A COMPREHENSIVE ANALYSIS OF THE FALSE CLAIMS ACT'S UNIQUE STATUTE OF LIMITATIONS: THE SUPREME COURT'S RULING IN COCHISE CONSULTANCY, INC. WAS A GOOD START BUT LEFT MUCH TO DO

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ABSTRACT

The False Claims Act (FCA) is the government's most important anti-fraud tool. It provides treble damages and civil penalties when a defendant wrongfully obtains government funds. Either the government or a whistleblower may file a suit to redress the harm. Because fraudulent schemes are often concealed, the FCA contains a two-tiered statute of limitations (SOL). The first tier consists of a minimum of six years from the date of the violation. The second tier extends the period to ten years if a FCA complaint is filed within three years of 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." The Supreme Court recently resolved a major source of conflict among the circuits regarding whether a different SOL applies depending on whether the government or a private person initiates the lawsuit. The Court made short work of this by concluding that the FCA statute of limitations, by its terms, does not apply differently based upon who initiates the lawsuit. There are, however, several key issues remaining that the Supreme Court did not resolve. These include: when does the SOL begin for certain violations, who is "the official" with responsibility to act that triggers the three-year period within the ten-year statute of limitations, and what constitutes "information material to the right of action"

that this official must know to trigger this period. After addressing these unresolved issues, this Article then explains the meaning of the recently added relation back provisions, including that the FCA's relation back rules trump any default tolling provisions. The goal of this Article is to systematically and comprehensively analyze every aspect of the FCA's SOL in order to provide guidance and a framework for the entire statute of limitations, including issues left unresolved by the Supreme Court's recent decision in *Cochise*.

I. INTRODUCTION

The False Claims Act (FCA),[1] which is the government's most important anti-fraud tool,[2] contains a two-tiered statute of limitations (SOL) and an accompanying relation back provision. Recently, the Supreme Court in *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, issued an opinion clarifying an important area of conflict among the circuits.[3] This issue pertained to whether the FCA's ten-year SOL applied differently to cases initiated by whistleblowers than cases initiated by the government. Although the Court provided much needed guidance by holding that the FCA does not distinguish between the two situations, the Court declined to rule on who constitutes "the official of the United States charged with responsibility to act in the circumstances" that triggers this particular SOL provision; however, the Court rejected the argument that the term referred to the relator.[4] In addition, the Court did not have a reason to address the FCA's six-year SOL or several other important issues affecting other aspects of the FCA's SOL. This Article systematically addresses each of the legal and procedural principles reflected in the FCA's SOL.

Section I introduces the issues that remain unresolved. Section II outlines each of the SOL provisions. Section III addresses the meaning and operation of the FCA's six-year SOL, including when the SOL begins to run. Section IV tackles the meaning and operation of the FCA's ten-year SOL, including issues left open by the Court in *Cochise*. These issues include who is the applicable government official named in the statute and what information must be known to trigger the three-year rule within the FCA's ten-year SOL. Section V addresses how the "relation

1. *See generally* 31 U.S.C. § 3729 (2018).

2. Avco Corp. v. U.S. Dep't of Justice, 884 F.2d 621, 622 (D.C. Cir. 1989) ("The False Claims Act is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government.").

3. *See* 139 S. Ct. 1507, 1511 (2019).

4. *Id.* at 1514 (citing Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004)).

back" provision applies when a FCA complaint is amended by a relator and when the government joins a *qui tam* initiated suit. It also discusses the applicability of Rule 15 of the Federal Rules of Civil Procedure (FRCP). Section VI restates each of the FCA's SOL provisions and procedures. Section VII contains the conclusion.

II. THE FCA AND ITS SOL PROVISIONS

The FCA allows both the government and private persons, known as relators, to initiate FCA actions.[5] The relator must file her *qui tam* complaint under seal and provide the government with time to investigate the claims in order to decide whether to intervene.[6] If the government decides to intervene, it may amend the complaint and will then assume primary authority over the suit.[7] If the government declines to intervene, the relator may pursue the case alone on behalf of the government.[8] Any recovery, ranging from fifteen to thirty percent of the proceeds, is shared with a proper relator.[9]

The FCA contains a unique two-tiered SOL, which reads:

> (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,

5. *See id.* at 1510 ("First, the Attorney General, who 'diligently shall investigate a violation under section 3729,' may bring a civil action against the alleged false claimant. § 3730(a). Second, a private person, known as a relator, may bring a *qui tam* civil action 'for the person and for the United States Government' against the alleged false claimant, 'in the name of the Government.' § 3730(b).").

6. *Id.* ("If a relator initiates the action, he must deliver a copy of the complaint and supporting evidence to the Government, which then has 60 days to intervene in the action. §§ 3730(b)(2), (4). During this time, the complaint remains sealed. § 3730(b)(2).").

7. *Id.* ("If the Government intervenes, it assumes primary responsibility for prosecuting the action, though the relator may continue to participate. § 3730(c).").

8. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1510 ("Otherwise, the relator has the right to pursue the action. §§ 3730(b)(4), (c)(3). Even if it does not intervene, the Government is entitled to be served with all pleadings upon request and may intervene at any time with good cause. § 3730(c)(3).").

9. *Id.* ("The relator receives a share of any proceeds from the action—generally 15 to 25 percent if the Government intervenes, and 25 to 30 percent if it does not—plus attorney's fees and costs. §§ 3730(d)(1)-(2).("). (citing Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 769–70 (2000)).

whichever occurs last.[10]

The Supreme Court described the SOL provisions this way:

> The False Claims Act contains two limitations periods . . . . The first period requires that the action be brought within 6 years after the statutory violation occurred. The second period requires that the action be brought within 3 years after the United States official charged with the responsibility to act knew or should have known the relevant facts, but not more than 10 years after the violation. Whichever period provides the later date serves as the limitations period.[11]

The FCA also contains a specific relation back provision, which reads:

> If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.[12]

In short, there are two separate SOLs under the FCA, consisting of both a minimum of six years and a maximum of ten years depending on the situation.[13] As explained in greater detail in Section IV, a relator and the government can each rely upon both of the FCA's SOL provisions and apply whichever provision allows for a later date. The next two sections separately address the framework and practical issues affecting the six and ten-year SOL provisions.

III. UNDERSTANDING THE FCA'S SIX-YEAR SOL

The FCA's six-year SOL provision is fairly straightforward. The government or relator must file a complaint not "more than [six] years after the date on which the violation of section 3729 is committed."[14] The first question that must be addressed in all SOL matters is when does the

10. 31 U.S.C. § 3731(b) (2018) (emphasis added).

11. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1510. In *Cochise*, the Court addressed the meaning of the ten-year SOL, and in particular whether the FCA contains a different SOL for cases in which the Government does not intervene. *See id.* at 1511.

12. 31 U.S.C. § 3731(c).

13. *Id.* § 3731(b); *Cochise Consultancy, Inc.*, 139 S. Ct. at 1510.

14. 31 U.S.C. § 3731(b) (alterations in original).

SOL begin to run. It is clear that the SOL starts when a FCA violation occurs.[15] However, the FCA contains seven liability provisions found in subparts § 3729 (a)(1)(A) through (G).[16] Determining the start of the SOL, therefore, depends on which provision is relied upon for a violation. Few circuit courts of appeals have squarely addressed the issue of when the SOL starts for each of these violations. Therefore, the following subsections outline when the SOL begins for the most common FCA violations.

A. When Does a Violation of the FCA Occur?

The four[17] commonly used FCA liability sections read as follows:

> (a) Liability for Certain Acts.—
>
> (1) In general.—Subject to paragraph (2), any person who—
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
>
> (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G); . . . or
>
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government . . . .[18]

15. The Supreme Court recognized that the six-year SOL "requires that the action be brought within 6 years after the statutory violation occurred." *Cochise Consultancy, Inc.*, 139 S. Ct. at 1510. Each new violation, however, begins a fresh start of the applicable SOL. *Id.* at 1512 (citing Graham Cty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 545 U.S. 409, 415 (2005)).

16. 31 U.S.C. § 3729(a)(1) (2018).

17. "Today, only four of the provisions, (a)(1)(A)–(a)(1)(C) and (a)(1)(G) are regularly [relied upon in FCA complaints]." CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:1 (3d ed. 2016) (alterations in original).

18. 31 U.S.C. § 3729(a)(1)(A)–(G). If there is a violation, the FCA continues, the person "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410), plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* § 3729(a)(1) (footnote omitted). When the FCA was amended in 2009, the liability sections were renumbered from (a)(1)–(7) to (a)(1)(A)–(G). The first six FCA liability provisions were originally part of the initial 1863 FCA in various forms. *See* SYLVIA, *supra* note 17, § 4:1. Subpart (G) was added with the modernized FCA in 1986. *Id.*

The most common FCA violation is subpart Section 3729(a)(1)(A).[19] Courts have distinguished this liability provision from all others because it requires a knowing "presentment" of a false or fraudulent claim to the government (or its proxy).[20] This presentment requirement is also likely how the FCA got its name; i.e., presenting a "false claim" for payment to the government. However, the remaining FCA provisions do not require the *presentment* of a false claim. For instance, as outlined below, subpart (a)(1)(B) requires making or using a false record or statement, subpart (a)(1)(C) simply requires proof of a conspiracy to violate any other liability provision, and subpart (a)(1)(G) makes it a violation for a party to retain federal funds that it is not entitled to keep.[21] Accordingly, each FCA liability provision has its own requirements; therefore, each has a different starting point for the SOL. The next subsections provide a framework for determining the start of the SOL for the four main liability provisions.[22]

1. Violations of Section 3729(a)(1)(A)

A violation of Section 3729(a)(1)(A) occurs when a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[23] This is the only liability provision which actually requires a defendant to *present* (or cause another to *present*)[24] a false claim to the government (or its proxy).[25] Courts typically require three elements to establish a violation of subparagraph (a)(1)(A): (1) knowingly; (2) presented or caused to be presented for payment or approval of a claim; (3) that is false or fraudulent.[26] Courts, however, have not sought to differentiate when the plaintiff is solely seeking civil penalties under the FCA in circumstances where the government did not pay the false

19. *See id.* § 4:2 ("The primary source of liability under the False Claims Act is subparagraph (a)(1)(A).").

20. The FCA was amended in 2009 to capture wrongful payments made under Medicare and other programs when the defendant claimed funds indirectly from the government. 31 U.S.C. § 3729(b)(2)(A)(ii) (defining claim under the FCA to include being "made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government"). Thus, misappropriation of funds under any government program are covered by the FCA. *See* SYLVIA, *supra* note 17, § 4.29.

21. 31 U.S.C. § 3729(a)(1)(B), (C), (G).

22. This analysis applies equally to the start of the FCA's ten-year SOL provision.

23. 31 U.S.C § 3729(a)(1)(A).

24. "Subsection (a)(1)(A) imposes liability not only on a person who 'presents' a false or fraudulent claim, but also on a person who *causes another* to 'present' a false or fraudulent claim." *See* SYLVIA, *supra* note 17, § 4:3.

25. SYLVIA, *supra* note 17.

26. *E.g.*, United States *ex rel.* Schmidt v. Zimmer, Inc., 386 F.3d 235, 242 (3d Cir. 2004).

claim from cases in which the plaintiff is also seeking FCA damages to recover treble damages based on when the false claim was paid. If the plaintiff is seeking damages, the plaintiff bears the additional burden of alleging and proving damages.[27] However, proof of damage to the government is not required when a plaintiff is seeking only civil penalties under the FCA.[28] Put another way, proof of a violation does not include proving damages; thus the SOL begins for a claim seeking civil penalties at the moment of the violation. However, when the plaintiff is seeking treble damages, an additional element is present and the SOL does not begin until the last element (damages) occurs.[29]

With respect to when the SOL begins under Section 3729(a)(1)(A), the courts are divided. At least two courts of appeals have ruled that the SOL starts at the presentment of the false claim.[30] However, two other courts of appeals have ruled that if FCA damages are sought, as opposed to only civil penalties for presenting a false claim, the SOL begins when the payment is made.[31] The latter is the better approach, as explained below.

The FCA allows for the recovery of both civil penalties and damages. When a person violates the FCA, she "is liable to the United States Government for a civil penalty . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person."[32] Under this statutory scheme, civil penalties are available simply for

27. *See* cases cited *infra* note 34.

28. *E.g.*, United States *ex rel*. Howard v. Lockheed Martin Corp., 14 F. Supp. 3d 982, 994 (S.D. Ohio 2014) (citing U.S. *ex rel.* Hagood v. Sonoma Cty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991); and then citing United States v. Killough, 848 F.2d 1523, 1533–34 (11th Cir. 1988)) (noting damages do not need to be proved to establish a violation).

29. Jana, Inc. v. United States, 41 Fed. Cl. 735, 743 (Fed. Cl. 1998).

30. United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995) (noting the FCA "attaches liability, not to . . . the government's wrongful payment, but to the 'claim for payment'"); Smith v. United States, 287 F.2d 299, 304 (5th Cir. 1961) (citing United States v. Borin, 209 F.2d 145, 147 (5th Cir. 1954) ("Little need be said as to the statute of limitations. The six-year period is to be computed from the time of 'the commission of the act,' 31 U.S.C.A. § 235. The 'act' in question is the filing of the false claim.").

31. United States *ex rel*. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1157 (2d Cir. 1993) ("Further, as to each such claim, the six-year limitations period of § 3731(b)(1) 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.'") (quoting Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (collecting cases), *aff'd*, 817 F.2d 1007 (2d Cir. 1987)); Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1043 (Fed. Cir. 1994) (citing Miller v. United States, 550 F.2d 17, 23 (Ct. Cl. 1977)) ("In order to recover damages for violation of the False Claims Act, the government must establish that . . . the United States suffered damages as a result of the false or fraudulent claim."); *Jana*, 41 Fed. Cl. at 742–43 (stating that if the government makes payment on a submitted false claim, the FCA violation occurs on the date payment was made, rather than on the date the claim was submitted).

32. 31 U.S.C. § 3729(a)(1) (2018).

presenting a false claim;[33] however, damages must be alleged and proven by the plaintiff to recover them.[34] Although a violation of Section (a)(1)(A) occurs once the claim is submitted, and civil penalties are available even if payment is not made, a claim for treble damages under the Act requires an actual payment.[35]

Those courts which have held that the SOL begins at the time of payment have adopted the better approach for interpreting the SOL for cases in which FCA treble damages are sought. A plaintiff can hardly bring a claim for treble damages prior to when FCA damages are suffered. Again, courts have consistently held that if the plaintiff is seeking FCA damages, the plaintiff bears the burden of alleging and proving damages.[36] In addition, the argument that the SOL should begin at the date of payment in cases where damages are sought is strengthened by the Supreme Court's pronouncement that "[f]raudulent conduct and false statements remain inchoate until a claim for payment causing the government to disburse funds is made."[37] Hence, when a plaintiff is seeking damages under the FCA, the SOL does not accrue until damages are suffered.[38] Moreover, it is settled that SOLs are construed narrowly in favor of the government.[39] "This canon is rooted in the traditional rule *quod nullum tempus occurrit regi*—time does not run against the King."[40] In other

33. *E.g.*, *Howard*, 14 F. Supp. 3d at 994 (noting damages do not need to be proved to establish a violation).

34. *E.g.,* United States v. United Techs. Corp., 782 F.3d 718, 735–36 (6th Cir. 2015) ("The government had the burden of proving damages . . ." under the FCA); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1280 (D.C. Cir. 2010) ("The government, however, bears the burden of proving damages . . ."); United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 923 (4th Cir. 2003) ("The FCA specifically places the burden of proving damages on the government.") (citing 31 U.S.C. § 3731(c)); United States v. Bornstein, 504 F.2d 368, 371 (3d Cir. 1974) ("The point is that the government was the plaintiff and had the burden of proving damages."), *rev'd on other grounds*, 423 U.S. 303, 317 (1976).

35. 31 U.S.C. § 3729.

36. *Jana*, 41 Fed. Cl. at 743.

37. United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 440 (E.D.N.Y. 1995) (citing United States v. McNinch, 356 U.S. 595, 599 (1958)).

38. *E.g.*, United States *ex rel.* Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 714 (7th Cir. 2014) ("[U]nder the FCA, the plaintiff must 'prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.'") (quoting 31 U.S.C. § 3731 (2018)). A defendant's wrongdoing does not shift the burden of proof to the defendant under the FCA. *See* United States *ex rel.* Crews & Ill. v. NCS Healthcare of Ill., Inc., 460 F.3d 853, 857 (7th Cir. 2006); *see also generally* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (holding that jury could estimate damages where defendant's wrongdoing impinged plaintiff's ability to compute damages).

39. *E.g.,* BP Am. Prod. Co. v. Burton, 549 U.S. 84, 95 (2006) (citing E. I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)).

40. *Id.* at 96 (citing l Guar. Tr. Co. v. United States, 304 U.S. 126, 132 (1938)).

words, "when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous."[41] Thus, courts should construe the date of payment as the proper beginning of the SOL when FCA damages are sought.

This Article provides an example to clarify this analysis. Assume a hospital submitted a claim of $100,000 for reimbursement for a procedure that is not allowable under Medicare rules. Assume also that Medicare had not yet paid the claim. At the moment the claim is submitted, it is clear that the defendant presented a false claim under Section 3729(a)(1)(A) and would be liable for a civil penalty under the FCA.[42] If the government filed a FCA action, but also included in the complaint a request for treble damages of $300,000, the defendant would move to dismiss the treble damages allegation because the plaintiff bears the burden of proving damages. At the time of the filing, there were no damages because the bill had not been paid. The FCA claim for treble damages springs to life only once the invoice is paid, notwithstanding the fact that the civil penalty allegation already fully matured.[43] In that instance, FCA damages are an essential element of the cause of action.[44] Because a SOL against the government must be strictly construed in favor of the SOL not running against the government, the SOL must begin at the time of payment when FCA damages are sought; this is the proper and only reasonable interpretation of the FCA's SOL with respect to seeking treble damages under the Act.

In short, if the plaintiff is seeking only civil penalties under the FCA, the date that the claim was submitted is the relevant date that triggers the SOL. But, if the plaintiff is seeking treble damages under the FCA, the date that the claim was paid triggers the SOL.[45] In the words of the Second Circuit Court of Appeals, "as to each such claim, the six-year

41. *Id.*

42. 31 U.S.C. § 3729 (2018).

43. *Id.*

44. *Island Park*, 888 F. Supp at 440 (Stating that the damage claim lies "inchoate until a claim for payment causing the government to disburse funds is made") (citing *McNinch*, 356 U.S. at 599).

45. In addition, if a defendant commits multiple violations of a specific provision, such as submitting multiple false claims in violation of Section (a)(1)(A), each violation is governed by the SOL. Thus, while some violations may be outside of the SOL, the relator and government may proceed on each violation within the SOL. Courts have also ruled that conduct occurring outside of the SOL may still be used for background. United States *ex rel.* Blyn v. Triumph Grp., Inc., No. 2:12-CV-922-DAK, 2016 U.S. Dist. LEXIS 55951, at *15–16 (D. Utah Apr. 26, 2016) (even though certain claims are outside of the SOL, the conduct was permitted to be considered as background for the alleged fraud scheme).

limitations period of § 3731(b)(1) 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.'"[46]

2. Violations of Section 3729(a)(1)(B)

A violation of Section 3729(a)(1)(B) occurs when a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[47] With respect to subparagraph (a)(1)(B), there is no presentment requirement for a violation.[48] Courts typically require three elements to establish a violation of subparagraph (a)(1)(B): "(1) the defendant makes a false statement, (2) the defendant knows that the statement is false, and (3) the false statement is material to a false claim for payment."[49] As with subpart § 3729(a)(1)(A), proof of damage to the government is not required when the plaintiff is seeking only civil penalties; however, proof of damages becomes an essential element when the plaintiff is claiming FCA treble damages.[50]

The SOL analysis is the same for § 3729(a)(1)(B) as it was for § 3729(a)(1)(A).[51] Accordingly, when the plaintiff is seeking civil penalties, the SOL begins at the date the defendant makes, uses, or causes to be made or used a false record or statement.[52] But, when the plaintiff is seeking treble damages under the FCA, the SOL begins at the date of payment.[53]

3. Violations of Section 3729(a)(1)(C)

A violation of § 3729(a)(1)(C) occurs when a person "conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)."[54] Most

46. *United Techs. Corp.*, 985 F.2d at 1157.

47. 31 U.S.C. § 3729(a)(1)(B).

48. "[Section (a)(1)(A)] often works in tandem with subparagraph (a)(1)(B), which prohibits making or using a false statement or record that is material to a false or fraudulent claim. Courts do not always distinguish between the two subparagraphs, and both are often involved in the same case. For example, a false claim for payment under (a)(1)(A) may be made in the form of a record or statement, which also would support a claim under (a)(1)(B)."

SYLVIA, *supra* note 17.

49. United States *ex rel.* Brooks v. Stevens-Henager Coll., Inc., 359 F. Supp. 3d 1088, 1109 (D. Utah 2019) (citing 31 U.S.C. § 3729(a)(1)(B)).

50. *Jana*, 41 Fed. Cl. at 743; *Rivera*, 55 F.3d at 709.

51. *See supra* Section III.A.1.

52. *Jana*, 41 Fed. Cl. at 743.

53. *Id.*

54. 31 U.S.C. § 3729(a)(1)(C) (2018); SYLVIA, *supra* note 17, § 4.8 ("The False Claims Act does not define the term 'conspires.' In interpreting former subsection (a)(3), now (a)(1)(C), courts have looked to general civil conspiracy principles. The essence of a conspiracy is an agreement between the defendant and one or more persons to commit a wrongful

courts have held that, in addition to reaching an agreement to conspire to violate the FCA, the plaintiff must also allege the commission of an act in furtherance of the conspiracy; i.e., "an overt act."[55] However, the courts are split as to whether the violation of this provision occurs at the first overt act necessary to complete the conspiracy, or if it runs anew for each subsequent overt act; this is referred to as the last overt act rule. Some courts follow *Blusal Meats, Inc. v. United States*, which rejects the last overt act rule and fixes the conspiracy at the moment when all elements are met.[56] Other courts follow *United States ex rel. Fisher v. Network Software Assocs., Inc.*, which holds that the "statute of limitations in a civil damages action for conspiracy runs separately from each overt act that is alleged to cause damage."[57] The better approach is the standard adopted by the court in *Fisher*. Thus, any overt act triggers anew the FCA's conspiracy SOL because each overt act could separately give rise to a violation of the FCA if the prior overt acts had not occurred.

A defendant should not be able to avoid FCA liability simply because a scheme was ongoing for a long time. For example, assume the government caught an entity that had been defrauding the military for eleven years. Clearly the government could seek repayment for up to ten years of fraud by relying upon either Section 3729(a)(1)(A) (presenting a false claim) or Section 3729(a)(1)(B) (making or using a false record or statement).[58] Assume further that another defendant had conspired with the first defendant. If the first overt act occurred eleven years ago, it would not make sense to say that the conspiracy that occurred over the last ten years would not apply to the conspirator. If it did, such a co-conspirator would not face FCA liability under the conspiracy provision for his role in defrauding the government over the last ten years.[59] Thus, this

act. In a False Claims Act case, the wrongful act to which the parties must agree is an act that violates the FCA.").

55. SYLVIA, *supra* note 17, § 4:11 ("Most courts that have described the elements of a claim under former subsection (a)(3), now (a)(1)(C), have stated that in addition to an agreement, the Government must allege commission of an act in furtherance of the conspiracy (or 'an overt act'), although they have not necessarily analyzed the issue. Unlike some conspiracy statutes, the False Claims Act does not expressly require an overt act, but courts could imply this requirement. Although resolution of this issue is unclear, to the extent an overt act is required, a single overt act by any one conspirator is sufficient to support a conspiracy.").

56. 638 F. Supp. 824, 828 (S.D.N.Y. 1986), *judgment aff'd*, 817 F.2d 1007 (2d Cir. 1987).

57. 180 F. Supp. 2d 192, 195 (D.D.C. 2002) (following the last overt act rule) (quoting Lawrence v. Acree, 665 F.2d 1319, 1324 (1981)).

58. SYLVIA, *supra* note 17, § 4:2 ("The primary source of liability under the False Claims Act is subparagraph (a)(1)(A).").

59. It is quite possible that the second defendant would be liable under § 3729(a)(1)(B) to the extent it can be shown that he caused the first defendant to make or use a false record or statement material to a false or fraudulent claim, because that section applies to those who

Article argues that each new act in furtherance of a conspiracy triggers the start of a new conspiracy violation of the FCA and triggers anew the FCA's SOL for conspiracy.

The SOL for conspiracy is also influenced by whether a plaintiff is seeking only civil penalties or also treble damages. As established earlier, when a plaintiff is seeking FCA damages, the SOL for Section 3729(a)(1)(A) and (B) should start on the date the government wrongfully paid the defendant.[60] Again, if the plaintiff is only seeking civil penalties, the date of the conspiracy (whether it is the first or last overt act) is the proper starting point of the SOL. But, when the plaintiff seeks FCA treble damages, the SOL must begin on the date of payment.[61]

4. Violations of Section 3729(a)(1)(G)

In 1986, Congress added to the FCA what is commonly referred to as the "reverse false claim" provision, found in Section 3729(a)(1)(G).[62] This provision allows the government to collect treble damages if a person uses a false record or statement material to an obligation to pay the government.[63] In 2009, Congress added a second liability provision within this Section that relates to retaining overpayments; it provides for liability if a person "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the [g]overnment."[64] This new provision does not require a false claim or false statement or record, but instead it reaches knowing avoidance of obligations to return government funds.[65] In 2010, Congress passed the Affordable Care Act (ACA), which requires a person who has received

cause another to violate this section. *See* 31 U.S.C. § 3729(a)(1)(B) (liability for "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.").

60. *See supra* Section III.A.1.

61. Again, the plaintiff bears the burden of alleging and proving FCA damages. *See supra* Section III.A.1. Therefore, when FCA treble damages are sought, the claim for damages "remain[s] inchoate until a claim for payment causing the government to disburse funds is made." *Vill. of Island Park*, 888 F. Supp. at 440 (citing *McNinch*, 356 U.S. at 599). Because the SOL must be construed narrowly against the government, the only reasonable approach is for the SOL to begin on the date of payment.

62. *E.g.,* Kane *ex rel.* United States v. Healthfirst, Inc., 120 F. Supp. 3d 370, 379 (S.D.N.Y. 2015) (discussing history of the FCA and ACA).

63. *Id.* (explaining the 1986 reverse false claim provision) (quoting 31 U.S.C. 3729(a)(7)).

64. 31 U.S.C. § 3729(a)(1)(G).

65. *Kane*, 120 F. Supp. 3d at 380; *see also* Joel D. Hesch & Mia Yugo, *Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?*, 41 AM. J. TRIAL ADVOC. 335, 347–48, 353–354, 363–64 (2017) (providing a more detailed discussion of the 2009 amendments and interplay with the 2010 ACA, which did away with any need to establish a false claim for payment).

an overpayment of Medicare or Medicaid to report and return the overpayment within sixty days.[66] Within the ACA, Congress specifically stated that this duty also constitutes an "obligation" under Section 3729(a)(1)(G) of the 2009 version of the FCA.[67] Thus, the FCA and ACA, acting in concert, eliminate any need to show that a false claim was used. Rather, the plaintiff must merely show that the defendant knew it was not entitled to retain government funds.

The 1986 provision requires a false claim; therefore, the analysis is the same as Section 3729(a)(1)(B), discussed above. However, under the second provision added in 2009, there is no requirement that a claim be presented or used.[68] Rather, the violation occurs when a person knowingly retains a payment.[69] This creates an interesting point as to when the SOL begins to run. Should the SOL start on the date the defendants first had requisite FCA knowledge that they avoided repaying funds that they are not entitled to retain, or does it nevertheless accrue on the date of payment? Consider the following example.

A doctor regularly bills for a certain treatment and is paid $100,000 a year for the past twelve years. Last year, the doctor discovers that he is not entitled to these payments. Because the doctor lacked FCA scienter until this year, the government could not have filed a FCA suit until last year. Assuming the SOL begins at the time of the FCA violation—which would be last year (at the moment of scienter)—the government could conceivably seek the return of twelve years of payments provided it filed suit within either the six or ten-year SOL provisions. In other words, because last year was the first time the doctor realized that he had unlawfully been retaining payments over the past twelve years, the FCA violation occurred just last year and the plaintiff could recover damages flowing from the violation; this includes all prior payments that the doctor should not have retained. On the other hand, if the SOL is nevertheless tied to when payment is made, the government can only seek recovery of payments made within six or ten years from the date of the FCA suit. In other words, the government could go back as far as ten years from the date of the violations.

Although the language of the FCA would appear to support the SOL first accruing at the moment of the violation (i.e. knowledge of the overpayment), the better view appears to limit the FCA SOL to a maximum

66. 42 U.S.C. § 1320a-7k(d)(2).
67. *Id.* § 1320a-7k(d)(1)–(3), 31 U.S.C. § 3729(a)(1)(B).
68. Hesch & Yugo, *supra* note 65, at 347–48, 358–59, 363–64.
69. *Id* at 358.

of ten years from final payment.[70] Support for this conclusion comes from how the government treats overpayments in non-FCA matters. A similar issue arose when CMS was recouping overpayments.[71] After notice and comment, CMS issued regulations regarding the calculation of time for returning overpayments.[72] In 2018, CMS has adopted a separate six year "look back" provision for Medicare overpayments to take into account this very dilemma.[73] In other words, CMS added a provision that states that once a provider is on notice that it has retained an overpayment, under this regulation, it is only required to reimburse Medicare for the six years from when it reasonably realized the overpayment.

Although the CMS regulation does not control or trump the FCA's SOL or liability framework, the approach taken by the government makes sense.[74] The government may seek damages under the FCA for overpayments made within the six or ten-year SOL provisions. Under the example above, assuming the government (or relator) filed suit within three years of knowledge by the government official charged with responsibility to act in the circumstances, the government would be allowed to recover overpayments made within ten years of the filing of the case.

At the same time, because no false claim is required under this provision, damages may still be estimated during the entire SOL period.[75] While damages will be limited to the SOL period of time, because no false claim is required to prove the retention of overpayment, there is no need to specifically identify each false claim or establish that the claims for payments themselves were false. Indeed, the very purpose of this revised reverse false claim provision is to eliminate the need to prove that

70. In the non-FCA context, CMS has adopted a separate six year look back provision for Medicare overpayments to take into account this very dilemma. 42 C.F.R. § 401.305(f) ("Lookback period. An overpayment must be reported and returned in accordance with this section if a person identifies the overpayment, as defined in paragraph (a)(2) of this section, within 6 years of the date the overpayment was received."). In other words, once a provider is on notice that it has retained an overpayment, under this regulation, it is only required to reimburse Medicare for the six years immediately prior to reasonably knowing about its overpayment. However, that regulation does not control or trump the FCA's SOL or liability framework.

71. *FCA Implications of the CMS Final Rule on Overpayments*, BASS, BERRY & SIMS INSIDE THE FCA (Feb. 22, 2016), https://www.insidethefca.com/fca-implications-of-the-cms-final-rule-on-overpayments/.

72. 42 C.F.R. § 401.305(f).

73. *Id*. ("Lookback period. An overpayment must be reported and returned in accordance with this section if a person identifies the overpayment, as defined in paragraph (a)(2) of this section, within 6 years of the date the overpayment was received.").

74. The government can have a longer SOL for fraud cases than for non-fraud cases. For instance, the SOL for tax overpayment is three years and there is no SOL at all for tax fraud. *See infra* note 152 and surrounding text.

75. *See supra* notes 54–57; *see also* Hesch & Yugo, *supra* note 65, at 354–55.

the defendant knew at the time of payment that it was not entitled to it; rather, liability attaches once the person knows that they have retained overpayments.[76] Accordingly, the plaintiff may rely upon statistical sampling to determine damages accruing within the SOL.[77]

In the Medicare context, the SOL is also implicated by the fact that certain providers (i.e. hospitals, skilled nursing facilities, and home health agencies),[78] are paid on a prospective payment system (PPS), in which they receive an interim payment, but must annually submit cost reports to determine actual costs and any overpayments.[79] With respect to these Medicare providers, "a cause of action for Medicare overpayment generally does not accrue, and the SOL for bringing a claim for Medicare overpayment does not begin to run, until the Government's fiscal intermediary (FI) charged with administering the Medicare benefits at issue conducts a comprehensive final audit of the cost report and issues a written Notice of Program Reimbursement (NPR)."[80] Thus, the SOL for Medicare providers that must submit annual cost reports does not accrue until the date of the FI's final determination and issuance of the NPR.[81]

B. The SOL Clock Stops when a Qui Tam Complaint Is Filed

When a FCA complaint is filed by either a relator or the government, the SOL stops.[82] Indeed, the FCA allows a relator to file a FCA *qui tam*

76. Kane *ex rel.* United States v. Healthfirst, Inc., 120 F. Supp. 3d 370, 391 (S.D.N.Y. 2015).

77. 31 U.S.C. § 3729(a)(1)(C) (2018); SYLVIA, *supra* note 17, § 10:34; *Blusal Meats*, 638 F. Supp. 824, 828 (S.D.N.Y. 1986), *judgment aff'd*, 817 F.2d 1007 (2d Cir. 1987); *United States ex rel Fisher*, 180 F. Supp. 2d 192, 195 (D.D.C. 2002) (following the last overt act rule) (citing Lawrence v. Acree, 665 F.2d 1319, 1324 (1981)).

78. *Cost Reports*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 21, 2019), https://www.cms.gov/Research-Statistics-Data-and-Systems/Downloadable-Public-Use-Files/Cost-Reports/.

79. Wells v. United States, No. 12-06133-CV-SJ-GAF, 2013 WL 12074974, at *2–3 (W.D. Mo. Oct. 24, 2013), *aff'd*, 565 F. App'x 578, 579 (8th Cir. 2014) (explaining the statutory Medicare reimbursement scheme, that interim payments to hospitals are not the final payment, and an obligation exists only after the fiscal intermediary reviews and approves the cost report); United States *ex rel.* Mastej v. Health Mgmt. Assocs., Inc., No. 2:11-CV-89-FTM-29DNF, 2013 WL 1149255, at *7 (M.D. Fla. Mar. 19, 2013) ("Hospitals are required to submit an annual Hospital Cost Report, which is essentially a reckoning of whether the hospital is entitled to additional Medicare payments or if there has been an overpayment (which requires reimbursement by the hospital to the government) during the prior fiscal year."); *Id*. at *3, *judgment clarified sub nom.* USA v. Health Mgmt. Assocs. Inc., No. 2:11-CV-89-FTM-29DNF, 2014 WL 12616929 (M.D. Fla. June 10, 2014).

80. United States v. Carell, No. 3:09-445, 2010 U.S. Dist. LEXIS 13264, at *5–6 (M.D. Tenn. Feb. 17, 2010) (gathering cases).

81. *Id.* at *10 (citations omitted).

82. *E.g.*, United States *ex rel.* Downy v. Corning, Inc., 118 F. Supp. 2d 1160, 1171 (D.N.M. 2000) (a FCA action, like all other federal laws, is "initiated (and the statute of

complaint and either proceed jointly with the government if the government elects to intervene or proceed on her own if the government declines to intervene.[83] The Supreme Court has held that the FCA's SOL applies equally to relators, even if the government declines to join the *qui tam* action. Specifically, the Court stated that "[b]oth Government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are 'civil action[s] under section 3730.' Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits."[84]

The Court further iterated that it is immaterial whether the government intervenes.[85] According to the Court, "either a relator-initiated, non-intervened suit is a 'civil action under section 3730'—and thus subject to the limitations periods in subsections (b)(1) and (b)(2)—or it is not. It is such an action. Whatever the default tolling rule might be, the clear text of the statute controls this case."[86]

In short, the SOL is stopped by the filing of a FCA complaint by either a relator or the government. This issue is addressed further in Section V, which addresses the application of the relation back provision when a relator amends a complaint or the government intervenes in a *qui tam* case.

III. UNDERSTANDING THE FCA'S TEN-YEAR SOL

As indicated, the FCA has a unique two-tiered SOL.[87] In addition to providing a general six-year SOL, a second provision extends the SOL to a maximum of ten years, provided that the complaint is filed not "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."[88] The FCA provides that the plaintiff is allowed to rely upon whichever of the two SOL provisions occur last and provide a greater length of time.[89]

limitations tolled) when the complaint is filed") (citations omitted); Hayes v. Dep't of Educ. of N.Y.C., 20 F. Supp. 3d 438, 444–45 (S.D.N.Y. 2014) (the FCA SOL stops when a *qui tam* case is filed, not when it is unsealed) (citations omitted).

83. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1510.

84. *Id*. at 1511–12.

85. *Id.* at 1512.

86. *Id.*

87. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1510. In *Cochise*, the Court addressed the meaning of the ten-year SOL, and it discussed in particular whether the FCA contains a different SOL for cases in which the Government does not intervene. *Id.*

88. 31 U.S.C. § 3731(b) (2018).

89. *Id.*

Here is how it works: Assume that a company has been overbilling Medicare for fifteen years, beginning on January 1, 2005. Assume the AG first obtained material factual evidence of the fraud on December 1, 2018 and filed a FCA complaint on January 2, 2019. The SOL would be up to ten years, because the AG (or a relator) filed suit within three years of when "facts material to the right of action are known or reasonably should have been known" by the AG.[90] Thus, the government could seek damages for up to ten years from when a FCA complaint was filed (by the AG or a relator). Since a complaint was filed on January 2, 2019, the government can recover ten years of the fifteen years of fraudulent billing, or damages suffered from January 2, 2009.

Now assume that the fraud was ongoing for fifteen years, but the AG learned of the facts material to the FCA right of action on December 1, 2015 and filed suit on January 2, 2019. Because the AG (nor a relator) did not file suit within three years of when the AG obtained material factual evidence of the FCA violations, the ten-year SOL does not apply. Therefore, the standard six-year SOL applies. Thus, the government could seek damages from January 2, 2013.

With respect to when the SOL clock starts, the courts should apply the same analysis as for the six-year SOL, discussed in Section III. However, there are three key issues affecting the ten-year SOL. First, may the relator rely upon the ten-year provision? Second, who is "the official of the United States charged with responsibility to act in the circumstances"?[91] Third, what constitutes "facts material to the right of action [that] are known or reasonably should have been known"?[92] Each issue is addressed below.

A. The Ten-Year SOL Applies to Relators in Declined Qui Tam Cases

Prior to the Supreme Court's ruling in *Cochise*, the circuits were split regarding whether the ten-year SOL applies to relators in declined *qui tam* cases. A unanimous Supreme Court held that the FCA's SOL provisions apply equally to realtors.[93] In doing so, the Court stated: "Both Government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are 'civil action[s] under section 3730.' Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits."[94] The Court added: "If the Government intervenes, the civil

90. *Id.*
91. *Id.*
92. *Id.*
93. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1512.
94. *Id.*

action remains the same—it simply has one additional party. There is no textual basis to base the meaning of '[a] civil action under section 3730' on whether the Government has intervened."[95]Accordingly, the ten-year SOL applies to relators in *qui tam* suits, including when the government declines to intervene.[96]

B. Who is the Official Charged with Responsibility to Act?

The Court in *Cochise* partially addressed the issue of who is "the official of the United States charged with responsibility to act in the circumstances" by ruling that a relator is not *the official*.[97] Although the Court did not make a definitive ruling on who is the official referred to in the statute,[98] the Court provided insight in *dicta*.[99] In ruling that the relator does not fall within this definition, the Court reasoned that a relator could not be "the official" because she is "neither appointed as an officer of the United States . . . nor employed by the United States."[100] The Court concluded that, at a minimum, the official referred to in the statute must be an official of the government instead of a private person.[101] However, the Court declined to rule on whether "the official" specifically means the Attorney General (AG) (or his delegates), as advocated by the United States.[102] At the same time, although in *dicta*, the Court chose to cite to *Rumsfeld* and, in doing so, included a parenthetical describing *Rumsfeld* as follows: "(explaining that the 'use of the definite article . . . indicates that there is generally only one' person covered)."[103] Regardless of how much weight can be placed on this parenthetical, it remains inescapable that Congress' use of the definite article "*the official* of the United States" combined with "charged with responsibility to act" must mean *the one person* who has actual authority.[104] There is only one official of the United States charged with responsibility to act in the circumstances—the AG.[105] Indeed, as a matter of law, "the Attorney General [is] the only

95. *Id.* at 1512.

96. *Id.*

97. *Id.* at 1514.

98. 31 U.S.C. § 3731(b) (2018).

99. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1514.

100. *Id.*

101. *Id.*

102. *See id.* at 1514 (suggesting it was not the intent of Congress for "the official" to refer to any and all private relators, but not saying to whom Congress intended to refer).

103. *Id.*

104. 31 U.S.C. § 3731(b) (2018) (emphasis added).

105. Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 265 (2012) [hereinafter Hesch, *Breaking the Siege*].

government official with authority to compromise an FCA case or common-law fraud claim."[106] In other words, Congress vested one, and only one, official with actual authority to compromise FCA allegations. Only the AG, not any agency employee, may settle or release a FCA violation.[107]

Although a few courts have held that information known by *other* government employees counts toward this analysis, those cases were wrongly decided because the courts relied on other statutes where "the official with responsibility to act" arises in contexts where government employees other than the AG have authority to act.[108] This mistake is easy to understand because the FCA uses virtually identical language as other statutes addressing the SOL for claims brought by the government for certain common law claims.[109] For example, Section 2416(c) of Title 28 excludes from its SOL "facts material to the right of action [that] 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."[110] Courts applying Section 2416 have held that it applies to knowledge of key government officials in various agencies outside of the DOJ.[111] The problem with relying upon cases based on Section 2416 (or other similar statutes) for use in the FCA context is that *the officials* referred to in those statutes are officials other than the AG, and they include agency officials.[112] "By contrast, the only official authorized to bring an FCA claim is the Attorney General (or his designee within the DOJ)."[113] Accordingly, any FCA decisions applying Section 2416(c) are not applicable.

106. *Id.* "The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government. *See* [31 U.S.C.] § 3730 (stating that FCA claims can only be brought by the AG or a private person suing in the name of the United States); *see also* [31 U.S.C.] § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2011) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division)." Hesch, *Breaking the Siege*, *supra* note 105, at 265 fn.281.

107. *Id.* at 265–66.

108. United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 607 (S.D.N.Y. 2013) (gathering cases and describing their flaws).

109. *See* 28 U.S.C. § 2416(c) (2018).

110. *Id.*

111. *Wells Fargo Bank,* 972 F. Supp. 2d at 607–08 (listing and criticizing cases holding that it "applies to officials other than those at DOJ"); *see also* United States v. Kellogg Brown & Root Servs., Inc., No. 4:12-CV-04110-SLD-JEH, 2016 U.S. Dist. LEXIS 126159, at *11–19 (C.D. Ill. Sept. 16, 2016) (analyzing Section 2416 and determining that it does not apply to the FCA despite similar language; finding that the FCA applies only the AG and his delegates).

112. *Wells Fargo Bank,* 972 F. Supp. 2d at 607.

113. *Id. See also supra* Section IV.C (establishing that the official for purposes of the FCA can only mean the AG and his delegates).

In short, it is not enough that government employees within an affected agency might have information pertaining to the allegations; the fraud allegations must be communicated to the AG or his delegates. This is true even if the information is known by the affected agency's Office of Inspector General (OIG), because agency lawyers do not have legal authority to compromise FCA allegations.[114] Rather, such agency officials must inform the DOJ of the allegations in order to be able to formally resolve the FCA allegations.[115]

Naturally, if the AG has formally delegated his settlement authority to compromise FCA cases to certain other government officials within the Department of Justice (DOJ), knowledge by such delegates would similarly be included. Here, "[t]he Attorney General delegated authority to certain attorneys in DOJ offices in Washington, D.C.; these offices are the Civil Division, Commercial Litigation Branch, Fraud Division (DOJ Civil Frauds), and in cases under certain dollar thresholds, USAOs nationwide."[116] Thus, "the official" spoken of within the FCA's SOL means the AG and his delegates, which consist of Assistant United States Attorneys and the attorneys in the Civil Fraud Section of the Department of Justice in Washington, D.C.[117] These are the only government officials for which Congress has established authority to act upon FCA cases.[118] In conclusion, Congress intended for the courts to apply a very specific definition when it used the phrase "*the official* of the United States charged with responsibility to act."[119] By law, this can only refer to the AG or his delegates.[120]

114. *See* Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Act*, 38 SEATTLE U. L. REV. 901, 917 n.91 (2015) [hereinafter Hesch, *It Takes Time*].

115. *See id.* at 912.

116. *Id.* at 918. ("Cases under $1 million are typically delegated to the USAO. In most cases where the allegations exceed $1 million, the case is jointly handled between DOJ Civil Frauds and the USAO.").

117. *Id.* at 917 n.91 (citing Hesch, *Breaking the Siege*, *supra* note 105).

118. *Id.* at 918 n.93.

119. 31 U.S.C. § 3731(b) (2018) (emphasis added).

120. *Most courts have concluded that the only government official charged with authority to act is the AG or his delegates. E.g.,* United States *ex rel*. Reeves v. Mercer Transp. Co., 253 F. Supp. 3d 1242 (M.D. Ga. 2017); United States v. Kellogg Brown & Root Servs., Inc., No. 4:12-CV-04110-SLD-JEH, 2016 U.S. Dist. LEXIS 126159, at *1, *12, *21, *24 (C.D. Ill. Sept. 16, 2016) (permitting discovery regarding communications to DOJ Civil Division that may put it on notice of FCA claims); United States v. R.J. Zavoral & Sons, Inc., 2014 U.S. Dist. LEXIS 150343 *1, *21 (D. Minn. 2014) (limitations period applies to an official who has authority to initiate litigation under the FCA, not just any government official); United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 608 (S.D.N.Y. 2013) (means the AG or his designees); *Jana, Inc*., 34 Fed. Cl. at 451, n.6, 40 Cont. Cas. Fed. (CCH) ¶ 76862 (1995); United States v. Inc. Vill. of Island Park, 791 F. Supp. 354, 363 (E.D. N.Y.

C. What Level of Information Must be Known by the AG?

When analyzing Section 3731(b), the heart of the issue is what level of information is needed to satisfy the requirement that "facts material to the right of action are known or reasonably should have been known" to the AG or his delegates.[121] The FCA does not contain any definition of this requirement, and there is no uniform standard (or even factors) identified by the courts for determining when this requirement is satisfied. As a result, courts have developed a myriad of inconsistent approaches, and none of the courts have advanced a proper framework.[122]

Those courts that have strayed the farthest from the proper approach have done so because they improperly relied upon cases that apply the similar language used in 28 U.S.C. § 2416(c). Just as it was problematic to rely upon Section 2416 to determine the *identity* of "the official,"[123] so too is it problematic to rely upon these cases to determine the *level* of information that an official must possess. There are two main problems with cases that have addressed this issue. First, the FCA requires much more than merely notice that there may be a breach or overpayment; however, this might be sufficient to trigger the SOL under Section 2416 for a contracting officer to make a determination. The FCA, on the other hand, requires an entirely different type of scienter; i.e., guilty knowledge, in addition to an overpayment or contract violation. Second, Section 2416 cases are distinguishable because knowledge from a broader range of

1992); United States v. Macomb Contracting Corp., 763 F. Supp. 272, 274, 37 Cont. Cas. Fed. (CCH) ¶ 76162 (M.D. Tenn. 1990). The court in *United States v. Kellogg Brown & Root Services, Inc.* analyzed and criticized the few older cases that permitted knowledge outside of DOJ. *See generally* No. 4:12-CV-04110-SLD-JEH, 2016 U.S. Dist. LEXIS 126159.

121. 31 U.S.C. § 3731(b).

122. United States *ex rel.* Miller v. Bill Harbert Int'l Const., 505 F. Supp. 2d 1, 7 (D.D.C.), *dismissed sub nom* United States ex rel. Miller v. Harbert, 505 F. Supp. 2d 20 (D.D.C. 2007) (quoting Loughlin v. United States, 230 F. Supp.2d 26, 40) (it is met when the government possesses critical facts to put it on notice that a wrong has been committed and further investigation is needed)); United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 606–09 (S.D.N.Y. 2013) (it is met when the DOJ becomes aware of the material facts for a violation); United States v. Kellogg Brown & Root Servs., Inc., No. 4:12-CV-04110-SLD-JEH, 2016 U.S. Dist. LEXIS 126159, at *4–7 (C.D. Ill. Sept. 16, 2016) (recognizing that only information actually provided to DOJ Civil counts, but includes information other government agencies provide to DOJ; and suggesting that the inquiry is whether "facts that should have put it on notice of any FCA claims"); United States v. Bourseau, No. 03CV907 BEN (WMc), 2005 WL 8169208, *1, *8 (S.D. Cal. Nov. 2, 2005) (it requires more than mere allegations, such as some sort of confirmation of the initial concern of possible fraud); *see generally* United States v. Bourseau, 2005 WL 8169208, at *9 (S.D. Cal. Nov. 2, 2005) (it is met when a reasonable governmental official should have conducted further investigation).

123. *See supra* Section IV.C.

officials is permitted,[124] whereas the FCA is limited to information known by the AG or his delegates. Thus, under the FCA, there is a much narrower type of information that can trigger what "facts material to the right of action are known or reasonably should have been known" by the AG or his delegates.[125]

Under the FCA, the *facts reasonably known* standard needs to be even more exacting because the AG must prove that the defendant "knowingly" violated the FCA.[126] According to the Tenth Circuit Court of Appeals, "False Claims Act 'cases often turn on the issue of scienter.' Yet, 'the government is never in a good position to have direct evidence of guilty knowledge.'"[127] Under the FCA, scienter is an essential element.[128] Accordingly, only if the AG has material facts establishing a defendant's scienter; i.e. guilty knowledge, would he have knowledge of the facts material to a FCA violation.

Because knowledge of scienter is typically only possessed by the defendant,[129] the AG lacks ready access to a key element of a FCA violation.[130] Therefore, the question is whether the "reasonably should have

124. United States v. Kass, 740 F.2d 1493, 1497 (11th Cir. 1984) ("This clause [Section 2416] recognizes, as a practical matter, that knowledge of a cause of action at one level of government is not always immediately communicated to the particular officials charged with acting upon it. Congress could not, however, be completely forgiving of government delay and still be true to its motives in enacting a statute of limitations. Therefore, it is not necessary that relevant officials have all details of a claim before the statutory period begins to run; once the facts making up the "very essence of the right of action" are reasonably knowable, the § 2416 bar is dropped.") (citing S. Rep. No. 1328, 89th Cong., 2d Sess. (1966)).

125. *Id.*; 28 U.S.C. § 2416(c) (2018).

126. 31 U.S.C. § 37291(b)(1) (2018) ("the terms 'knowing' and 'knowingly'—(A) mean that a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information.'").

127. United States *ex rel.* Reed v. Keypoint Gov't Sols., 923 F.3d 729, 760 (10th Cir. 2019) (citing Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments*, 51 U. OF RICH. L. REV. 991, 1024 (2017)).

128. United States *ex rel.* Gross v. AIDS Research All.-Chi., 415 F.3d 601, 604 (7th Cir. 2005) (citing § 3729(a)); *see, e.g.*, United States. *ex rel.* Crews v. NCS Healthcare of Ill., Inc., 460 F.3d 853, 856 (7th Cir. 2006) (an essential element is that "the defendant knew it was false") (citing *AIDS Research All.-Chi.*, 415 F.3d at 604); United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1174 (9th Cir. 2006) (holding that scienter is an essential element).

129. Courts similarly recognize that even under Section 2416, the official "should not be penalized if the fraud of an adverse party restricted its ability to discover a valid cause of action until long after its accrual." United States v. Kass, 740 F.2d 1493, 1497 (11th Cir. 1984) ("Foremost in the enactment of § 2416(c) was the thought that the government should not be penalized if the fraud of an adverse party restricted its ability to discover a valid cause of action until long after its accrual.").

130. *See infra* notes 132–37 and accompanying text.

known" language requires the AG to attempt to discover the defendant's scienter from the defendant. It is true that the FCA states that the AG "diligently shall investigate a violation under section 3729."[131] However, this does not require the AG to issue subpoenas or attempt to interview employees or former employees of the defendant each time there is a possibility that a defendant violated the FCA.

This Article argues that whether the AG must undertake an investigation, as well as the level of any investigation, depends on two key factors: (1) the level and credibility of the allegations, and (2) the ease of access to information to establish FCA scienter.

1. The Level and Credibility of the Allegations

Whether and how the AG expends his limited resources to investigate a FCA allegation depends first on the credibility and details within the allegation itself. For instance, a hotline tip devoid of any specific information would not even warrant opening an investigation. Conversely, a *qui tam* complaint alleging specific allegations and providing details of the defendant's guilty knowledge usually satisfies the "reasonably should have been known" standard.[132]

There are two primary ways the AG learns of FCA allegations: referrals from other government agencies, and allegations reported by whistleblowers. Because agencies lack authority to resolve fraud or FCA allegations, they must make referrals to the AG.[133] Under this process, agencies routinely inform the AG of potential fraud allegations, and they do so in writing.[134] The AG's office opens files when it receives fraud allegations, *provided* that those allegations contain sufficient detail to warrant assessment or further investigation. Conversely, if information provided by the agency lacks sufficient details or indicia of fraud, the AG

131. 31 U.S.C. § 3730(a) (2018).

132. Two courts have ruled that information contained in a relator's *qui tam* complaint and statement of material evidence qualify as providing the DOJ with sufficient information as to the defendant's knowledge to trigger the three-year clock. United States *ex rel.* Purcell v. MWI Corp., 520 F. Supp. 2d 158, 170–72 (D.D.C. 2007), *rev'd and remanded*, 807 F.3d 281 (D.C. Cir. 2015); United States *ex rel.* Miller v. Bill Harbert Int'l Const., 505 F. Supp. 2d 1, 6–14 (D.D.C. 2007). Prior to the FCA amendments in 2009, the courts were divided regarding whether the government's intervening complaint related back to the original *qui tam* complaint. This issue is now moot because, even if the relator's complaint did inform the DOJ, the relator's complaint tolled the SOL. *See infra* Section V.B.

133. *See supra* Section IV.B.

134. *See* Hesch, *It Takes Time*, *supra* note 114, at 905, 912 (discussing process of investigating FCA allegations). The defendant is entitled to discover written communication by a government agency consisting of a referral of a potential fraud case to the AG or his delegates. The government, however, may redact any non-factual information or anything otherwise protected by the attorney-client privilege of the attorney work product doctrine.

may choose to not open a file (or close a file without further investigation). Thus, the written communication sent by a federal agency to the AG or his delegates that contains fraud allegations is the type of information that *may* qualify as "facts material to the right of action [that] are known or reasonably should have been known" by the AG.[135] The more detailed the factual assertions of fraud in the referral, the more likely it will trigger a duty to conduct an investigation commensurate with the information provided.[136] If the DOJ declines to open an investigation based upon its review of the referral, the referral would not meet the reasonably should have known standard.[137]

Conversely, a very factual allegation with strong indicators of fraud is more likely to trigger a duty to conduct an investigation. However, the mere opening of an investigation does not mean the investigation will develop enough information to satisfy the standard of the AG possessing "facts" material to the right of action. This is because an essential element of the FCA is scienter, which is not typically available to the referring agency or easily obtained by the AG, as discussed with respect to the second factor below.[138]

The AG also learns of FCA allegations from whistleblowers. At times, a whistleblower might contact the AG simply to report fraud by providing a tip.[139] Most of the time, however, whistleblowers contact the AG through legal counsel as part of the process of filing a *qui tam* complaint because that is the only way to receive an award.[140] In fact, *qui tam* cases account for nearly eighty percent of all fraud recoveries under the FCA, and they far surpass even fraud recoveries based on information provided to the AG by agencies.[141] Whether a whistleblower merely passes on information or instead files a *qui tam* complaint significantly affects the ten–year SOL. When information is simply passed on to the AG, such information must be weighed to determine if it constitutes "facts material to the right of action [that] are known or reasonably should have been known by the official of the United States charged with

135. 31 U.S.C. § 3731(b) (2018).

136. *See generally supra* notes 119, 122, 124, 126, 134.

137. 31 U.S.C. § 3731(b)(2) (setting forth the reasonably should have known standard and prohibiting the government from bringing actions that do not meet this standard).

138. *See* Hesch, *Breaking the Siege, supra* note 105, at 263.

139. SEC. EXCHANGE COMMISSION FREQUENTLY ASKED QUESTIONS, https://www.sec.gov/whistleblower/frequently-asked-questions (last visited Jan. 24, 2020).

140. *Id.*; *see* Hesch, *It Takes Time*, *supra* note 114, at 911; s*ee* Hesch, *Breaking the Siege*, *supra* note 105, at 219, 222.

141. *See* Hesch, *It Takes Time*, *supra* note 114, at 907.

responsibility to act in the circumstances."[142] The level and quality of the information supplied must be weighed, similar to when information is passed on to the DOJ from an agency.

When the whistleblower files a *qui tam* complaint, however, the analysis changes. By law, the relator must serve the AG with a copy of the *qui tam* complaint and a statement of all material evidence in support of the claim.[143] Thus, much more detailed information is usually supplied to the AG under this process. When a *qui tam* complaint contains factual details of each essential element of a FCA claim, it satisfies the standard.[144] At the same time, the issue is often moot, because the filing of the *qui tam* complaint also stops the SOL clock, as explained in Section III(B).[145]

The scope of the AG's duty to investigate also depends on the available resources of the AG's office. Since the modernization of the FCA, from 1986 through 2018, there have been 12,643 *qui tam* cases filed.[146] In a recent five-year period (2014-2018), there have been 3,388 *qui tam* cases filed, amounting to 678 new filings per year on average.[147] Because it takes between three and six years to conclude a case, the government is working on thousands of *qui tam* cases each year.[148] This is in addition

142. 31 U.S.C. § 3731(b)(2).

143. *See* Hesch, *It Takes Time*, *supra* note 114, at 912.

144. *Cochise Consultancy, Inc.,* 139 S. Ct. at 1513. Two courts have ruled that information contained in a relator's *qui tam* complaint and statement of material evidence provided the DOJ with sufficient information as to the defendant's knowledge to trigger the three-year clock. *See generally* United States *ex rel.* Purcell v. MWI Corp., 520 F. Supp. 2d 158, 170–72 (D.D.C. 2007), *rev'd and remanded*, 807 F.3d 281 (D.C. Cir. 2015); *see generally* United States *ex rel.* Miller v. Bill Harbert Int'l Const., 505 F. Supp. 2d 1, 6–14 (D. D.C. 2007). Prior to the FCA amendments in 2009, the courts were divided regarding whether the government's intervening complaint related back to the original *qui tam* complaint. This issue is moot because, even if the relator's complaint did inform DOJ, the relator's complaint tolled the SOL. *See infra* Section V.B.

145. United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 267 (2d Cir. 2006). In addition, relators who intend to file a *qui tam* complaint often contact the DOJ in advance of filing a *qui tam* complaint to discuss the allegations. In those instances, the information provided prior to filing the *qui tam* complaint must be considered. *See* Hesch, *Breaking the Siege*, *supra* note 105, at 263–64 (explaining that the information known by the government prior to the complaint is a relevant consideration).

146. U.S. DEP'T OF JUST. FRAUD STATISTICS—OVERVIEW, https://www.justice.gov/civil/page/file/1080696/download (last visited Jan. 24, 2020).

147. *Id.* The total FCA recoveries since 1986 amounted to $59 billion, of which *qui tam* cases accounted for $42.5 billion, consisting of seventy-two percent. *Id.* In addition, 126 non-*qui tam* cases per year have been filed by the DOJ. *Id.*

148. *See* Hesch, *It Takes Time*, *supra* note 114, at 917. "The GAO found that although the average FCA investigation took thirty-eight months, in many cases it was considerably longer. In fact, courts have found that extensions of seven or eight years can satisfy the good cause standard because of special circumstances. Thus, there remains a strong need for the

to the fielding of allegations from whistleblowers that do not seek a reward, plus the information provided by agencies that suspect fraud.[149] These cases and tips require an enormous amount of resources.[150] The DOJ cannot investigate them all. In fact, "the DOJ declines nearly 80 percent of *qui tam* cases and lacks resources to investigate every tip or complaint."[151]

Courts have recognized that one of the reasons the DOJ declines *qui tam* cases is because it lacks the resources to pursue all of the FCA allegations it receives each year.[152] "Given its limited time and resources, the government cannot intervene in every FCA action."[153] Rather, the government must weigh the size of the potential recovery against the cost to investigate the allegation, as well as ensure fairness to the defendant prior to bringing suit.[154] Because the AG lacks resources to investigate every allegation, a court must give deference to the government when evaluating what information "reasonably should have been known" to the United States official with respect to that official's evaluation of which cases merit an allocation of resources.[155] Courts should also presume that the AG acted in good faith in assessing which FCA allegations merited an allocation of its limited resources, including which allegations warranted the issuing of CIDs or conducting interviews. The decision not to issue a CID or conduct interviews should be given deference, and it should not be assumed that, because the government could have theoretically issued a CID, the information it might have discovered reasonably should have been known to it.

In sum, because the AG receives so many allegations, he must assign resources based upon the level and credibility of the information and, as

government to continue to investigate larger or more complicated cases beyond three years." *Id.* at 932.

149. *See* U.S. DEP'T OF JUST. FRAUD STATISTICS—OVERVIEW, *supra* note 146.

150. *See* Hesch, *It Takes Time*, *supra* note 114, at 917, 936.

151. Joel D. Hesch, *The False Claims Act Creates A "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 418 (2014).

152. *E.g.*, United States *ex rel.* Ubl v. IIF Data Solutions, 650 F.3d 445, 457 (4th Cir. 2011) (citing United States *ex rel.* Berge v. Bd. of Trs., 104 F.3d 1453, 1457–58 (4th Cir. 1997) (citation omitted)).

153. *Id.*

154. *See* United States *ex rel.* Roberts v. Lutheran Hosp., No. 1:97-CV-174, 1998 U.S. Dist. LEXIS 15791, at *11 (N.D. Ind. Apr. 17, 1998); United States v. Baker–Lockwood Mfg. Co., 138 F.2d 48, 53 (8th Cir. 1943) ("[d]iligence in the enforcement of the false claims statute requires . . . the careful and orderly investigation and preparation of the action to be brought, in order that the government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the public.").

155. *See* Hesch, *It Takes Time*, *supra* note 114, at 936.

explained below, the ease of access to information to establish scienter. Courts should give deference to the AG in his allocation of resources based upon these factors.

2. The Ease of Access to Information to Establish Scienter

The second factor affecting whether the AG should open an investigation or what level of investigation to conduct is the ease of access to information needed to establish FCA scienter.[156] Without evidence of scienter, the AG cannot prevail on a FCA claim. For instance, if the AG is aware that a company received an overpayment, this fact may constitute a breach of contract or overpayment, but not a FCA violation.[157] Since other government agencies have authority to redress breaches of contract or overpayments, the mere allegation from an agency that a person received an overpayment does not trigger the need to expend resources to determine if the person had guilty knowledge under the FCA.[158] Because evidence of scienter is often only known by the defendant, it can be difficult for the AG to reasonably determine if a FCA violation occurred without an insider providing detailed factual information of the defendant's knowledge of a FCA violation.[159] Thus, as discussed above, mere referrals from an agency may not trigger a duty to investigate absent evidence of fraudulent conduct. Mere suspicion is not enough. The reasonably known clause is premised upon–and specifically only applies to–"facts," not allegations, "material to the right of action."[160] Thus, allegations that do not contain factual evidence to strongly support scienter do not to trigger a duty to investigate, let alone satisfy the "reasonably should have known" standard.

"Because the government is unable to detect most instances of fraud absent the help of whistleblowers, Congress included *qui tam*[3] provisions in the False Claims Act (FCA)."[161] Congress chose to incentivize relators, who are often company employees, to file *qui tam* complaints in order to share in the recovery.[162] "Overnight, the *qui tam* provisions of the FCA became the government's best weapon for combating fraud against the

156. *See* Hesch, *Breaking the Siege*, *supra* note 105, at 263.

157. *See* United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 606–09, 611–12 (S.D.N.Y. 2013) (noting that other government officials can resolve matters that do not consist of fraud or FCA allegations and distinguishing the FCA from 28 U.S.C. § 2416).

158. *Id.*

159. Hesch, *Breaking the Siege*, *supra* note 105, at 267.

160. 31 U.S.C. § 3731(b)(2) (2018).

161. Hesch, *It Takes Time*, *supra* note 114, at 904; *see Cochise Consultancy, Inc*., 139 S. Ct. at 1510.

162. *See Cochise Consultancy, Inc.*,139 S. Ct. at 1510.

government."[163] Not only is the help of insiders critical in uncovering violations of the FCA, but this insider information is precisely the type of information Congress had in mind when it inserted the "reasonably known" language into the FCA.[164] Thus, when an employee of a company files a *qui tam* complaint, that filing typically triggers the three-year clock because the employee often provides details of scienter.[165]

In sum, without an employee becoming a *qui tam* relator (or the company self-reporting to receive reduced damages under the FCA),[166] it is very difficult for the government to obtain information about scienter—an essential element of a FCA claim. Thus, whether the AG reasonably should have known material facts of a FCA claim depends on if he has received material facts that strongly support establishing the defendant's scienter. Again, the AG must often rely on an insider to come forward with sufficient factual details of scienter.[167]

This Article suggests the following standard for determining whether "facts material to the right of action are known or reasonably should have been known."[168] A court must determine whether any factual information actually provided to the AG or his delegates reasonably puts

163. Hesch, *It Takes Time*, *supra* note 114, at 904; *see id.*

164. *See* Hesch, *Breaking the Siege*, *supra* note 105, at 265–67 (discussing the relation between the SOL for the FCA and the knowledge provider by a whistleblower which required by the AG to bring a FCA claim).

165. Two courts have ruled that information contained in a relator's *qui tam* complaint and statement of material evidence provided the DOJ with sufficient information as to the defendant's knowledge to trigger the three-year clock. United States *ex rel.* Purcell v. MWI Corp., 520 F. Supp. 2d 158, 170–72 (D.D.C. 2007), *remanded to* 807 F.3d 281 (D.C. Cir. 2015); United States *ex rel.* Miller v. Bill Harbert Int'l Const., 505 F. Supp. 2d 1, 6–14 (D.D.C. 2007). Prior to the FCA amendments in 2009, the courts were divided regarding whether the government's intervening complaint related back to the original *qui tam* complaint. This issue is moot because, even if the relator's complaint did inform the DOJ, the relator's complaint tolled the SOL. *See infra* Section V.B.

166. Congress also incentivizes the company itself to self-report. 31 U.S.C. § 3729(a)(2) (2018). The FCA contains a self-reporting provision that reduces the available damages to double, instead of triple, in a FCA case where a person self-reports. *Id.* Because the company has the option of self-reporting to limit its liability, it has less reason to complain about the government delaying in bringing a FCA suit. *See id*. By its very nature, the defendant is the one concealing its FCA violations and is the one possessing evidence of its scienter. *See id*. Therefore, courts should not be persuaded by a defendant complaining about the length of time it took the government to be in a position to reasonably obtain evidence of scienter. *See id*.

167. Of course, the AG does have the ability to issue a civil investigative demand (CID) under the FCA to force a company to divulge information via documents or depositions. However, it is not possible to do this in every case. *See* Hesch, *It Takes Time*, *supra* note 114, at 912–15. This is also addressed in the third factor below.

168. 31 U.S.C. § 3731(b) (2018).

the AG on notice that the defendant violated the FCA.[169] Only reasonable access to material facts supporting all essential elements, including scienter, triggers the three-year clock. There are two factors a court must consider.

First, a court must assess the level and credibility of the allegations to determine whether the AG is in a position to obtain all of the essential elements of a FCA claim.[170] It is not sufficient that the AG receives fraud allegations or is merely informed that a FCA violation may have occurred; the information must contain factual assertions that reasonably inform the AG that a FCA violation actually occurred.[171] Within this factor, a court should give deference to the decision by the AG regarding the scope of any investigation. A court should presume that the AG acted in good faith in assessing which FCA allegations merited an allocation of its limited resources, including which allegations warranted the issuing of CIDs or conducting interviews.

Second, a court must assess the AG's ease of access to scienter, which is an essential element of a FCA claim.[172] It is not enough that a defendant is in possession of funds of which it is not entitled; there must be evidence that the defendant had requisite knowledge of this.[173] That is the hallmark of a FCA claim and separates the FCA from mere breaches of contract for which a contracting officer or other government agency can remedy.[174] Because scienter is the hardest aspect of a FCA violation, and evidence of it is solely in the possession of the defendant, a court must find that the AG had reasonable access to material facts establishing scienter before the three-year clock is triggered.[175] A court should also consider whether the defendant has self-reported, or whether an employee or former employee of a defendant company has provided information to the AG regarding scienter.[176]

169. *See* United States v. Kellogg Brown & Root Servs., Inc., No. 4:12-CV-04110-SLD-JEH, 2016 U.S. Dist. LEXIS 126159, at *19–21 (C.D. Ill. Sept. 16, 2016) (finding that only information known to DOJ Civil counts, but also allowing discovery regarding what other agencies informed DOJ Civil to determine if it reasonably informed it that fraud occurred).

170. *See* Hesch, *Breaking the Siege*, *supra* note 105, at 262.

171. *See id*. at 255–56, 263–64 (discussing the significance of information provided by the relator and its value to the DOJ to assess the strengths of each case).

172. *See id.* at 266 (discussing that knowledge is needed to prove the claim is false, otherwise the claim will not fall within the FCA).

173. *Id*.

174. *Id.*

175. Hesch, *Breaking the Siege*, *supra* note 105, at 266–67.

176. *See* 31 U.S.C. § 3729(a)(2) (2018); *see also id.* at 267–68 (providing examples of evidence provided by employees).

In sum, these two factors should be weighed in order to determine if the AG had material facts that should have reasonably informed him of an actual FCA violation. In assessing these factors, courts must take into account that the government must weigh the size of the case, the credibility and level of factual evidence, and the ease of access to evidence of scienter against the cost to investigate when deciding both whether to open an investigation, and what the scope of the investigation will be.

V. UNDERSTANDING "RELATION BACK" UNDER THE FCA PROVISIONS

Congress included in the FCA a "relation back" provision, which must be given its full meaning and effect. Specifically, the FCA states:

> If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.[177]

This provision requires all FCA complaints to relate back to the original filing when they arise out of the same conduct, transactions or occurrences.[178] It is meant to broadly apply and capture all fraud schemes that the relator intended to include in her complaint, even if the original complaint was poorly worded or technically flawed.[179]

A. All Amended Filings Concerning the Same Fraud Scheme Relate Back

The FCA was amended in May 2009 by the Fraud Enforcement and Recovery Act ("FERA").[180] Prior to that time, the FCA was silent regarding whether the government's complaint relates back to the relator's complaint. As a result, courts applied a variety of approaches to relation back, including default tolling rules specified in Rule 15(c).[181] However,

177. 31 U.S.C. § 3731(c) (2018).

178. *See id.*

179. *See id.*

180. Fraud Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (codified at 31 U.S.C. § 3731(b)–(c) 1617 (2009)).

181. *E.g.*, United States *ex rel.* Landis v. Tailwind Sports Corp., 51 F. Supp. 3d 9, 32 (D.D.C. 2014).

Congress amended the FCA to provide a specific relation back provision to allow the Government's complaint in intervention to relate back to the initial *qui tam* filing.[182]

Today, the FCA is crystal clear that the government's intervention and subsequently filed amended complaints relate back to the initial filing whenever the allegations "arise[] out of the conduct, transactions, or occurrences" contained in a prior complaint.[183] The statute went a step further in giving relation back its fullest possible application by also adding that relation back applies when the prior complaint, perhaps in an artfully worded way or even in a way in which it fails to meet the pleading requirements of Rule 9(b), "attempts" to set forth violations of the FCA.[184] Thus, Congress intended relation back to apply to any fraud scheme alleged in a relator's complaint. This is true even if a *qui tam* case is under seal for several years and unknown to the defendant.

The same relation back rule applies when a relator amends her complaint prior to government intervention. The Supreme Court in *Cochise* also clarified that the FCA's SOL applies equally to cases initiated by whistleblowers or those initiated by the government.[185] Thus, amendments by the relator relate back to her original complaint if they "arise[] out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint."[186] Even though the FCA contains language regarding the government intervening in the action, it also contains language supporting the notion that the same relation back rule applies to all amended complaints filed by either the relator or the government. Specifically, relation back applies to "the claim of the Government."[187] Here, a *qui tam* complaint is a claim of the government, albeit brought by the relator on behalf of the government.[188] Merely because the FCA requires the relator to file a *qui tam* suit to obtain a reward does not alter the fact that it is the government's claim and injury.[189]

If there is any ambiguity as to whether an amended *qui tam* complaint is a claim of the government for purposes of relation back, a court must construe it in favor of protecting the government's interest. Congress has the power to create whatever length of SOL it desires in order

182. 31 U.S.C. § 3731(b)–(c) (emphasis added).
183. *Id.* § 3731(c).
184. *Id.*
185. *Cochise Consultancy, Inc.,* 139 U.S. at 1511–12.
186. 31 U.S.C. § 3731(c).
187. *Id.*
188. United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 930 (2009).
189. *Id.*

to protect a particular government interest.[190] In fact, absent the government enacting a SOL, there is no limitation of time against the government.[191] When Congress does act, the "[s]tatutes of limitation[s] sought to be applied to bar rights of the [g]overnment, must receive a strict construction in favor of the [g]overnment."[192] Because the government is the "real party of interest" and the entity that suffered the harm,[193] courts must strictly construe the FCA's SOL in favor of recovering taxpayers' funds lost due to fraud. This means that the ten year limitation period should broadly (not narrowly) apply to favor the government's claim.[194] Accordingly, the government's intervention, and any other amendments by the relator or the government to the relator's *qui tam* complaint, relate back to the original complaint, provided that the amendments arise out of the same conduct, transactions, or occurrences.[195]

B. The FCA Relation Back Provisions Trump Any Default Rules

The FCA relation back provision trumps any default tolling provisions, including the requirements in Rule 15(c) pertaining to notice. First, Rule 15(c)(1)(A) states that relation back applies when "the law that provides the applicable statute of limitations allows relation back."[196] Here, the FCA contains a specific relation back provision. Second, the Supreme

190. Ellen E. Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133, 135 (1989).

191. *E.g.*, United States v. Summerlin, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.") (citing United States v. Thompson, 98 U.S. 486, 490 (1878)). With respect to filing fraudulent tax returns, there is no SOL. *E.g.*, Payne v. Comm'r, 224 F.3d 415, 420 (5th Cir. 2000) ("The only exception to the general three-year limitations rule of § 6501(a) that is implicated in this appeal is § 6501(c)'s statutory tax fraud exception, which provides: 'In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.'").

192. E. I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924) (citing United States v. Whited & Wheless, Ltd., 246 U.S. 552, 561 (1918)).

193. *Eisenstein*, 556 U.S. at 930.

194. *E.g.*, BP Am. Prod. Co. v. Burton, 549 U.S. 84, 95–96 (2006) (citing *E. I. du Pont de Nemours & Co.*, 264 U.S. at 462 (1924)).

195. There is no doubt that *qui tam* complaints redress an important government interest and thus the SOL must be strictly construed to accomplish the goal of recovering back all the ill-gotten taxpayers' funds from *qui tam* cases. The government not only remains the real party in interest, but is real victor in *qui tam* complaints by retaining the lion's share of the recovery. *E.g.*, United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 872 (8th Cir. 1998); *accord* Hesch, *Breaking the Siege*, *supra* note 105. This means that *qui tam* complaints, including declined *qui tam* complaints, are a vital component of the FCA and represent an important government interest. Hesch, *Breaking the Siege, supra* note 105.

196. FED. R. CIV. P. 15(c)(1)(A).

Court has stated that the FCA's SOL trumps any default tolling rules.[197] Third, it is settled that rules contained in the FRCP cannot abridge or enlarge substantive rights, including those found in federal statutes.[198] Thus, the relation back provision contained in the FCA must be given its full meaning, which requires all pleadings to relate back to a prior pleading whenever the party attempts to set forth allegations that might later be held improperly pleaded. The key is that relation back applies to all claims arising out of the alleged "conduct, transactions, or occurrence[s]" contained in the prior complaint.[199] Accordingly, relation back applies to any fraud scheme alleged in a prior complaint.

Notice is not required to be given to any defendant before relation back applies to any amended complaint, regardless of whether it was filed by either the relator or the government. Again, any purported notice requirement in Rule 15 is trumped by the FCA's relation back provision.[200] Nothing in Rule 15 can be relied upon to abridge the standard Congress set forth in the FCA. This is true even when adding a new defendant.[201] Indeed, the very structure of the FCA prohibits a relator from notifying a defendant (or the public) of the filing of a *qui tam* complaint.[202] The FCA requires that the case remain under seal and unknown to defendants and the public until the government investigates the allegations and the court lifts the seal.[203] Thus, the FCA's relation back provision cannot be interpreted as requiring notice for it to apply. Again, Congress stated that relation back applies to all fraud schemes that are set forth or attempted to be set forth, and it included as the test, or standard, whether allegations in a later complaint "arise[] out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."[204] Thus, relation back is based upon the scheme itself, not the

197. *Cochise Consultancy, Inc.*, 139 S. Ct. at 1512 ("Whatever the default tolling rule might be, the clear text of the statute controls this case.").

198. *E.g.*, Hanna v. Plumer, 380 U.S. 460, 464 (1965). The Court also noted that the Rules Enabling Act, 28 U.S.C. § 2072, prohibits the Court from enacting or interpreting the FRCP in any ways that "abridge, enlarge or modify any substantive right." *Id.*

199. 31 U.S.C. § 3731(c) (2018).

200. *See Cochise Consultancy, Inc*., 139 S. Ct. at 1512.

201. *See, e.g.*, United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 606–09 (S.D.N.Y. 2013) (gathering cases and explaining the flaws in the few older cases that wrongly held that knowledge outside of DOJ counts).

202. 31 U.S.C. § 3730(b)(2) (2018) ("The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."); *see also* 31 U.S.C. § 3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2).").

203. 31 U.S.C. § 3730(b)(2).

204. 31 U.S.C. § 3731(b)–(c) (2018).

particular actors or potential defendants who participated in the scheme.[205] The fact that more than one person may have been involved in the scheme does not alter the fact that the entire scheme is tolled upon the filing of a *qui tam* complaint if it arises out of the conduct, transactions or occurrences of an earlier filed FCA complaint.[206] Both the relator and the government can later add new defendants charged with participating in the scheme set forth, or attempted to be set forth, in the initial *qui tam* complaint, and relation back under the FCA attaches.[207]

In sum, the relation back principle applies equally to the amending of allegations against existing defendants and the amending of allegations naming new defendants; this does not require notice, as required in other default relation back situations such as that contained in Rule 15(c)(1)(C)(i) and (ii).[208] Again, absent Congress adopting a SOL, there is no SOL pertaining to the government. Congress has spoken, and it established relation back in the FCA context to any transaction or occurrence that a relator attempted to set forth. Thus, the focus is on whether the transaction or fraud scheme is alleged in a prior complaint. If so, amendments relating to any aspect of the scheme relate back, including the addition of additional parties that participated in such fraudulent transaction or occurrence. There is nothing in the FCA's relation back provision that requires notice to an existing or newly named defendant. Again, the sole test is whether the allegations "arise[] out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."[209] Accordingly, even if a *qui tam* complaint does not satisfy FRCP 9(b), a later filed FCA *complaint* by the relator or intervention by the government relates back to the prior complaint

205. *See id.*

206. *See* 31 U.S.C. § 3730(b)–(c).

207. 31 U.S.C. § 3731(b)–(c).

208. FED. R. CIV. P. 15(c)(1)(C). FRCP 15(c) requires the following when adding a new party: "the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." *Id*. Again, however, FRCP cannot displace any relation back provisions in federal statutes, such as the one contained in the FCA. *See Cochise Consultancy, Inc*., 139 S. Ct. at 1512.

209. 31 U.S.C. § 3731(b)–(c). Because state FCAs mirror the federal FCA, "courts generally look to federal case law to decide issues under the [state FCAs]." Hill v. Bd. of Regents of the Univ. Sys. of Ga., 829 S.E.2d 193, 198 (Ga. Ct. App. 2019) (quoting Murray v. Cmty. Health Sys. Prof'l Corp., 811 S.E.2d 531, 537 (Ga. 2018)); *accord* People *ex rel.* Lindblom v. Sears Brands, LLC, 2019 IL App (1st) 180588, at *29 (Ill. Ct. App. 2019); State of New York, *ex rel.* Raw Data Analytics L.L.C. v. JP Morgan Chase & Co., 108 N.Y.S.3d 796, 802 (N.Y. Sup. Ct. 2019); State v. Premier Healthcare Inc., Del. Super. LEXIS 262, at *16 (Del. Super. Ct. 2018).

if it "arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth" in the prior complaint.[210]

VI. RESTATING THE FCA'S SOL PROVISIONS AND PROCEDURES

Based on the authority and analysis cited in this Article, the following is a restatement of the law pertaining to the SOL under the FCA.[211]

A. The FCA Statute of Limitations

The FCA contains a unique two-tiered SOL, which reads:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than six years after the date on which the violation of section 3729 is committed, or
>
> (2) more than three 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 ten years after the date on which the violation is committed,
>
> whichever occurs last.[212]

The first SOL provides an absolute six-year time period to file a FCA complaint. The second SOL extends the time to ten years, provided that a complaint is filed by the government or relator not "more than three 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."[213]

B. The Start Date of the SOL

When a person violates the FCA, she "is liable to the United States Government for a civil penalty . . . plus three times the amount of damages which the Government sustains because of the act of that person."[214] Under this statutory scheme, civil penalties are available simply for

210. *See* § 3731(b)–(c).

211. *See* 31 U.S.C. § 3729 (2018). The FCA allows both the government and private persons, known as relators, to initiate FCA cases. 31 U.S.C. § 3731(b)–(c). The relator must file her *qui tam* case under seal and provide the government with time to investigate and decide whether to intervene. *Id.* If the government joins, it may amend the complaint and assumes primary authority over the suit. If the government declines to join, the relator may pursue the case alone on behalf of the government. *Id.* Any recovery is shared with a proper relator, ranging from fifteen to thirty percent of the proceeds. *See id.*

212. 31 U.S.C. § 3731(b). A relator and the government can each rely upon both of the FCA's SOL provisions and apply the longer of the two. *Id.*

213. *Id.*

214. 31 U.S.C. § 3729(a)(1)(A) (2018).

violating the FCA, whereas damages must be alleged and proven by the plaintiff.[215] Determining the start date of the SOL depends on whether the plaintiff is seeking civil penalties or treble damages under the Act. On a claim for civil penalties, the SOL clock starts at the date of the FCA violation because all of the required elements are met.[216] However, when the plaintiff is seeking treble damages, the SOL clock does not start until payment is made because damages become an additional element.[217] The plaintiff has the burden of proving damages as a part of the claim.[218] In short, if the plaintiff is seeking only civil penalties under the FCA, the date that the claim was submitted is the relevant date for the start of the SOL. But if the plaintiff is seeking treble damages under the FCA, the date that the claim was paid triggers the start of the SOL.

1. Violations of Section 3729(a)(1)(A)

A violation of Section 3729(a)(1)(A) occurs when a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[219] For civil penalty purposes, the SOL begins when the claim is presented.[220] For damage purposes, the SOL begins when the claim is paid.[221]

2. Violations of Section 3729(a)(1)(B)

A violation of Section 3729(a)(1)(B) occurs when a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[222] For civil penalty purposes, the SOL begins on the date the defendant makes, uses, or causes to be made or used, a false record or statement.[223] For damage purposes, the SOL begins when the claim is paid.[224]

215. *E.g.*, United States v. United Techs. Corp., 782 F.3d 718, 735–36 (6th Cir. 2015).

216. *See* 31 U.S.C. § 3731(b)(1)–(2).

217. *See id.* § 3731(b), (c), (d), (e).

218. When seeking damages in addition to civil penalties, "[f]raudulent conduct and false statements remain inchoate until a claim for payment causing the government to disburse funds is made." United States v. Incorporated Village of Highland Park, 888 F. Supp. 419, 440 (E.D.N.Y. 1995) (citing United States v. McNinch, 356 U.S. 595, 599 (1958)).

219. 31 U.S.C. § 3729(a)(1)(A).

220. *See* 31 U.S.C. § 3731(b).

221. *Id*.

222. 31 U.S.C. § 3729(a)(1)(B).

223. *See id.* (This is implicit in the elements of the rule).

224. *See* 31 U.S.C. § 3731(b).

3. Violations of Section 3729(a)(1)(C)

A violation of Section 3729(a)(1)(C) occurs when a person "conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)."[225] In addition to reaching an agreement to conspire to violate the FCA, the plaintiff must also allege the commission of an act in furtherance of the conspiracy; i.e. "an overt act."[226] For purposes of civil penalties, the SOL runs separately from the date of each overt act that is alleged to cause damage.[227] For damage purposes, the SOL begins when the claim is paid.[228]

4. Violations of Section 3729(a)(1)(G)

With respect to the so-called reverse false claim provision contained in Section 3729(a)(1)(G), there are two separate liability provisions. The first liability provision was included in the 1986 version of the FCA and renders a person liable if she "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government."[229] Thus, this provision requires a false record or statement, much like the requirements of Section 3729(a)(1)(B). The analysis for a claim and the SOL for that claim mirror the analysis of a violation of Section 3729(a)(1)(B), as discussed above.

The second liability provision within Section 3729(a)(1)(G) was added in 2009, when Congress passed the Fraud Enforcement and Recovery Act (FERA).[230] This provision reaches concealment of obligations without needing to prove a false claim.[231] It applies to the knowing retention of overpayments.[232] In conjunction with the full FCA, this second provision reads:

> any person who . . . knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil

225. 31 U.S.C. § 3729(a)(1)(C).

226. *See, e.g.*, United States *ex rel.* Quartararo v. Catholic Health Sys. of Long Island, No. 12-CV-4425 (MKB), 2017 U.S. Dist. LEXIS 50696, at *23 (E.D.N.Y. Mar. 31, 2017) (citing United States *ex rel.* Scharff v. Camelot Counseling, No. 12-CV-3791 (PKC), 2016 U.S. Dist. LEXIS 133292, at *6 (S.D.N.Y. Sept. 28, 2016)).

227. *See* 31 U.S.C. § 3731(c) (speaking to relationship between commission of FCA and statute of limitations).

228. *See id.* § 3731(b).

229. 31 U.S.C. § 3729(a)(1)(G).

230. *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111–21, § 4, 123 Stat. 1617, 1621–25 (2009).

231. *Id.*

232. *Id.*

> penalty . . . plus three times the amount of damages which the Government sustains because of the act of that person.[233] ***
>
> For purposes of this section— . . . the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment . . . .[234]

Just one year later, this provision was further modified by another statute enacted by Congress in the area of Medicare fraud.[235] In 2010, Congress passed the ACA requiring a person who has received an overpayment of Medicare or Medicaid to report and return the overpayment within sixty days.[236] Under the ACA, a violation of the sixty-day rule constitutes an "obligation" under Section 3729(a)(1)(G).[237] Therefore, it is a violation of Section 3729(a)(1)(G) for a person to knowingly retain an overpayment.[238] There is no need to establish that the person submitted a false claim or used a false statement or record.[239] Simply knowingly and improperly avoiding an obligation to pay money to the government is enough to constitute a FCA violation.[240]

In the Medicare context, when a plaintiff is relying on the 2010 ACA to establish a FCA violation, a defendant has sixty days to return overpayments from when she knew she was not entitled to retain the funds.[241] Failure to do so results in a FCA violation.[242]

The 2009 version of Section 3729(a)(1)(G) also applies to knowingly retaining overpayments in contexts outside of Medicare.[243] It is a violation if a person knowingly retains any overpayment of government funds.[244] The SOL begins on the date that the defendant knew it was not entitled to retain the government funds.[245]

Finally, because no false claim is required under the 2009 version of Section 3729(a)(1)(G), damages may be estimated to determine the

233. *Id.* (emphasis added).

234. *Id*.

235. *See* Kane *ex rel.* United States v. Healthfirst Inc., 102 F. Supp. 3d 370, 380–81 (S.D.N.Y. 2015).

236. 42 U.S.C. § 1320a-7k(d)(2) (2018).

237. *Id.*; *See also Healthfirst Inc.*, 102 F. Supp. 3d at 381.

238. 42 U.S.C. § 1320a-7k(d)(3); 31 U.S.C. § 3729(a)(1)(G) (2018).

239. 31 U.S.C. § 3729(b)(1).

240. *Id.* § 3729(b)(1)(A), (a)(1)(G).

241. 42 U.S.C. § 1320a-7k(d)(2)(A), (d)(4)(B).

242. *Id.* § 1320a-7k(d)(3); 31 U.S.C. § 3729(a)(1)(G).

243. 31 U.S.C. § 3729(a)(1)(G), (b)(3).

244. *Id.*

245. 31 U.S.C. § 3731(b)(1) (2018); *Id.* § 3729(b)(1)(A).

amount of overpayment retained during either the six or ten-year SOL periods.[246] While damages will be limited to funds received by the defendant within the applicable SOL period of time, because no false claim is required to prove any retention of overpayment, there is no need to specifically identify each false claim or otherwise establish that the initial claims for payments themselves were false.[247] Indeed, the purpose of this 2009 version of Section 3729(a)(1)(G) is to eliminate the need to prove that the defendant knew at the time of payment that it was not entitled to it; rather, FCA liability attaches once the person knows that they have retained overpayments.[248] Accordingly, the plaintiff may rely upon statistical sampling to determine damages accruing within the SOL.[249]

C. The SOL Clock Stops when a Qui Tam Complaint Is Filed

The SOL stops when a FCA complaint is filed by either a relator or the government. It is immaterial whether the government intervenes.[250]

D. The Ten-Year SOL

In addition to vesting the government and relator with an absolute six-year SOL, a second provision extends the SOL to ten years provided that the complaint is filed not "more than [three] 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."[251] The plaintiff may rely upon the longer of the two.

The FCA's SOL provisions apply equally to realtors, even when the government declines to intervene.[252]

E. Who Is the Government Official Charged with Responsibility to Act?

The official referred to in the ten-year SOL is *the one person* who has actual authority to act with respect to FCA actions. By law, there is only one "official of the United States charged with responsibility to act in the circumstances"—the AG.[253] In fact, "the Attorney General [is] the only government official with authority to compromise an FCA case or

246. 31 U.S.C. § 3729(a)(1)(G); Hesch & Yugo, *supra* note 65, at 355.

247. *See* 31 U.S.C. § 3729(b)(1).

248. Kane *ex rel.* United States v. Healthfirst, Inc., 120 F. Supp. 3d 370, 391 (S.D.N.Y. 2015).

249. Hesch & Yugo, *supra* note 65, at 341.

250. *See Cochise Consultancy, Inc*., 139 S. Ct. at 1510.

251. 31 U.S.C. § 3731(b)(2) (2018) (alterations in original).

252. *See Cochise Consultancy, Inc.*, 139 S. Ct. at 1510.

253. 31 U.S.C. § 3731(b)(2); 31 U.S.C. § 3730(a), (b) (2018).

common-law fraud claim."[254] The AG has delegated authority to certain Department of Justice attorneys located in the Civil Division, Commercial Litigation Branch, Fraud Division (DOJ Civil Frauds), and in cases under certain dollar thresholds, United States Attorney's Offices nationwide.[255] Thus, "the official" spoken of in the FCA's ten-year SOL constitutes the AG and his delegates, consisting of attorneys in the Civil Fraud Section of the Department of Justice in Washington, D.C. and Assistant United States Attorneys throughout the country.[256] Only information actually known by the AG or his delegates may be considered, and the court must analyze this information in order to determine if the factual assertions reasonably informed the AG that a FCA violation actually occurred.[257]

F. What Information Must Be Known by the AG?

Only facts that are reasonably known to the AG trigger the three-year action requirement within the FCA's ten-year SOL.[258] Whether the AG must undertake an investigation (and the level of any such investigation) depends on two factors: (1) the level and credibility of the allegations, and (2) the ease of access to information to establish scienter.[259]

First, a court must assess the level and credibility of the allegations to determine whether the AG is in a position to obtain all of the essential elements of a FCA claim.[260] Only credible and detailed factual assertions have the potential to place a duty upon the AG to undertake an investigation. Mere suspicion is not enough. It is not sufficient that the AG is merely informed that a FCA violation may have occurred. The information must contain factual assertions that reasonably inform the AG that a FCA violation actually occurred.[261] Within this factor, the scope of the AG's duty to investigate and the scope of any investigation depends upon the available resources of the AG's office.[262] The court should presume that the AG acted in good faith in deciding how to delegate the government's limited resources amongst the FCA allegations, including which

254. Hesch, *Breaking the Siege*, *supra* note 105, at 265 n.281 ("The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government.").

255. *See id.* at 265 n.282.

256. *Id.*

257. *See supra* note 171 and accompanying text.

258. *Supra* note 125 and accompanying text.

259. *Supra* Part IV.C.

260. *Supra* Part IV.C.1.

261. *Supra* notes 135–36 and accompanying text.

262. *Supra* notes 153–54 and accompanying text.

allegations warrant the issuing of CIDs or conducting interviews.[263] The decision not to issue a CID or conduct interviews should be given deference.[264]

Second, a court must assess the AG's ease of access to information establishing FCA scienter, which is an essential element of a FCA claim.[265] Simply being aware that a person received an overpayment, and that the retention of this overpayment might be fraudulent, does not trigger a duty to determine if the person had guilty knowledge under the FCA. Because scienter is the hardest element of a FCA violation to prove, and evidence of scienter is often solely in the possession of the defendant, a court must find that the AG had reasonable access to material facts establishing scienter before finding that he had reasonable access to "facts material to the right of action."[266] There must be evidence that the AG had requisite knowledge of a FCA violation. Absent the AG's being presented with detailed, credible, factual evidence of scienter, the AG does not have a duty to open a FCA investigation or conduct interviews.[267] The court should also consider whether the defendant has self-reported, or whether an employee (or former employee) of a defendant company has provided information to the AG regarding scienter.[268]

G. Relation Back Under the FCA

The FCA contains a specific relation back provision, which states:

> If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.[269]

This provision requires all FCA complaints to relate back to the original filing when they arise out of the same conduct, transactions or

263. *See* United States v. Am. Nat'l Red Cross, 518 F.3d 61, 65 (D.C. Cir. 2007).
264. *See id.*
265. *Supra* Part IV.C.2.
266. 31 U.S.C. § 3731(b) (2018).
267. *Supra* note 158 and accompanying text.
268. *Supra* notes 166, 176 and accompanying text.
269. 31 U.S.C. § 3731(c) (internal footnote omitted).

occurrences.[270] It broadly applies and captures all fraud schemes that the relator attempted to include in her complaint, even if poorly worded or technically flawed.[271]

H. The FCA Relation Back Provision Trumps any Default Rules

The FCA relation back provision trumps any default tolling provisions, including requirements in FRCP 15(c) pertaining to notice.[272] Rule 15(c)(1)(A) specifically states that relation back applies when "the law that provides the applicable statute of limitations allows relation back."[273] Here, the FCA contains a specific relation back provision.[274] In addition, the Supreme Court has declared that the FCA's SOL trumps any default tolling rules.[275] Moreover, the FRCP cannot abridge or enlarge substantive rights found in federal statutes.[276] Thus, the relation back provision contained in the FCA must be given its full meaning, which requires all pleadings to relate back to a prior pleading whenever the party attempted to set forth allegations that might later be held improperly pleaded. Relation back applies to all claims arising out of the alleged conduct, transactions, or occurrences contained in the prior complaint.[277] Accordingly, relation back applies to any fraud scheme alleged in a prior complaint without regard to any notice to any defendant or other default SOL rules.

270. *Id.*

271. Congress has the power to create whatever length of SOL it desires to protect a particular Government interest. In fact, absent the Government enacting a statute of limitations, there is no limitation against the Government. When Congress does act, the "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." E. I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924). Because the Government is the "real party in interest" and the entity that suffered the harm, courts must strictly construe the FCA's SOL in favor of recovering of taxpayers' funds lost due to fraud. *Id.*; United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 930 (2009). Because *qui tam* complaints redress an important government interest, the FCA's SOL must be strictly construed to accomplish the goal of recovering back all the ill-gotten taxpayers' funds from *qui tam* cases. United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 872 (8th Cir. 1998).

272. *Cochise Consultancy, Inc*., 139 S. Ct. at 1512; FED R. CIV. P. 15(c).

273. FED R. CIV. P. 15(c).

274. 31 U.S.C. § 3731(c) (2018).

275. *Cochise Consultancy*, 139 S. Ct. at 1512 ("Whatever the default tolling rule might be, the clear text of the statute controls this case.").

276. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 463–64 (1965). The Court also noted that the Rules Enabling Act prohibit the Court from enacting or interpreting the Federal Rules of Civil Procedure in any way that "abridge, enlarge or modify any substantive right." *Id.* at 464 (quoting 28 U.S.C. 2072(b) (2018)).

277. 31 U.S.C. § 3731(c).

Relation back also applies when a new party is added as a defendant.[278] The focus of this analysis is whether the transaction or fraud scheme is alleged (or attempted to be alleged) in a prior FCA complaint.[279] Any amendments relating to any aspect of the fraud scheme relates back, including the addition of additional parties that participated in such fraudulent transactions or occurrences. The sole test is whether the allegations "arise[] out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."[280]

VII. CONCLUSION

The FCA contains a unique, two-tiered SOL and an accompanying relation back provision. Although the Supreme Court in *Cochise Consultancy, Inc.* clarified one important issue—the SOL does not distinguish between complaints filed by relators or the government—it did not address several other areas of conflict. This Article systematically and comprehensively analyzed each of the legal and procedural principles affected by the FCA's SOL. The Article developed frameworks and legal standards for the courts to follow with respect to each aspect of the SOL. The Article also contained a restatement of the SOL and relation back provision in order to provide guidance and a framework for the courts and practitioners.

278. FED R. CIV. P. 15(c)(1)(C).
279. 31 U.S.C. § 3731(c).
280. *Id.*