crafted 8-0 decision in *Universal Health* will excite Congress into action. At the same time, the court’s decision does not preclude lower courts from restricting the excesses of DOJ and qui tam relators, for example, where an FCA defendant

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4 Similarly, in 1943, Congress amended the FCA in response to the court’s decision in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Specifically, Congress eliminated jurisdiction over qui tam suits based on evidence known by the government at the time of filing.
dant reasonably interprets an ambiguous statutory, regulatory or contractual provision. See, e.g., U.S. ex rel. Purcell v. MWI Corp., 807 F.3d 281 (D.C. Cir. 2015).

Both the Supreme Court in Universal Health and the D.C. Circuit in Purcell emphasized strict enforcement of the FCA’s knowledge requirement.\(^5\) Universal Health Servs., Inc., slip op. at 13-14; Purcell, 807 F.3d at 287.\(^6\)

Similarly, both decisions restrict FCA plaintiffs’ ability to impose liability for minor violations made in good faith. Universal Health Servs., Inc., slip op. at 15; Purcell, 807 F.3d at 287-88.

Finally, the Supreme Court invited lower courts to dismiss weak or poorly pleaded FCA complaints. Universal Health demonstrates that FCA plaintiffs have a difficult burden to meet given the “rigorous” materiality standard, strict enforcement of the act’s scienter requirement, and the need to plead FCA claims with plausibility and particularity under FED. R. CIV. P. 9(b). Universal Health Servs., Inc., slip op. at 16 n.6.

In summary, the opinion in Universal Health is a balanced and sensible result that clarifies the law and provides a useful road map for trial courts and litigants.

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\(^5\) 31 U.S.C. § 3729(b)(1); U.S. ex rel. Drakeford v. Tuomey, 792 F.3d 364, 380 (4th Cir. 2015) (defining FCA’s knowledge requirement as actual knowledge, deliberate ignorance or reckless disregard).

The Most Important Government Contracts Related Decisions of 2016


I. Introduction

Last year, debate over the “implied certification” theory of liability under the False Claims Act (“FCA”), 31 U.S.C. § 3729 et seq., reached a high level of intensity. All eyes were on the pending Supreme Court decision in Universal Health Services, Inc. v. U.S. ex rel. Escobar, 136 S.Ct. 1989 (June 16, 2016). The Court addressed two issues that had divided the courts of appeals: (1) whether implied certification is a viable theory, and (2) if so, what is its proper scope.\(^1\) As the Supreme Court noted, the theory is based on the notion that when a defendant submits a claim to the government, the defendant “impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant’s violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim ‘false or fraudulent’ under” the FCA. \textit{Id.} at 1995.

In our presentation last year, we surveyed the decisions of the various circuits and predicted that the Supreme Court would follow the lead of the Fourth Circuit and D.C. Circuit and focus on the FCA requirements of \textit{scienter} and materiality, and on the requirement to plead fraud with specificity. We said the Supreme Court should avoid distinctions, such as those between “factually” and “legally” false claims or between “conditions of payment” and “conditions of participation.” We noted those distinctions had created confusion and were unrelated to the FCA statutory language. In \textit{Escobar}, the Court essentially adopted the view we advanced. The Court accepted the notion of implied certification that is not tied to violation of an express condition of payment. \textit{Id.} at 2001; \textit{see also id.} at 1995. But the Court reigned in the outer reaches of implied certification by placing strict limits on it. The court also held that the government’s decision to designate a provision as a condition of payment would be treated as relevant to the materiality determination, but not dispositive.

The initial opinions interpreting the case justify the conclusion that \textit{Escobar} is a balanced decision with protection for defendants improperly accused of fraud.

\(^1\) Before \textit{Escobar}, the Seventh Circuit had rejected the theory outright, holding that only express misrepresentations render claims false or fraudulent under the FCA. \textit{United States v. Sanford–Brown, Ltd.}, 788 F.3d 696 (7th Cir. 2015). Other courts of appeal had accepted implied certification, but split on whether the violation had to be tied to an expressly designated condition of payment. \textit{Mikes v. Straus}, 274 F.3d 687 (2d Cir. 2001) (holding “implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies \textit{expressly} states the provider must comply in order to be paid.”); \textit{United States v. Science Applications Int’l Corp.}, 626 F.3d 1257 (D.C. Cir. 2010) (condition allegedly violated need \textit{not} be expressly designated for payment).
II. *Universal Health Services v. U.S. ex rel. Escobar*

Escobar involved allegations that a mental health facility (UHS) allowed unlicensed and unsupervised staff to provide treatment, including prescribing medication, to relators’ teenage daughter. The complaint alleged the daughter had an adverse reaction to medication prescribed by the unlicensed staff and died of a seizure while receiving treatment at the facility. During the time UHS provided treatment, UHS sought and received reimbursement from MassHealth (Massachusetts’ Medicaid agency), which in turn received Federal funds.

Relators alleged that in submitting claims, UHS “impliedly certified” that its services conformed with licensing and supervision requirements. UHS’s failure to disclose or correct the violations, according to relators, made the claims fraudulent under the FCA. Relators alleged MassHealth “would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff.” Escobar, 136 S.Ct. at 1998.²

The district court dismissed the complaint because the regulations UHS allegedly violated were conditions of participation in the MassHealth program, not conditions of payment. After the First Circuit reversed, UHS appealed to the Supreme Court, which granted certiorari on December 4, 2015 and held oral argument on April 19, 2016.

On June 16, 2016, the Supreme Court accepted the notion of implied certification even if the statutory, regulatory, or contractual provision allegedly violated is not a condition of payment. The Court held:

[T]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Id. at 2001.

Having recognized implied certification as a viable theory, the Court addressed concerns about open-ended liability by mandating “strict enforcement” of the FCA’s materiality and scienter requirements.³ Both of these requirements, the Court said, “are rigorous.” Escobar, 136 S.Ct. at 2002. The Court also described the materiality standard as “demanding.”

The Court further restricted implied certification by making the government accountable for payment of claims despite knowledge of alleged violations. According to the Court, “if the

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² The United States declined to intervene in Escobar.

³ We provide a detailed discussion of Escobar in A Sensible Outcome for False Claims in Universal Health Services, 106 Fed. Cont. Rep. (BNA) No. 4, at 97 (July 26, 2016), appended as Attachment 1.
Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.” *Id.* at 2003-04.

Indeed, the Court rejected what it considered the government’s “extraordinarily expansive” view of FCA liability, *i.e.*, “that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation.” *Id.* at 2004. Taken to its logical conclusion, the government’s argument would have allowed FCA liability to attach “if the Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations,” and a contractor failed to mention non-compliance. *Id.* The Court sought to protect government contractors by instructing that, under the FCA, “insignificant regulatory or contractual violations” are not material. *Id.*

In an accompanying footnote, the Court also invited district courts to dismiss cases or grant summary judgment to defendants if plaintiffs fail to meet the “rigorous” materiality and *scienter* requirements, or if plaintiffs fail to “plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b).” *Id.* at 2003; *id.* at n.6.

The language of footnote 6 is powerful and deserves to be quoted in its entirety:

We reject Universal Health’s assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment. The standard for materiality that we have outlined is a familiar and rigorous one. And False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality.

The Court further restricted liability for implied certification claims by clarifying that in addition to the “demanding” materiality standard, the FCA is not “an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations.” *Id.* at 2003 (citation omitted). This limitation accords with pre-*Escobar* decisions by the courts of appeal that sought to prevent open-ended FCA liability. *See, e.g., U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (FCA plaintiff cannot “shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the False Claims Act.”); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010) (“Strict enforcement of the FCA’s *scienter* requirement will also help to ensure that ordinary breaches of contract are not converted into FCA liability.”).

On remand, the First Circuit held that “UHS’s alleged misrepresentations were material when looking to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016). The court addressed whether relators’ “complaint sufficiently alleged that the regulatory violations in question were material to the government’s payment decision, a
requirement for an actionable FCA claim.” *Id.* at 105. The court affirmed its previous decision reversing the district court’s dismissal of the complaint. *Id.* at 106. In doing so, the First Circuit provided three reasons for concluding it had “little difficulty” in finding a sufficient allegation of an FCA violation: (1) regulatory compliance was a condition of payment, which is relevant, but not dispositive, to materiality; (2) the regulations allegedly violated went to the “very essence” of the government’s decision to reimburse UHS; and (3) no evidence existed that the government had paid UHS’s claims despite knowing of the violations. *Id.* at 110-11.

A. *Escobar*’s Implications

Before the Supreme Court issued its *Escobar* decision, commentators and *amici* predicted dire consequences if the Court were to accept implied certification. These observers feared that FCA liability would be open-ended if the Court accepted implied certification, but failed to limit the theory to alleged violations of provisions expressly designated as conditions of payment. The Court held that implied certification is a viable theory of FCA liability even if the provision allegedly violated is not expressly designated a condition of payment. The Court nevertheless curbed the reach of implied certification in *Escobar* in the manner described above.

The decisions following *Escobar* to date validate the Supreme Court’s approach, including its invitation to district courts in footnote 6 to dismiss weak or poorly pleaded cases on motion. The courts have followed *Escobar*’s instruction that the FCA’s materiality requirement is “demanding,” and have dismissed improperly pleaded or insufficient FCA complaints. The courts are also rejecting continued efforts by the Department of Justice and relators’ counsel, notwithstanding *Escobar*, to urge expansive theories of FCA liability. Several decisions are summarized below.

- In *United States v. Northern Adult Daily Health Care Center*, 2016 WL 4703653 (E.D.N.Y. Sept. 7, 2016), the court dismissed a complaint that would have survived before *Escobar*. *Northern Adult* involved allegations that a health care center failed to supervise residents; failed to provide services for which it billed; and engaged in additional actions that violated conditions of payment. Relators alleged defendant violated the FCA because, in submitting claims, defendant impliedly certified compliance with Federal and state Medicaid regulations. *Id.* at *10.

Before *Escobar*, the complaint in *Northern Adult* would have been adequate to state an implied certification claim because the relators alleged that defendant violated an express condition of payment. This allegation was sufficient under *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), in which the Second Circuit held that implied certification was viable “only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid.” *Id.* at 700. After *Escobar*, the court noted in *Northern Adult*, such allegations were insufficient. Under *Escobar*, whether the government labels a provision a condition of payment is relevant to but not dispositive of the materiality inquiry: “While Relators’ argument may have sufficed to support an implied false certification claim under the standard in
Mikes, it no longer suffices under the standard” announced in Escobar. N. Adult Daily Health Care Ctr., 2016 WL 4703653, at *12. Escobar required relators to allege that the health care center’s “misrepresentations were material and that the government would have refused reimbursement had it known of” the noncompliance with the regulations allegedly violated. Id. Merely alleging an FCA defendant falsely “certified its compliance with regulations on which the government conditioned . . . reimbursement” is no longer sufficient. Id. Accordingly, the court dismissed the complaint, holding that “Relators have not stated a claim under an implied false certification theory of liability” as articulated in Escobar. Id.

In United States ex. rel. Dresser v. Qualium Corp., 2016 WL 3880763 (N.D. Cal. July 18, 2016), the court held that the government’s complaint sufficiently alleged express false certification and fraud in the inducement claims, but failed to meet Escobar’s “newly articulated” implied certification standard. Specifically, the government alleged it would not have paid the claims had it known of the fraudulent conduct, but failed to explain why. Id. at *6. The court held that the government’s allegations failed to “meet Universal Health Services’ heightened materiality standard: While Universal Health Services held that payment being conditioned on compliance with regulations could be evidence that a misrepresentation was material, it also explained that this did not necessarily make a misrepresentation material.” Id. Because “the United States has not sufficiently pled materiality,” the court granted defendants’ motion to dismiss. Id. at *9.

In United States v. Fulton County, Georgia, 2016 WL 4158392 (N.D. Ga. Aug. 5, 2016), the court followed Escobar in dismissing an implied certification claim that failed to plead fraud with particularity under Rule 9(b). The court also held that relators failed to sufficiently plead that defendants’ Davis-Bacon Act violations were material, or that defendants had the requisite scienter under the FCA. Id. at *8, 11. Citing Escobar, the court noted that the FCA’s materiality and scienter requirements are “rigorous” and “demanding.” Id.

The initial decisions issued by the Federal courts of appeal align with district court decisions recognizing Escobar’s increased materiality requirements. In United States v. Sanford–Brown, Ltd., 840 F.3d 445 (7th Cir. 2016), the court affirmed the district court’s grant of summary judgment in defendant’s favor, holding that relator failed to meet Escobar’s strict test for implied certification. The case involved allegations that a for-profit college falsely certified compliance with Department of Education regulations when executing an agreement between the parties. The district court rejected relator’s implied certification claim and the First Circuit affirmed. After issuing its Escobar decision, the Supreme Court remanded the case to the First Circuit for reconsideration of the part of its opinion addressing implied certification.
On remand, the First Circuit again held that the relator failed to prove an implied certification claim, this time because the relator failed to meet the test set forth in *Escobar*. Relator failed to offer evidence that the college made “false or misleading representations” in connection with its claims for payment. *Id.* at 447. Additionally, relator “failed to establish the independent element of materiality,” which is a “rigorous” and “demanding” requirement. *Id.* at 447. Relator “offered no evidence that the government’s decision to pay . . . would likely or actually have been different had it known of” the alleged noncompliance. *Id.* The government had previously examined the college’s files and had “concluded that neither administrative penalties nor termination was warranted.” *Id.* At most, relator proved that the college’s alleged misrepresentations “would have entitled the government to decline payment,” which, under *Escobar*, is insufficient to establish materiality. *Id.*

- In *United States ex rel. Miller v. Weston Educational, Inc.*, 840 F.3d 494 (8th Cir. 2016), a case with facts similar to those in *Sanford-Brown*, the Eight Circuit held that relators had adequately pleaded an implied certification claim under the FCA. That case also involved allegations against a for-profit college (Heritage), including relators’ allegations that Heritage altered grade and attendance records to maximize government funding. *Id.* at 498.

After the government declined to intervene, the district court granted defendant’s motion for summary judgment. The Eight Circuit reversed in part, but the Supreme Court vacated the opinion based on *Escobar*. *Id.* at 498. On remand, the court addressed “whether Heritage made a knowingly false statement, and whether it was material.” *Id.* at 500. The Eight Circuit again reversed the district court’s entry of summary judgment in defendant’s favor, holding genuine issues of fact existed regarding whether Heritage promised to maintain accurate records while intending not to do so. *Id.* at 503.

The court held that relators were entitled to a trial on the issue of whether the college’s violations met *Escobar*’s test for materiality. *Id.* at 504. The government “expressly conditioned” its decision to disburse funds on whether Heritage kept accurate records, which is relevant but not automatically dispositive to materiality under *Escobar*. *Id.* Additionally, the college promised to keep accurate records, admitted that it did not, and “a reasonable person would attach importance to a promise to do what is necessary to ensure funds go where they are supposed to go.” *Id.* Relators also presented evidence that the government terminated its relationship with colleges that had falsified records. *Id.* at 505. Accordingly, “for purposes of summary judgment, Heritage’s promise to keep accurate records was material.” *Id.* Ultimately, relators barely survived summary judgment. Although relators’ claims were “undermine[d]” by the lack of evidence, the court refused to “weigh the evidence or decide credibility” at the summary judgment stage. *Id.* at 502.
In *Carlson v. DynCorp International LLC.*, 2016 WL 4434415 (4th Cir. Aug. 22, 2016) (unpub.), the Fourth Circuit held that a relator failed to prove a contractor’s alleged Federal Acquisition Regulation (FAR) and Cost Accounting Standards (CAS) violations were material. Rather, according to the court, relator could prove at most that defendant’s actions constituted “insignificant regulatory or contractual violations.” *Id.* at *6. Citing *Escobar*, the court affirmed the district court’s dismissal of relator’s complaint, holding that FCA liability requires more than mere “failure to follow an accounting regulation or best practice on any government contract.” *Id.* As noted, the Court in *Escobar* instructed that contractors are not required “to aver their compliance with the entire U.S. Code and Code of Federal Regulations” because “insignificant regulatory or contractual violations” cannot be material. *Escobar*, 136 S.Ct. at 2004.

**Conclusion**

Under *Escobar* and the initial decisions interpreting the decision, the implied certification theory of liability has been curtailed. The Supreme Court placed strict limits on implied certification, instructing that the FCA’s *scienter* and materiality requirements are “rigorous” and “demanding,” and that FCA plaintiffs must plead fraud with particularity under Federal Rules of Civil Procedure 8 and 9(b). The Court has encouraged district courts to shed reluctance to dismiss weak or improperly pleaded cases on motion. The Court rejected what it considered the “extraordinarily expansive” theories of FCA liability previously advocated by the government and relators.

Without question, the contours of *Escobar* will continue to be litigated. A likely point of contention will be the Court’s statement, quoted above, that “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.” *Escobar*, 136 S.Ct. at 2003-04 (emphasis added). For example, suppose a defendant discloses its non-compliance with an otherwise material statutory, regulatory, or contractual requirement, but nevertheless invoices the full amount. In addition to the Court’s statement about the government’s “actual knowledge,” the Court also held that a defendant must make “specific representations about the goods or services” provided, and the misrepresentations must be “misleading” to the government. *Id.* at 1995. In *Escobar*, the representations were “clearly misleading in context” because UHS submitted claims using specific payment codes that conveyed information “without disclosing” regulatory violations. *Id.* at 2000. In other words, UHS submitted claims “while omitting critical qualifying information” about its regulatory violations. *Id.* Under *Escobar*, it was not UHS’s violations *per se* that rendered its claims fraudulent under the FCA, but rather its “failure to disclose noncompliance” that made “those representations misleading half-truths.” *Id.* at 2001.

The Department of Justice and relators may nevertheless argue that a claimant must have a good faith basis to believe it was entitled to payment notwithstanding a violation. The answer may be that such a case does not involve a False Claims Act violation because the relator failed
to clear the Escobar hurdle, and the government, being armed with full knowledge, could have refused payment. This brings us back to the concern over “implied certification” in the first place; namely, the FCA should not be used to convert breach of contract claims into fraud claims. Id. at 2003 (the FCA is not “an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations.”). In Carlson, the Fourth Circuit followed Escobar, affirming the district court’s dismissal of a complaint that merely alleged defendant’s “failure to follow an accounting regulation or best practice on any government contract.” Violations of immaterial provisions are not cognizable under the FCA because, under Escobar, “the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations.” 136 S.Ct. at 2004.

As the cases following Escobar confirm, the standards have been raised for relators, who can now expect increased motions to dismiss and motions for summary judgment based on Escobar’s heightened standards of scienter, materiality and pleading.