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ABSTRACT

When Congress amended the False Claims Act (FCA) in 1986, it established three separate and distinct ways to establish requisite knowledge. A person violates the FCA when they (1) have actual knowledge, (2) act with deliberate ignorance of the truth, or (3) act in reckless disregard of the truth. The three FCA knowledge standards are differentiated not by ease of proof but by specific application. Merely because deliberate ignorance is the least common standard does not make it less important or harder to prove. This Article gathers and evaluates the handful of Circuit Courts of Appeals cases that specifically address deliberate ignorance and proposes a uniform and proper standard to guide courts and practitioners on the proper meaning and usage of deliberate ignorance.

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United States ex rel. Sheldon v. Forest Lab'ys, LLC, 499 F. Supp. 3d 184, 208 (D. Md. 2020), aff'd sub nom. United States ex rel. Sheldon v. Allergan Sales, LLC, No. 20-2330, 2022 U.S. App. LEXIS 27437 (4th Cir. Sept. 23, 2022).

*Mr. Hesch extends a special note of thanks to his research assistant, Brent Dugwyler, J.D. 2024, who provided valuable assistance in drafting this article.

ARTICLE

PROVING A VIOLATION OF THE FALSE CLAIMS ACT THROUGH DELIBERATE IGNORANCE

Joel D. Hesch[†*]

ABSTRACT

When Congress amended the False Claims Act (FCA) in 1986, it established three separate and distinct ways to establish requisite knowledge. A person violates the FCA when they (1) have actual knowledge, (2) act with deliberate ignorance of the truth, or (3) act in reckless disregard of the truth. The three FCA knowledge standards are differentiated not by ease of proof but by specific application. Merely because deliberate ignorance is the least common standard does not make it less important or harder to prove. This Article gathers and evaluates the handful of Circuit Courts of Appeals cases that specifically address deliberate ignorance and proposes a uniform and proper standard to guide courts and practitioners on the proper meaning and usage of deliberate ignorance.

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[*] Mr. Hesch extends a special note of thanks to his research assistant, Brent Dugwyler, J.D. 2024, who provided valuable assistance in drafting this article.

I. INTRODUCTION

The False Claims Act (FCA)[1] is the government's primary tool for combatting fraud and recovering ill-gotten gains.[2] To combat rising fraud, Congress overhauled the FCA in 1986.[3] Congress set out to strengthen the statute by broadening its reach. First, it made clear that the government need not prove fraudulent intent.[4] Second, it expanded the definition of knowledge, which courts viewed as requiring "actual knowledge,"[5] to include "deliberate ignorance" and "reckless disregard" as two separate and distinct ways of establishing knowledge.[6] Thus, under the 1986 amendments, a person has the requisite scienter or FCA knowledge if they (1) have actual knowledge, (2) act with deliberate ignorance of the truth, or (3) act in reckless disregard of the truth.[7] Although the FCA and its legislative history make clear that only one of the three forms of knowledge is required, deliberate ignorance is often overlooked and underutilized. Moreover, a few circuit courts have mistakenly stated that reckless disregard is the "loosest" knowledge standard of the three,[8] which only leads to confusion as to the true

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[1] *See generally* 31 U.S.C. § 3729.

[2] Avco Corp. v. U.S. Dep't of Just., 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] Joel D. Hesch, *Allowing Whistleblowers to Copy Company Documents to File* Qui Tam *Complaints Under the False Claims Act When Reporting Medicare Fraud*, 13 LIBERTY U. L. REV. 265, 270 (2019).

[4] 31 U.S.C. § 3729(b)(1)(B) ("require no proof of specific intent to defraud").

[5] CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:43. (2022) ("Prior to 1986, the Act did not define the term 'knowingly.' A number of courts had construed the Act to require that a plaintiff show that the defendant had 'actual knowledge' of the fraud, or a specific intent to defraud.").

[6] 31 U.S.C. § 3729(b)(1)(A)(i)–(iii).

[7] *Id.*

[8] *See* United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1378 (D.C. Cir. 2000); United States *ex rel.* Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1190 (8th Cir. 2010) (quoting *Siewick*, 214 F.3d at 1378); United States *ex rel.* Complin v. N.C. Baptist Hosp., 818 F. App'x 179, 184 (4th Cir. 2020) (quoting United States *ex rel.* Purcell v. MWI

meaning and application of deliberate ignorance. The three FCA knowledge standards are differentiated not by ease of proof but by specific application. The mere fact that deliberate ignorance is the least common standard does not render it less important or harder to prove. Congress added deliberate ignorance to capture special types of improper billings. The deliberate ignorance standard imposes on those who do business with the government a limited duty to inquire when red flags exist, and it renders them liable for sticking their heads in the sand instead of making simple inquiries to appreciate their true obligations.

Section II of this Article states the history and purpose of the FCA. Section III addresses areas in which the courts mistakenly treat deliberate ignorance as a higher standard than reckless disregard as well as improperly borrow definitions from criminal cases. Section III also gathers and evaluates United States Circuit Courts of Appeals cases that specifically address deliberate ignorance. Section IV proposes a uniform and proper standard to guide courts and practitioners on the proper meaning and usage of deliberate ignorance to establish a knowing violation of the FCA.

II. HISTORY AND REQUIREMENTS OF THE FALSE CLAIMS ACT

The False Claims Act was first enacted in 1863 by President Abraham Lincoln to combat widespread fraud "against the military during the Civil War."[9] The FCA "sat largely dormant from 1943 to 1986" because its provisions were "too strict."[10] In 1986, due to rising fraud, Congress revitalized and modernized the FCA, which is now the government's most important tool to combat fraud.[11]

Corp. 807 F.3d 281, 288 (D.C. Cir. 2015)); United States *ex rel.* Schutte v. SuperValu Inc., 9 F.4th 455, 468 (7th Cir. 2021) (citing *Purcell*, 807 F.3d at 288).

[9] Joel D. Hesch, *Understanding the Revised Reverse False Claims Provision of the False Claims Act and Why No Proof of A False Claim Is Required*, 53 UIC J. MARSHALL L. REV. 461, 464 (2021) (citing S. REP. NO. 99-345, at 7 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) ("The False Claims Act of 1863 was adopted during the Civil War in order to combat fraud and price-gouging in war procurement contracts.").

[10] Hesch, *supra* note 3, at 270.

[11] Avco Corp. v. U.S. Dep't of Just., 884 F.2d 621, 622 (D.C. Cir. 1989).

The FCA renders a person liable when they knowingly submit false claims to the government.[12] Prior to 1986, the statute did not define knowledge and thus it generally required actual knowledge.[13] The 1986 amendments not only added a definition, but purposefully defined knowledge to include both deliberate ignorance and reckless disregard. Today, the terms "knowing" and "knowingly" are specifically defined to "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."[14]

Congress intentionally included the disjunctive "or" when drafting the requirements of knowledge to create three distinct ways to establish knowledge. First, a person may have acted with *actual knowledge* that they were submitting a claim for funds that they were not entitled to.[15] This is the classic form of fraud whereby the person knew the claim was false. Second, a person may have acted with *deliberate ignorance* of the truth or falsity of the information.[16] This occurs when a person has a duty to inquire but elects to

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[12] 31 U.S.C. § 3729(a)(1)(A)–(G). The seven subparts of liability cover a broad array ranging from knowingly presenting to causing others to present false claims. The distinctions are not relevant to this Article.

[13] SYLVIA, *supra* note 5.

[14] 31 U.S.C. § 3729(b)(1)(A)(i)–(iii).

[15] *Id.* § 3729(b)(1)(A)(i); *see also* United States *ex rel.* Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc., 370 F. Supp. 2d 18, 40–41 (D.D.C. 2005); United States v. Speqtrum, Inc., 113 F. Supp. 3d 238, 249 (D.D.C. 2015) ("Actual knowledge looks at 'subjective knowledge,' while deliberate ignorance 'seeks out the kind of willful blindness from which subjective intent can be inferred.'" (quoting United States *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 57 (D.D.C. 2007))). Reckless disregard, in contrast, is "an extension of gross negligence . . . an extreme version of ordinary negligence" or "gross negligence-plus." United States v. Krizek, 111 F.3d 934, 942–43 (D.D.C. 1997); *see also* United States *ex rel.* K & R Ltd. P'ship v. Mass. Hous. Fin. Agency, 530 F.3d 980, 983 (D.C. Cir. 2008); United States *ex rel.* Bettis v. Odebrecht Contractors of Cal., Inc., 297 F. Supp. 2d 272, 277 (D.D.C. 2004), *aff'd*, 393 F.3d 1321 (D.C. Cir. 2005) ("innocent mistakes [or] negligence . . . are insufficient . . . 'the claim must be a lie'" (quoting Hindo v. Univ. of Health Sciences/The Chicago Med. Sch., 65 F.3d 608, 613 (7th Cir. 1995))); Hamilton Sec. Grp., Inc., 370 F. Supp. 2d at 42 ("The standard of reckless disregard . . . address[es] the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered.").

[16] 31 U.S.C. § 3729(b)(1)(A)(ii).

bury their head in the sand to avoid knowing the claim is false. For instance, a person might have made an initial inquiry with a government official regarding a contract requirement but disliked the direction of the conversation and elected to stop further communications to avoid learning that they were not entitled to the funds. Third, a person may have acted with *reckless disregard* for the truth or falsity of the information.[17] This addresses a type of guilty knowledge different from burying one's head in the sand. For instance, a person might have unreasonably relied upon a regulation they considered to be ambiguous. The Act considers reckless conduct to be tantamount to knowledge.[18]

Deliberate ignorance was new to the 1986 amendments. Before 1986, the FCA did not define knowledge or include either reckless disregard or deliberate ignorance as ways of establishing knowledge.[19] When modernizing and strengthening the FCA, "the House Judiciary Committee noted the problems from the lack of a definition of 'knowledge' and reported":[20]

> By adopting this [three-pronged] definition of knowledge, the committee intends not only to cover those individuals who file a claim with actual knowledge that the information is false, but also to confer liability upon those individuals who deliberately ignore or act in reckless disregard of the falsity of the information contained in the claim. *It is intended that persons who ignore "red flags" that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through*

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[17] *Id.* § 3729(b)(1)(A)(iii).

[18] According to legislative history, "reckless disregard and gross negligence define essentially the same conduct and . . . under this act, reckless disregard does not require any proof of an intentional, deliberate, or willful act." 132 Cong. Rec. S11238 (1986). The Supreme Court also noted that if a reasonable person would understand that a requirement was material, it amounts to reckless disregard, even if the government did not "spell [it] out." Universal Health Servs., Inc. v. United States, 579 U.S. 176, 191 (2016).

[19] SYLVIA, *supra* note 5, § 4:45.

[20] United States v. SuperValu Inc., 9 F.4th 455, 479 (7th Cir. 2021) (Hamilton, J., dissenting).

> *which their company handles a claim should be held liable under the Act*. This definition, therefore, enables the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play "ostrich."[21]

The Senate further addressed the need to define knowledge and to make it clear that it is not limited to actual knowledge. With respect to adding deliberate ignorance, "the Senate Committee also focused on proverbial 'ostriches' who stick their heads in the sand instead of verifying that they are not cheating taxpayers."[22] According to the Senate Committee, "the

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[21] *Id.* (alteration in original) (emphasis added) (quoting H. REP. NO. 99-660, at 21 (1986)).

[22] *Id.* (citing S. REP. NO. 99-345, at 7, 15, 21 (1986)). The full language on these points by the Senate read:

> New subsection (c) of section 3729 clarifies the standard of intent for a finding of liability under the act. This language establishes liability for those 'who know, or have reason to know' that a claim is false. In order to avoid varying interpretations, the Committee further defined the standard as making liable those who have 'actual knowledge that the claim is false, fictitious, or fraudulent, or acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim.' [] While it is clear that actual knowledge of a claim's falsity will confer liability, courts have split on defining what type of 'constructive knowledge', if any, is rightfully culpable. In fashioning the appropriate standard of knowledge for liability under the civil False Claims Act, S. 1562 adopts the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek. A rigid definition of that 'duty', however, would ignore the wide variance of circumstances under which the Government funds its programs and the correlating variance in sophistication of program recipients. Consequently, S. 1562 defines this obligation as 'to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim.' Only those who act in 'gross negligence' of this duty will be found liable under the False Claims Act.

constructive knowledge definition attempts to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted."[23]

The two leading authors of the amendments also described why Congress added deliberate ignorance. Senator Grassley "explained that the sponsors had rejected a proposed 'constructive knowledge' standard because it could be construed to absolve persons of a duty to ascertain the facts, which would 'leave unaddressed the "ostrich" problem.'"[24] Congressman Berman similarly explained why the House included deliberate ignorance:

> Federal Contractors, persons and entities doing business with the government must be made to understand that they have an affirmative obligation to ascertain the truthfulness

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S. REP. NO. 99-345, at 20.

> The Committee believes that the definition of knowledge under the False Claims Act should not differ from the definition of knowledge for any administrative adjudications regarding false claims. In both bills, the constructive knowledge definition attempts to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted. While the Committee intends that at least some inquiry be made, the inquiry need only be 'reasonable and prudent under the circumstances', which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation. The phrase strikes a balance which was accurately described by the Department of Justice as 'designed to assure the skeptical both that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually require some form of intent as an essential ingredient of proof.'

Id. at 21.

[23] S. REP. NO. 99-345, at 21; *see also SuperValu*, 9 F.4th 455, 479 (Hamilton, J., dissenting) ("These ostriches need not have 'conscious culpability' of wrongdoing: people who submit claims that they have 'reason to know' are potentially false run the risk of violating the Act if they 'fail[] to inquire' as to the falsity of the claims." (alteration in original) (citing 132 CONG. REC. 20535 (1986))).

[24] SYLVIA, *supra* note 5, § 4:45 (quoting 132 CONG. REC. 20535 (1986)).

> of the claims they submit. No longer will Federal contractors be able to bury their heads in the sand to insulate themselves from the knowledge a prudent person should have before submitting a claim to the Government. Contractors who ignore or fail to inquire about red flags that should alert them to the fact that false claims are being submitted will be liable for those false claims.[25]

In sum, in 1986, Congress added two new ways of establishing knowledge: deliberate ignorance and reckless disregard. Congress specifically added deliberate ignorance to ensure that those who receive government funds not only understand that they have a limited duty to inquire but are liable under the FCA for failing to do so. This is different from—and in addition to—actual knowledge or reckless disregard.[26]

III. COURTS' TREATMENT OF DELIBERATE IGNORANCE

Unfortunately, courts often lump reckless disregard and deliberate ignorance together rather than define and evaluate their individual requirements.[27] Consequently, few cases have stated the test or standard for deliberate ignorance. Improperly lumping the two standards together has created an environment where courts use the same reasoning for dismissing allegations of reckless disregard and deliberate ignorance. This section evaluates why it is improper to lump the standards together and gathers cases that correctly focus upon the meaning of deliberate ignorance.

A. *Reckless Disregard Is Not the Loosest Standard*

Without analysis, four Circuit Courts of Appeals have stated that reckless disregard is the *loosest standard* of knowledge under the FCA.[28] The starting

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[25] *Id.* (quoting 132 CONG. REC. 20535 (1986)).

[26] *Id.* ("courts have construed the 'reckless disregard' standard to be a form of gross negligence") (gathering cases addressing reckless disregard).

[27] *Id.* ("Although few courts have addressed the deliberate ignorance standard, a number of courts have addressed 'reckless disregard' or considered both standards together.").

[28] *See* United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1378 (D.C. Cir. 2000) ("it is hard to see how [the defendants] could . . . have satisfied even the loosest

point was a 2000 D.C. Circuit Court of Appeals case—*United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*[29] In *Siewick*, the plaintiff alleged that a former employer violated a criminal statute aimed at "revolving door" abuses by former government employees while working for the company negotiating a government contract.[30] The FCA case was predicated upon the allegation that the invoices were false because the company did not comply with the law pertaining to hiring government employees. The court of appeals rejected a claim based upon implicit certifications because a mere violation of law does not render all claims false.[31]

With respect to reliance upon express certifications, the court noted that it turns in part on the FCA's definition of "knowingly."[32] The court listed the three FCA knowledge standards, but that is as far as it went to analyze them.[33] The plaintiff argued that knowledge could be inferred because the defendant knew the contract was voidable.[34] The court devoted its full attention to whether the contract was voidable.[35] It observed that if an existing published opinion by a panel of the Seventh Circuit could not itself determine if such a contract was voidable (which the court in this case still left open), the defendant could not have had the knowledge the FCA required.[36] The court

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standard of knowledge, i.e., acting 'in reckless disregard of the truth or falsity of the information.'"); United States *ex rel.* Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1190 (8th Cir. 2010) (quoting *Siewick*, 214 F.3d at 1378); United States *ex rel.* Complin v. N.C. Baptist Hosp., 818 F. App'x 179, 184 (4th Cir. 2020) ("But 'establishing even the loosest standard of knowledge, i.e., acting in reckless disregard of the truth or falsity of the information, is difficult when falsity turns on a disputed interpretive question.'"); *SuperValu*, 9 F.4th at 468 ("reckless disregard is the loosest standard of knowledge under the FCA's scienter requirement" (referring to language in United States *ex rel.* Purcell v. MWI Corp., 807 F.3d 281, 288 (D.C. Cir. 2015))).

[29] *Siewick*, 214 F.3d at 1378.

[30] *Id.* at 1374.

[31] *Id.*

[32] *Id.* at 1376.

[33] *Id.*

[34] *Id.*

[35] Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1376–78 (D.C. Cir. 2000).

[36] *Id.* at 1377–38.

noted that "the obstacles to a conclusion that [the defendant] 'knowingly' misrepresented the validity of the contract obligations are legion."[37] It was here that the court introduced the "loosest standard" language:

> First, if the panel in *Medico* was uncertain whether a § 207 violation created voidability, it is hard to see how Jamieson or O'Connor could—with respect even to voidability, let alone validity—*have satisfied even the loosest standard of knowledge, i.e., acting "in reckless disregard of the truth or falsity of the information.*"[38]

Ironically, the *Siewick* court cited the disjunctively written FCA definition of knowledge as its sole authority for the proposition that recklessness somehow is the "loosest" of the three methods.[39] In addition, the *Siewick* court never defined or analyzed a single test, definition, or standard for either reckless disregard or deliberate ignorance. Instead, the court focused on the fact that falsity was premised upon a contingency that did not exist.[40] Even if the contract were voidable, only the government, not the whistleblower, could exercise the right to void it. For the claims to be false, the government would have to elect to void the contract, which it did not do.[41] The whistleblower's problem was that he lacked authority to void government contracts or to treat this contract as void.[42] Because the contract was not void,

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[37] *Id.* at 1378.

[38] *Id.* (emphasis added) (quoting 31 U.S.C. § 3729(b)(3)).

[39] *Id.*

[40] *Id.*

> While a faulty estimate or opinion can qualify as a false statement where the speaker knows facts "which would *preclude* such an opinion," the "facts" of which the *Harrison* court spoke are those that the speaking party could reasonably classify as true or false. Here there is only legal argumentation and possibility.

Id. (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999) (citations omitted)).

[41] Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1378 (D.C. Cir. 2000).

[42] *Id.*

the defendant could not possess FCA knowledge of any kind because the claims were not false.[43] Thus, the court did not need to differentiate between reckless disregard and deliberate ignorance. The court had no reason to state that reckless disregard is the loosest standard. Again, the court never discussed or analyzed the meaning of deliberate ignorance. As such, the oft quoted passage has no legs to stand on. At most, the court in *Siewick* held that there was no proof that the contract was void—a necessary ingredient for the claims to be false.[44] Because the contract was not void, there was no false claim and the defendant's knowledge was irrelevant.[45] Accordingly, the *Siewick* court had no reason to even state that reckless disregard was the loosest form of knowledge. It certainly did not analyze the standards for either reckless disregard or deliberate ignorance.[46]

The other circuit cases were erroneous because the court merely relied upon *Siewick* (or cases citing to it) without any analysis.[47] Just because one case, *Siewick*, states in *dicta* that reckless disregard is the "loosest" of the three standards does not make it true. It defies logic to categorize one of three different types as the "loosest" or easiest to prove such that its absence bars even an attempt to prove another. A "loosest" premise would be true if the issue centered around the burden of proof. It would be true that preponderance of the evidence is a looser standard than beyond a reasonable doubt, such that if you cannot meet the preponderance of evidence standard, as a matter of law, you cannot establish beyond a reasonable doubt. But it is illogical to suggest, let alone rule as a matter of law, that if a plaintiff cannot prove that the defendant acted with reckless disregard, it cannot not prove that the defendant acted with deliberate ignorance. Indeed, each of the three

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[43] 31 U.S.C. § 3729(b)(1)(A)(i)–(iii).

[44] *Siewick*, 214 F.3d at 1378.

[45] *See id.*

[46] *Siewick*, 214 F.3d 1372.

[47] United States *ex rel.* Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1190 (8th Cir. 2010); United States *ex rel.* Complin v. N.C. Baptist Hosp., 818 F. App'x 179, 184 (4th Cir. 2020) (citing United States *ex rel.* Purcell v. MWI Corp., 807 F.3d 281, 288 (D.C. Cir. 2015), which simply relied upon *Siewick*); United States v. SuperValu Inc., 9 F.4th 455, 468 (7th Cir. 2021) (citing *Purcell*, 807 F.3d at 288).

methods of proving FCA knowledge apply to different types of fact patterns. It is therefore a mistake to label one looser or easier to prove. While it may be harder in some factual settings to prove that a person had actual knowledge that a claim they submitted did not meet government standards, it does not mean that it is always harder to prove or that it forecloses deliberate ignorance.

Moreover, it does not mean plaintiffs can never prove actual knowledge if they cannot prove deliberate ignorance. For instance, consider the factual setting in 1863 that prompted the enactment of the original FCA.[48] The military received sand instead of sugar.[49] When the defendant gave the military sand, the defendant had actual knowledge of the falsity of the claim for payment for supplying sugar. The defendant knew it was substituting sand instead of sugar to cheat the government. However, it does not follow that it would be easier for the government to prove reckless disregard than actual knowledge. Here, only actual knowledge would be available as a way of establishing knowledge. Because the contract was clear and unambiguous, there was no evidence available to prove reckless disregard, such as reasonable reliance upon an ambiguous regulation. Thus, if reckless disregard, as the purported "loosest standard," is a gateway barring the other two forms of the FCA knowledge standard, then the person intending to supply sand instead of sugar would escape FCA liability because the contract and any associated regulations were crystal clear that sugar was required.

There are many factual settings in which more than one of the three standards might apply, and it would be wrong to limit FCA knowledge to reckless disregard. Take another example. Assume a company wins a military contract to build an airplane, but the military later issues regulations requiring companies to heat treat certain airplane parts to harden and increase metal strength. Further assume that the company does not perform the required heat treatment. In that setting, the company might be liable under each of the three knowledge standards *depending upon why* it did not heat treat the parts as required. If the company knew about the heat treatment

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[48] Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments*, 51 U. RICH. L. REV. 991, 995 (2017).

[49] *Id.*

requirement but wanted to save costs by choosing not to do it, it might be liable for having *actual knowledge*. If it read the regulations but considered them ambiguous and inapplicable, it might be liable under *reckless disregard*. If it heard that there were new regulations that might apply but chose not to read them, it could be liable under *deliberate ignorance*. Similarly, if the company reached out to the contracting officer to ask a question about the regulations but did not like the direction the conversation was going and chose to stop further inquiries, it might be liable under *deliberate ignorance*.

Another fatal flaw of the "loosest standard" interpretation is its rejection of subjective bad faith as a way of establishing a defendant's knowledge.[50] By adopting an objective scienter—reckless disregard—as the scienter "floor," it makes subjective intent entirely irrelevant.[51] Such an interpretation is inconsistent with the nature of fraud and the Supreme Court's interpretation of the FCA. The Supreme Court has interpreted the FCA consistently with common law fraud,[52] which makes subjective bad faith central to fraudulent scienter.[53] Thus, a person could be held liable under the FCA if they "knew" or "believed" their claim was false or if they "did not have the confidence in the accuracy" of their claim.[54] Indeed, deliberate ignorance was included in the 1986 amendment to capture this form of subjective bad faith.[55]

In short, it is unjustified for any court to hold, as a matter of law, that reckless disregard is the loosest form of knowledge or that if it cannot be met, the court need not examine deliberate ignorance. Deliberate ignorance can exist in factual settings where reckless disregard is not available. The house of cards collapses for the "loosest standard" language initiated by *Siewick* because none of these courts engaged in a learned focus or conducted a detailed analysis of the standard for deliberate ignorance. In fact, none of these courts contrasted the standard for reckless disregard. For later courts

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[50] United States *ex rel.* Schutte v. SuperValu Inc., 9 F.4th 455, 473 (7th Cir. 2021) (Hamilton, J., dissenting).

[51] *Id*.

[52] *Id*. at 477.

[53] *Id*. at 478.

[54] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 526 (AM. L. INST. 1977)).

[55] *Id.* at 479 (Hamilton, J., dissenting).

to simply adopt and build a house of cards on the loose language from *Siewick* is inappropriate.

B. *Criminal Law's Definition of Deliberate Ignorance Does Not Apply to the FCA*

Some courts have also mistakenly borrowed the test for willful blindness from criminal cases and applied it to the meaning of deliberate ignorance under the FCA, which helps explain why some courts incorrectly assume deliberate ignorance has a higher culpability requirement than reckless disregard.[56] For instance, in 2016, a judge from the Eastern District of Virginia in *United States ex rel. Orgnon v. Chang* adopted the test from a Supreme Court case addressing willful blindness normally reserved for criminal cases, but the Court applied it to a civil patent infringement case.[57] The *Chang* court quoted language from the Supreme Court in *Global-Tech Appliances, Inc. v. SEB S.A.* as justification to adopt a two-part test from criminal cases to evaluate deliberate ignorance under the civil FCA.[58] However tempting it might be to borrow the definition of deliberate ignorance from criminal cases, or even willful blindness from *Global-Tech Appliances, Inc.*, that is not what Congress had in mind in 1986 when it set out to both *lower* the standard of knowledge and *eliminate* any need to prove intent by adding deliberate ignorance and reckless disregard as alternatives to proving actual knowledge.

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[56] *See, e.g.*, United States *ex rel.* Orgnon v. Chang, No. 3:13-CV-144-JAG, 2016 U.S. Dist. LEXIS 20613, at *8–10 (E.D. Va. Feb. 19, 2016); Siebert v. Gene Sec. Network, Inc, 75 F. Supp. 3d 1108, 1116–17 (N.D. Cal. 2014); United States *ex rel*. Saltzman v. Textron Sys. Corp., No. CIV.A. 09-11985-RGS, 2011 U.S. Dist, LEXIS 61994, at *12, n.8 (D. Mass. June 9, 2011).

[57] United States *ex rel.* Orgnon v. Chang, No. 3:13-CV-144-JAG, 2016 U.S. Dist. LEXIS 20613, at *9–10 (E.D. Va. Feb. 19, 2016).

[58] *Chang*, U.S. Dist. LEXIS 20613, at *10 ("[T]he doctrine of 'willful blindness' has two basic requirements: '(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.'" (quoting Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2070 (2011)); *accord* Siebert v. Gene Sec. Network, Inc, 75 F. Supp. 3d 1108, 1116–17 (N.D. Cal. 2014) ("In other contexts, the Ninth Circuit has defined deliberate ignorance to incorporate two components: (1) a subjective belief in a high probability that a fact exists, and (2) deliberate actions taken to avoid learning the truth." (citation omitted)).

In *Global-Tech Appliances,* the Supreme Court explained the decades-long criminal standard as follows:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine have held that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for the doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. This Court endorsed a concept similar to willful blindness over a century ago in *Spurr v. United States*, and every Federal Court of Appeals but one has fully embraced willful blindness.[59]

The Court broke new ground by applying the criminal standard for willful blindness to civil patent infringement allegations,[60] but it did so only after it determined that the infringement cause of action contained an "intent" element and thus was similar to requirements in criminal cases.[61]

The test for willful blindness from criminal cases or civil cases with intent elements do not apply to the civil FCA. First, unlike criminal statutes or the intent-based patent infringement statute in *Global-Tech Appliances,* the civil FCA has no intent requirement.[62] The FCA specifically states that "the terms 'knowing' and 'knowingly' . . . require no proof of specific intent to defraud."[63]

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[59] Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 755–56 (2011) (citation omitted).

[60] *Id.* at 768 ("Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, [there is] no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).").

[61] *Id.* at 760. ("Although the text of § 271(b) makes no mention of intent, we infer that at least some intent is required.").

[62] 31 U.S.C. § 3729(b)(1)(B).

[63] *Id.*

Second, in 1986, Congress specifically amended the FCA knowledge requirement to lower or lessen the standard of proof by adding deliberate ignorance and reckless disregard as separate and independent bases for establishing knowledge. The deliberate ignorance standard was intended to be different from and lighter than the pre-existing actual knowledge requirement.[64] Thus, Congress lowered the standard by adding deliberate ignorance (and reckless disregard) to capture all forms of knowledge above innocent mistakes or mere negligence.[65]

Third, nowhere in the legislative history does Congress cite to any criminal case or intent-based statutes as a basis for defining or equating deliberate ignorance.[66] Rather, the legislative history makes clear that deliberate ignorance as used in the FCA is designed to hold accountable the proverbial ostriches who stick their heads in the sand.[67] It also imposes a limited duty to make simple inquiries that would alert a person that their claims for payment are false.[68]

In sum, it is not proper to adopt definitions or standards from criminal cases or intent-based statutes to determine the meaning of deliberate ignorance under the FCA. Indeed, doctrines developed from criminal cases are based upon the rationale "that defendants who behave in this manner are just as culpable as those who have actual knowledge."[69] In other words, the terms "deliberate ignorance" and "willful blindness" in criminal or intent-based statutes are proxies for intent. As such, they are neither controlling nor instructive because the civil FCA is not an intent-based statute, and Congress meant deliberate ignorance to be something less than actual knowledge.

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[64] *See* SYLVIA, *supra* note 5. Prior to 1986, the knowledge requirement was not defined and was equated with actual knowledge. *Id.*

[65] *See* discussion of legislative history, *supra* notes 21–26.

[66] *See* discussion of legislative history, *supra* notes 21–26.

[67] *See* discussion of legislative history, *supra* notes 21–26.

[68] *See* discussion of legislative history, *supra* notes 21–26.

[69] Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011).

C. *Court of Appeals Cases Addressing Deliberate Ignorance*

This section gathers and analyzes four Circuit Courts of Appeals cases that directly address and apply the deliberate ignorance standard. Two of the cases held that the deliberate ignorance standard was met and two held that it was not met.

In 2016, the Ninth Circuit Court of Appeals in *United States v. United Healthcare Insurance Company*, conducted a detailed analysis of deliberate ignorance.[70] The case is instructive because the court not only evaluated the legislative history but also created a separate standard for deliberate ignorance rather than lumping it in with reckless disregard.[71] In *United Healthcare Insurance Company*, the plaintiff alleged FCA knowledge based upon deliberate ignorance when a group of Medicare Advantage organizations allegedly submitted false certifications by exaggerating enrollees' health risks.[72] The Ninth Circuit adopted the following standard for deliberate ignorance:

> As we have explained in describing this standard under the False Claims Act:
>
> > In defining knowingly, Congress attempted "to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted." Congress adopted "the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek. While the Committee intends that at least some inquiry be made, the

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[70] *See* United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1176–77 (9th Cir. 2016).

[71] *See id.* at 1174, 1179.

[72] *Id.* at 1166.

> inquiry need only be 'reasonable and prudent under the circumstances.'"[73]

In *United Healthcare Insurance Company*, the government alleged the defendant designed review procedures to find errors in prior billings that under-reported costs billed through diagnostic codes but not those that over-reported costs.[74] At the time that it certified its bills, the company reasonably believed it was billing proper codes. However, the defendant orchestrated cherry-picking of data that would increase the amount of billings that the defendant might not have to pay back.[75] Because the system did not flag specific over-reporting errors, the company disclaimed any actual knowledge that its prior claims were inflated.[76] The Ninth Circuit held that the deliberate ignorance standard was adequately plead by the government's complaint.[77] The court reasoned that "[t]he deliberate ignorance standard does not allow a contractor to deliberately turn a blind eye to reporting errors and then attest that, to its knowledge, they do not exist."[78] The court observed that, under the facts alleged, deliberate ignorance would be met because once the company created its program to examine prior billings and learned that its data included a significant number of erroneously reported diagnostic codes, red flags existed indicating that the errors could either increase or decrease the amount of payments.[79] The government alleged the company simply chose to turn a blind eye to those that decreased payments.[80]

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[73] *Id.* at 1174 (citations omitted) (quoting United States v. Bourseau, 531 F.3d 1159, 1168 (9th Cir. 2008)). The *Bourseau* court held that deliberate ignorance was met where non-existent expenses were included in cost reports submitted to the government, such as rental expenses that never existed. *Bourseau*, 531 F.3d at 1168. The president was equally deliberately ignorant because "[h]e undertook no inquiry into the cost reports, let alone a reasonable and prudent one. His behavior falls within the category of deliberate ignorance." *Id.*

[74] *United Healthcare Ins. Co.*, 848 F.3d at 1170.

[75] *Id.* at 1171.

[76] *Id.* at 1176.

[77] *Id.* at 1176.

[78] *Id.* at 1178.

[79] *Id.* at 1175.

[80] United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1175 (9th Cir. 2016).

In 2019, the Ninth Circuit similarly found that allegations are sufficient under the deliberate ignorance standard when a defendant has notice of its false claims and actively attempts to conceal their disclosure.[81] The court restated the standard as follows:

> The deliberate ignorance standard can cover "the ostrich type situation where an individual has buried his head in the sand and failed to make simple inquiries which would alert him that false claims are being submitted. Congress adopted the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek."[82]

In *Godecke ex rel. United States v. Kinetic Concepts, Inc.*, a medical equipment manufacturer allegedly submitted false claims to Medicare by failing to notify Medicare that the manufacturer did not meet Medicare's requirements for reimbursement.[83] Medicare requires that the manufacturer obtain a detailed written order from a physician before the manufacturer delivers medical equipment to Medicare patients.[84] If that requirement is not met, Medicare will not reimburse the manufacturer for the equipment.[85] The manufacturer in *Godecke* allegedly submitted claims to Medicare for reimbursement even though it delivered the equipment before receiving the physician's order.[86]

The *Godecke* court found sufficient facts to allege deliberate ignorance for two reasons: because the manufacturer allegedly set up a tracking system to hide that the manufacturer delivered the equipment before it received the physician's order and because management instructed an employee not to appeal Medicare's denial of claims for fear that Medicare would notice the

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[81] Godecke *ex rel.* United States v. Kinetic Concepts, Inc., 937 F.3d 1201, 1211–12 (9th Cir. 2019).

[82] *Id.* at 1211(citations omitted) (quoting *United Healthcare Ins. Co.*, 848 F.3d at 1174).

[83] *Id.* at 1206–07.

[84] *Id.* at 1206.

[85] *Id.*

[86] *Id.* at 1206–07.

lack of a prior order.[87] The court also observed that the company fired an employee shortly after the employee raised issues about the billings.[88] The court held that the plaintiff sufficiently alleged the scienter requirement—at least under the deliberate ignorance standard—based on the tracking system, the instruction not to appeal Medicare denials, and the quick termination of the employees who raised concerns about false claims being submitted.[89] The court reasoned that "at the very least, [the evidence] [was] sufficient to show the 'ostrich type situation' of deliberate ignorance on the part of [the manufacturer], where [the manufacturer] has 'buried his head in the sand and failed to make simple inquiries which would alert [it] that false claims are being submitted.'"[90]

At least two circuit courts have found deliberate ignorance to be lacking. In its 2020 unpublished decision in *Vassallo v. Rural/Metro Operating Co.*, the Ninth Circuit held that deliberate ignorance was not met simply due to negligence.[91] An ambulance transport service company allegedly submitted false claims to Medicare because of its faulty coding system.[92] The company

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[87] Godecke *ex rel.* United States v. Kinetic Concepts, Inc., 937 F. 3d 1201, 1211–12 (9th Cir. 2019).

[88] *Id.* at 1208.

[89] *Id.*

[90] *Id.* at 1212 (fifth alteration in original) (quoting United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1174 (9th Cir. 2016)). In an unpublished opinion, the Ninth Circuit also summarily affirmed a finding of deliberate ignorance in light of "undisputed evidence that [the defendant] ignored expert advice about handling grant funds . . . ." United States *ex rel.* Kozak v. Chabad of Cal., 697 F. App'x 509, 509 (9th Cir. 2017). A few district court cases are also illustrative. Courts have found sufficient facts to allege deliberate ignorance when a company knew it lacked the resources and the manpower to deliver, when a board simply rubber-stamped exorbitant spending by officers without making any inquiries, and when a defendant failed to review coding practices in the face of the high failure results of audits and chart reviews by Medicare auditors. United States v. Armet Armored Vehicles, Inc., No. 4:12-cv-00045, 2014 U.S. Dist. LEXIS 171925, at *4–6 (W.D. Va. Dec. 12, 2014); United States *ex rel.* Wuestenhoefer v. Jefferson, 105 F. Supp. 3d 641, 668 (N.D. Miss. 2015); United States *ex rel.* Ormsby v. Sutter Health, 444 F. Supp. 3d 1010, 1040, 1080 (N.D. Cal. 2020).

[91] Vassallo v. Rural/Metro Operating Co., 798 F. App'x 1000, 1001 (9th Cir. 2020).

[92] Vasallo v. Rural/Metro Corp., No. CV-15-00119-PHX-SRB, 2019 U.S. Dist. LEXIS 237615, at *5 (D. Ariz. Jan. 10, 2019)

hired inexperienced coders, had glitchy software, and had imperfect training practices.[93] This resulted in inaccurate claims to Medicare.[94] The circuit court held that the company's conduct did not meet the FCA's deliberate ignorance standard.[95] The court reasoned that, by itself, "'inexperienced coders, glitchy billing software, imperfect training practices, and even post-transition billing and coding errors' [did] not demonstrate that [the] [d]efendants sought to avoid learning about coding issues."[96] Thus, the court affirmed the grant of summary judgment.[97]

In 2002, the Eighth Circuit in *United States ex rel. Quirk v. Madonna Towers, Inc.*, ruled that merely failing to seek legal advice does not rise to the level of deliberate ignorance.[98] There, the dispute centered around whether the Medicare provider should have billed at the lower residential fee or the higher skilled nursing facility fee.[99] The whistleblower alleged that the provider acted with deliberate ignorance because it did not seek a legal opinion to resolve the questions.[100] The court began its analysis by stating that "innocent mistakes and negligence are not offenses under the Act."[101] The court opined that in some cases failing to obtain a legal opinion might constitute deliberate ignorance if red flags warranted it.[102] However, neither facility employee in question "had any reason to pursue a legal opinion concerning the billing practices because both of them considered the practice

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[93] *Vassallo*, 798 F. App'x at 1001.

[94] *Vasallo*, 2019 U.S. Dist. LEXIS 237615, at *5; *see also Vassallo*, 798 F. App'x at 1001.

[95] *Vassallo*, 798 F. App'x at 1001.

[96] *Id.* The court added, "Nor does this evidence make out a case of reckless disregard – as the district court found, it 'does little more than second-guess the wisdom' of Rural/Metro's compliance efforts. At best, Relators made out a case of negligence, which is insufficient for FCA purposes." *Id.* (citing Gonzalez v. Planned Parenthood of L.A., 759 F.3d 1112, 1115 (9th Cir. 2014)).

[97] *Id.*

[98] United States *ex rel.* Quirk v. Madonna Towers, Inc., 278 F.3d 765, 768 (8th Cir. 2002).

[99] *Id.* at 767.

[100] *See id.*

[101] *Id.* (quoting United States *ex rel.* Oliver v. Parsons Co., 195 F.3d 457, 464–65 (9th Cir. 1999)).

[102] *See Madonna Towers*, 278 F.3d at 768.

acceptable standard procedure."[103] One of the employees testified that his prior employer also billed in the same manner.[104] Thus, there was no "evidence suggesting that anyone at [the facility] suspected something wrong but deliberately avoided learning more so that a fraudulent scheme could continue."[105] Accordingly, "failing to secure a legal opinion, without more, is not the type of deliberate ignorance that can form the basis for a FCA lawsuit."[106]

These decisions share a common thread: liability will be imposed under the deliberate ignorance standard when a defendant has notice of the potential falsity of their claim and fails to take reasonable steps to investigate the matter.

IV. THE CORRECT APPROACH TO THE FCA'S DELIBERATE IGNORANCE

This section proposes a uniform standard to guide courts and practitioners on the proper meaning and usage of deliberate ignorance to establish a knowing violation of the FCA.[107]

A. The False Claims Act

When Congress amended the FCA in 1986, it created three distinct ways to establish knowledge: actual knowledge, deliberate ignorance, and reckless

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[103] *Id.*

[104] *Id.*

[105] *Id.* at 769.

[106] *Id.* A district court similarly ruled that deliberate ignorance was lacking where a government contractor misclassified certain costs and the contractor did not seek legal advice. United States *ex rel.* Tate v. Honeywell, Inc., No. CIV 96-0098 PK/LFG, 2002 U.S. Dist. LEXIS 30099, at *9–10 (D.N.M. Oct. 17, 2002). The whistleblower alleged that the contractor falsely classified a project as a major subcontractor. *Id.* at *3. The court held that deliberate ignorance was not met because it amounted to a legitimate dispute over the proper classification within the parameters of the applicable cost accounting standards and practices, and the company did not hide the classification or data. *See id.* at *9–10. There were no red flags warranting seeking legal advice. *See id.*

[107] The proposed standard builds upon and is consistent with the Ninth Circuit Court of Appeals cases cited in this Article.

disregard.[108] These knowledge standards are not differentiated by ease of proof but by specific application. Deliberate ignorance does not have a higher standard of proof than reckless disregard or actual knowledge.[109] In addition, deliberate ignorance was not meant to be a proxy for actual knowledge but a separate way of proving knowledge as defined by the FCA. Merely because deliberate ignorance is less common does not make it less important. Congress added it to capture special types of knowledge of false claims.

B. Proposed Standards for Deliberate Ignorance

A person acts with deliberate ignorance when they have reason to suspect their claim is false and fail to inquire as to the claim's truthfulness or falsity.[110] Put another way, a person cannot escape FCA liability by deliberately avoiding learning the requirements of the law. Such deliberate ignorance is generally found in two forms: burying one's head in the sand and turning a blind eye.

1. Burying One's Head in the Sand

Deliberate ignorance reaches the "'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted."[111] Deliberate ignorance captures persons who ignore red flags that warn them that the information or claim submitted to the government may be false.[112] Once a red flag is raised, a duty to investigate exists, although "the inquiry need only be 'reasonable and prudent under the circumstances.'"[113]

Deliberate ignorance occurs when people bury their heads in the sand to avoid learning information that might lead them to know their claim is false

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[108] 31 U.S.C. § 3729(b)(1)(A)(i)–(iii).

[109] Reckless disregard is not the loosest form of knowledge. It is simply a different way of establishing knowledge. *See* discussion *supra* Section III.A.

[110] *See* S. REP. NO. 99-345, at 20 (1986); United States *ex rel.* Schutte v. SuperValu Inc., 9 F.4th 455, 479 (7th Cir. 2021) (Hamilton, J., dissenting).

[111] United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1174 (9th Cir. 2016) (quoting United States v. Bouresau, 531 F.3d 1159, 1168 (9th Cir. 2008)).

[112] *See id.*

[113] *Id.* (quoting United States v. Bouresau, 531 F.3d 1159, 1168 (9th Cir. 2008)).

or that they are not entitled to the funds.[114] Deliberate ignorance attaches when a person seeks to remain ignorant. It may involve taking steps to avoid learning information or instructing others not to ask questions. Burying one's head in the sand also includes failing to become familiar with contract terms or regulations.[115] Those who do business with the government have an affirmative duty to ascertain the truthfulness of their claims.[116] Persons submitting claims to the government cannot insulate themselves from FCA liability merely by choosing not to become knowledgeable.[117] Persons who choose to remain in the dark are liable under deliberate ignorance for false claims.[118]

The notion of burying one's head in the sand also includes those who make an initial inquiry with the government but fail to follow up to avoid learning the law's requirements. This occurs when a person seeks the government's guidance on the law but then terminates the conversation after realizing they do not like where the conversation is headed. They would rather remain ignorant. When people raise an issue with the government, they must see it through. Failing to do so shows a deliberate attempt to remain ignorant.

2. Turning a Blind Eye

Deliberate ignorance also applies when a person turns a blind eye to known issues or potential problems.[119] Those submitting claims have an obligation to take steps to ensure their data or claims are accurate, complete,

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[114] Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1211 (9th Cir. 2019) (quoting *United Healthcare Ins. Co.*, 848 F3d at 1174).

[115] *E.g.*, Universal Health Servs., Inc. v. United States, 579 U.S. 176, 191 (2016) (stating that if a reasonable person would understand that a requirement was material it amounts to reckless disregard even if the government did not spell it out); *United Healthcare Ins. Co.*, 848 F.3d at 1174.

[116] *See United Healthcare Ins. Co.*, 848 F.3d at 1174.

[117] *Id.*

[118] *Id.*

[119] *See* United States *ex rel.* Schmuckley v. Rite Aid Corp., No. 2:12-CV-01699-KJM-EFB, 2021 U.S. Dist. LEXIS 67800, at *3, *10 (E.D. Cal. Apr. 7, 2021); *see also United Healthcare Ins. Co.*, 848 F.3d at 1174.

and truthful.[120] For example, a person might know that there are errors in the data, but rather than investigate the issue, they choose to turn a blind eye.[121] The standard applies when supervisors pressure employees to bill higher codes or instruct them to focus on revenue instead of compliance.[122] Another example is ignoring bad information or cherry-picking information.[123] Red flags exist when employees or outside consultants raise issues or concerns that trigger a limited duty to conduct a reasonable investigation.[124] However, deliberate ignorance does not apply to innocent mistakes or mere negligence. For instance, hiring "inexperienced coders," using "glitchy" software, or using "imperfect training practices" are typically not enough to show deliberate ignorance.[125] The key is whether the person turns a blind eye to what would inform a reasonable person that their claim may be false.

Regardless of whether it is labeled burying one's head in the sand or turning a blind eye, deliberate ignorance frequently occurs when a red flag exists and a simple inquiry would resolve the question.[126] Once a red flag is present that would alert a reasonable person that the claim may be false, a duty to investigate exists. Deliberate ignorance captures those who fail to make reasonable inquires in response to red flags.

V. CONCLUSION

When Congress amended the FCA in 1986, it established three separate and distinct ways to establish knowledge: actual knowledge, deliberate ignorance, and reckless disregard. They are not differentiated by ease of proof

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[120] *United Healthcare Ins. Co.*, 848 F.3d at 1174 ("Medicare Advantage organizations have always had 'an obligation to take steps to ensure the accuracy, completeness, and truthfulness of the encounter data' and 'an obligation to undertake "due diligence" to ensure the accuracy, completeness, and truthfulness of encounter data submitted to [CMS].'" (alteration in original)).

[121] *See id.*

[122] *See* United States *ex rel.* Ormsby v. Sutter Health, 444 F. Supp. 3d 1010, 1083 (N.D. Cal. 2020).

[123] *See United Healthcare Ins. Co.*, 848 F.3d at 1171.

[124] *Id.* at 1176.

[125] Vassallo v. Rural/Metro Operating Co., 798 F. App'x 1000, 1001 (9th Cir. 2020).

[126] *United Healthcare Ins. Co.*, 848 F.3d at 1174.

but by specific application. The three standards "may overlap" in some cases, but the adoption of "the three distinct" standards "was unmistakably an effort to be both thorough and broad."[127] Accordingly, the current trend of treating reckless disregard as the "loosest standard" is misguided, unsupported by the legislature's intent,[128] and should not be heeded by future courts. Such an approach "also violates one of the most common tools of statutory interpretation"—it makes the actual knowledge and deliberate ignorance standards "utterly superfluous."[129] Instead, courts should assess each of the three FCA knowledge standards (actual knowledge, deliberate ignorance, and reckless disregard) as separate and distinct standards that apply to different factual settings.

Deliberate ignorance applies to those who "ignore 'red flags' . . . or deliberately choose to remain ignorant."[130] That is, people cannot simply bury their heads in the sand or turn a blind eye to avoid learning the law's requirements. It is this unique type of conduct that Congress intended to capture when it amended the FCA in 1986 to include deliberate ignorance.[131] Indeed, this sort of fraudulent conduct would likely not satisfy either the actual knowledge or reckless disregard prongs of the FCA.

Thus, to adhere to the statutory text and the legislature's clear intent, courts should treat the FCA's three knowledge standards as separate and distinct ways of establishing knowledge. In so doing, the FCA can be utilized to capture each of the broad forms of fraud it was intended to address, including deliberate ignorance.

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[127] United States *ex rel.* Schutte v. SuperValu Inc., 9 F.4th 455, 484 (7th Cir. 2021) (Hamilton, J., dissenting).

[128] *See* H.R. REP. NO. 99-660, at 21 (1986).

[129] *SuperValu*, 9 F.4th at 484 (Hamilton, J., dissenting).

[130] H.R. REP. NO. 99-660, at 21.

[131] *Id.*