Physician False Claims Act Liability—The Circuit "Split" That Illustrates the Need for Health Courts

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INTRODUCTION

A man was diagnosed with lung cancer.[1] His oncologists discovered the cancer metastasized, meaning it spread to his brain and bones.[2] The patient received chemotherapy treatments.[3] Chemotherapy has numerous side effects, one of which is febrile neutropenia, a fever resulting from a patient lacking in a type of white blood cells.[4] Unfortunately, the patient developed febrile neutropenia approximately six months after his diagnosis.[5] He was admitted to the hospital, where he was treated by the inpatient physicians.[6] The inpatient physicians prescribed and administered broad spectrum antibiotics, which resolved the patient's fever.[7] Concerned the patient's immunocompromised condition subjected him to greater risk of infection, the inpatient physicians discharged the patient to continue the course of antibiotics at home with daily follow-ups from a home health nurse.[8] Two days later, the patient's fever spiked, and he was readmitted to the hospital through the emergency department.[9] At this point, the inpatient physicians reviewed the patient's medical records and discovered the patient had spent more than half of the past six months in the hospital for treatment of complications from the chemotherapy.[10] They consulted the patient's oncologist, who insisted that aggressive chemotherapy remained the appropriate course of action for the patient.[11] The inpatient team disagreed, and felt the chemotherapy not only diminished the patient's quality of life, but was further shortening his already expected six-month prognosis.[12]

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1 *See* David J. Casarett, *When Doctors Disagree*, 8 AM. J. ETHICS 571, 571 (2006).
2 *See id.*
3 *See id.*
4 *See* Krish Patel & Howard (Jack) West, *Febrile Neutropenia*, JAMA ONCOLOGY (July 27, 2017), http://jamanetwork.com/journals/jamaoncology/fullarticle/2645851 [http://perma.cc/72TV-MG6V].
5 *See* Casarett, *supra* note 1, at 571.
6 *See id.*
7 *See id.*
8 *See id.*
9 *See id.*
10 *See id.*
11 *See id.*
12 *See id.*

As the adage goes, "[m]edicine is a science of uncertainty and an art of probability."[13] The reality is, physicians often disagree with each other.[14] Disagreement can arise in many instances – whether it be the result of multiple treating teams as in the above example,[15] the hierarchical nature of the medical system,[16] patients seeking second opinions,[17] or medical decisions questioned by insurance companies[18] or government reimbursement programs.[19]

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13 ROBERT BENNETT BEAN, SIR WILLIAM OSLER: APHORISMS FROM HIS BEDSIDE TEACHINGS AND WRITINGS 125 (William Bennett Bean ed., Henry Schuman, Inc. 1950).

14 One study found seventy-seven percent of second opinions obtained after an initial diagnosis resulted in changes in diagnoses, treatments, or treating physicians. *See* Miles Varn, *Data Shows Second Opinions Can Change the Course of Your Healthcare*, PINNACLECARE (Apr. 9, 2015), http://www.pinnaclecare.com/highlights/blog/data-shows-second-opinions-can-change-the-course-of-your-healthcare/ [http://perma.cc/8AA4-D8GT].

15 *See, e.g.*, Casarett, *supra* note 1, at 572. While this Note's introduction described an example of an initial aggressive approach recommendation being called into question by a later recommendation to pursue a conservative course of treatment, the inverse can also occur. *See, e.g.*, Francis D. Moore, *What To Do When Physicians Disagree: A Second Look at Second Opinion*, 113 ARCHIVES SURGERY 1397, 1398 (1978). This journal describes an older man with severe hip pain whose family physician determined he was too old to undergo any kind of an operation. *See id.* The patient is later seen by a surgeon who is very familiar with total hip reconstruction and who tells him:

> I think it would be wise for you to consider a total hip. There is a risk to it and a mortality somewhere around 1%, with infection a possibility in about 3%, in our own hands. Even though you are 82 years old, your brain, heart, and kidneys are all working well. You deserve some more painless physical activity in the years left to you. The risk seems small, but you have the operation if you want it.

See id.

16 In the United States, medical students report to interns, who report to residents, who report to attendings. *See* Jennifer Whitlock, *Resident vs. Attending Physician: What's the Difference?*, VERYWELLHEALTH (Aug. 11, 2022), http://www.verywellhealth.com/types-of-doctors-residents-interns-and-fellows-3157293 [http://perma.cc/DH4L-XZDK]. Sometimes medical practitioners disagree with their supervisors' decisions. *See, e.g.*, Alex Harding, *I Was Confident in My Patient's End-of-Life Care. Then My Senior Doctor Overruled Me*, STAT NEWS (Apr. 18, 2017), http://www.statnews.com/2017/04/18/medical-resident-attending-physician-disagreement/ [http://perma.cc/6QMH-MWWU]. This article describes a scenario wherein a resident was working in the cardiac intensive care unit treating a critically ill man who appeared close to death with little hope of reversing his decline. *See id.* As the man's condition continued to worsen, the resident determined that escalating treatment would be pointless and would conflict with the family's stated wishes. *See id.* The resident presented the patient's case during morning rounds to the attending physician, who, after examining the patient, delineated orders for aggressive treatment protocols. *See id.*

17 *See, e.g.*, Varn, *supra* note 14. A recent Gallup poll reported that about thirty percent of Americans seek second opinions about issues related to health or proposed treatment. *See id.*

18 In *Rollo v. Blue Cross/Blue Shield*, Tishna Rollo needed an autologous bone marrow transplant with high dose chemotherapy to treat a Wilms' tumor, which is a malignant kidney tumor. *See* Rollo v. Blue Cross/Blue Shield, No. 90-597, 1990 U.S. Dist. LEXIS 5376, at *1–3 (D.N.J. Mar. 22, 1990). Blue Cross denied coverage upon determining the procedure in question was considered "experimental," and as such was specifically excluded from coverage. *See id.* at *8.

19 *See, e.g.*, United States v. AseraCare, Inc., 938 F.3d 1278, 1281 (11th Cir. 2019).

The latter can implicate complex issues, such as when a disagreement in medical opinion can subject the treating physician to liability under fraud statutes.

In particular, the False Claims Act ("FCA") often deals with questions of medical necessity that can result in disagreement between the treating physician and the plaintiff's expert.[20] Under the FCA, "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States Government."[21] The question then becomes, when a plaintiff's expert disagrees with the treating physician's assessment, can the treating physician be held liable under the FCA for making a false or fraudulent claim? Part I of this Note provides a background of the FCA and explores an alleged circuit split on the issue, ultimately concluding that the disagreement is more of a misunderstanding than an actual split. Although the circuits treat physician liability under the FCA very similarly, one circuit's mischaracterization of another circuit's decision muddled the case law, promoting judicial misunderstanding of the FCA and raising concerns that a lack of expertise in healthcare issues amongst judges has left them unprepared to grapple with complex medical terminology. Part II argues that such judicial confusion suggests that the current structure of judicial review does not meet the needs of the healthcare community and should be tweaked to include initial reviews by specialized federal health courts that expand upon the existing Medicare system, with "expert" judges to properly adjudicate healthcare litigation, such as that arising under the FCA.

I. THE FALSE CLAIMS ACT CIRCUIT "SPLIT"

A. Background of the False Claims Act

Historically, the FCA was the first whistleblower law in the United States and remains one of the strongest existing whistleblower acts.[22] Originally enacted in 1863 during Abraham

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20 *See, e.g.*, *id.* Indeed, the individuals who often initiate FCA *qui tam* actions are healthcare professionals who, through their employment, notice cause for concern in the treating physician's medical necessity certification. *See, e.g.*, Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1112–16 (9th Cir. 2020).

21 37 U.S.C. § 3729(a)(1)(A). Of note, the government is not always the plaintiff in FCA cases. *See* 37 U.S.C. § 3730. Individuals may bring civil actions for FCA violations, and in such *qui tam* actions, the government has discretion to intervene or allow the individual to proceed as the plaintiff. *See id.* In either scenario, the government receives a percentage of the recovery. *See id.*

22 *See What is the False Claims Act?*, NAT'L WHISTLEBLOWER CTR., http://www.whistleblowers.org/protect-the-false-claims-act/ [http://perma.cc/4LF6-4L58].

Lincoln's presidency as a governmental tool to address issues of fraud during the Civil War,[23] it is sometimes referred to as "Lincoln's Law," [24] and has been amended multiple times since its passage.[25] While the FCA was originally enacted to combat military-related fraud,[26] it also targets fraudulent acts in the areas of healthcare fraud, defense contracting fraud, financial fraud, conflicts of interest, cyber fraud, procurement fraud, grant fraud, customs fraud, and disaster relief fraud.[27]

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23 *See id.*; *Deputy Associate Attorney General Stephen Cox Delivers Remarks at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement*, U.S. DEP'T OF JUST. (Jan. 28, 2019), http://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-2019-advanced-forum-false [http://perma.cc/HPG3-SCW7].

24 *See* H.R. REP. NO. 111-97, at 2 (2009).

25 The 1943 amendment and subsequent court decisions temporarily neutralized the FCA's effectiveness toward combatting fraud. *See False Claims Act Amendments: Hearings Before the Subcomm. On Admin. L. & Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 291, 332 (1986) (statements of Rep. Stark and Rep. Bedell). Decades later, the FCA was reinvigorated by the 1986, 2009, and 2010 amendments which clarified the degree of knowledge required to support an FCA case, established preponderance of the evidence as the burden of proof standard, expanded the relator's role, increased damages and penalties, and added protection for whistleblowers. *See* JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 115–16 (Bloomberg BNA, 6th ed. 2012).

26 *See* H.R. REP. NO. 111-97, at 2–3 (2009).

27 *See, e.g.*, *Northrop Grumman Systems Corporation to Pay $27.45 Million to Settle False Claims Act Allegations*, U.S. DEP'T OF JUST. (Nov. 2, 2018), http://www.justice.gov/opa/pr/northrop-grumman-systems-corporation-pay-2745-million-settle-false-claims-act-allegations [http://perma.cc/QJ62-94KQ]; *Deloitte & Touche Agrees to Pay $149.5 Million to Settle Claims Arising From Its Audits of Failed Mortgage Lender Taylor, Bean & Whitaker*, U.S. DEP'T OF JUST. (Feb. 28, 2018), http://www.justice.gov/opa/pr/deloitte-touche-agrees-pay-1495-million-settle-claims-arising-its-audits-failed-mortgage [http://perma.cc/ZF7N-2YK3]; *North Texas Contractor and Executive Agree to Pay United States $2.475 Million to Resolve False Claims Act and Anti-kickback Act Allegations*, U.S. DEP'T OF JUST. (June 5, 2017), http://www.justice.gov/opa/pr/north-texas-contractor-and-executive-agree-pay-united-states-2475-million-resolve-false-1 [http://perma.cc/2ZUE-N3N5]; *IBM Agrees to Pay $14.8 Million to Settle False Claims Act Allegations Related to Maryland Health Benefit Exchange*, U.S. DEP'T OF JUST. (June 14, 2019), http://www.justice.gov/opa/pr/ibm-agrees-pay-148-million-settle-false-claims-act-allegations-related-maryland-health [http://perma.cc/4SKT-UQT4]; *Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests*, U.S. DEP'T OF JUST. (Mar. 15, 2018), http://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet [http://perma.cc/FQ6L-UR9B]; *Duke University Agrees to Pay U.S. $112.5 Million to Settle False Claims Act Allegations Related to Scientific Research Misconduct*, U.S. DEP'T OF JUST. (Mar. 25, 2019), http://www.justice.gov/opa/pr/duke-university-agrees-pay-us-1125-million-settle-false-claims-act-allegations-related [http://perma.cc/9LN6-8BEE]; *Bassett Mirror Company Agrees to Pay $10.5 Million to Settle False Claims Act Allegations Relating to Evaded Customs Duties*, U.S. DEP'T OF JUST. (Jan. 16, 2018), http://www.justice.gov/opa/pr/bassett-mirror-company-agrees-pay-105-million-settle-false-claims-act-allegations-relating [http://perma.cc/Z5BN-TEL4]; *United States Joins Lawsuit against AECOM Alleging False Claims in Connection with Hurricane Disaster Relief*, U.S. DEP'T OF JUST. (June 3, 2020), http://www.justice.gov/opa/pr/united-states-joins-lawsuit-against-aecom-alleging-false-claims-connection-hurricane-disaster [http://perma.cc/UF4Z-

Procedurally, the FCA can be a *qui tam* cause of action, meaning relators can file cases on behalf of the federal government.[28] These *qui tam* plaintiffs, who are private citizens, sue on behalf of the government and assume a share of the recovery if victorious.[29] The government has the option to intervene within a sixty-day period,[30] during which time the *qui tam* complaint is sealed, and is required to complete an investigation into the validity of the complaint.[31] Extensions to the sixty-day time period can be granted, and at the conclusion of the investigation, the government makes a determination on whether to intervene, with the *qui tam* relator assuming responsibility for the case if the government declines to proceed.[32] Additionally, relators cannot proceed with their case if the government already possesses knowledge of the facts that form the basis of the case.[33] Often individuals who initiate FCA *qui tam* actions in the medical context are healthcare professionals who, through their employment, discover a reason for concern in the treating physician's medical necessity certification.[34] Of note, the government itself can also initiate FCA lawsuits on its own without a relator.[35]

MFJP]; *See e.g.*, Ryan P. Blaney & Matthew J. Westbrook, *DOJ's Civil Cyber-Fraud Initiative Secures More Than $9 Million in Two False Claims Act Settlements for Alleged Cybersecurity Violations*, PROSKAUER (July 21, 2022), http://privacylaw.proskauer.com/2022/07/articles/cybersecurity/dojs-civil-cyber-fraud-initiative-secures-more-than-9-million-in-two-false-claims-act-settlements-for-alleged-cybersecurity-violations/ [http://perma.cc/WL64-FUK6].

28 *See* S. REP. NO. 110-507, at 2 (2008).

29 *See What is the False Claims Act?, supra* note 22.

30 *See* 37 U.S.C. § 3730.

31 *See* U.S. DEP'T OF JUST., THE FALSE CLAIMS ACT: A PRIMER, http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf [http://perma.cc/76TL-9MFS].

32 *See id.*

33 *See* United States *ex rel.* McKenzie v. Bellsouth Telecomms., 123 F.3d 935, 939 (6th Cir. 1997) (quoting United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec., 41 F.3d 1032, 1035 (6th Cir. 1994)) (noting the original source exception means a relator "is unable to pursue the suit and collect a percentage of the recovery if the case is based upon information that has previously been made public or if the claim has already been filed by another").

34 *See, e.g.*, Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1112–16 (9th Cir. 2020). As a measure of protection since initiation of these actions often ties to the relator's employment, those who report FCA violations have recourse if terminated or adversely impacted as a result of coming forward. *See* Benjamin McCoy & Zac Arbitman, *Blowing the Whistle: A Primer on the False Claims Act*, THE TEMPLE 10-Q (2019), http://www2.law.temple.edu/10q/blowing-the-whistle-a-primer-on-the-false-claims-act/ [http://perma.cc/C7WL-K22R]. These individuals are entitled to reinstatement with seniority restored, twice their back pay with interest along with compensation for additional damages. *See id.*

35 *See* U.S. DEP'T OF JUST. CIV. DIV., FRAUD STATISTICS - OVERVIEW: OCTOBER 1, 1986 - SEPTEMBER 30, 2021, http://www.justice.gov/opa/press-release/file/1467811/download [http://perma.cc/3ANV-VPRB] (distinguishing between non *qui tam* and *qui tam*).

Substantively, individuals prosecuted pursuant to the FCA for "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" can face civil penalties and treble damages.[36] The FCA defines "knowing" and "knowingly" as actual knowledge, deliberate ignorance of truth or falsity, or reckless disregard of truth or falsity.[37] Specific intent to defraud is not a requirement under the statute.[38] The claim element of the Act can be satisfied by any request for money made to an agent of the United States.[39] The claim need not be paid or approved, only submitted.[40] The falsity requirement of the FCA is less straightforward, in no small part because the terms "false" and "fraudulent" remain undefined statutorily.[41] In the healthcare context, this ambiguity gives rise to the question of whether and when courts can deem a physician's opinion false.[42]

While the FCA is applicable to all federally funded programs,[43] in 2020, the federal government recovered over $1.8 billion in healthcare-related FCA cases, which represent over eighty percent of all FCA awards.[44] Two major federally funded healthcare

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36 *See* 31 U.S.C. § 3729(a)(1).

37 *See id.* § 3729(b)(1).

38 *See id.*

39 *See id.* § 3729(b)(2)(A).

40 *See id.*; *see also* Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964) ("Proof of damage to the Government resulting from a false claim is not a necessary part of the Government's case under the Act."); *see also* United States *ex rel.* Luther v. Consol. Indus., 720 F. Supp. 919, 922 (N.D. Ala. 1989) (quoting United States v. Rapoport, 514 F. Supp. 519, 523 (S.D.N.Y. 1981)) ("It is well settled that the Government can recover the forfeiture without proving any damages.").

41 *See* United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[T]he FCA does not define 'false' or 'fraudulent.'"); *see also* United States *ex rel.* Pervez v. Beth Isr. Med. Ctr., 736 F. Supp. 2d 804, 812 (S.D.N.Y. 2010) ("The FCA does not define falsity.").

42 *See, e.g.,* United States v. AseraCare, Inc., 938 F.3d 1278, 1281 (11th Cir. 2019) (finding that "a medical provider's clinical judgment that a patient is terminally ill" cannot be deemed false "when there is only reasonable disagreement between medical experts as to the accuracy" of the opinion); *cf. What Is Considered a False Claim?*, NOLAN AUERBACH & WHITE, http://www.whistleblowerfirm.com/healthcare-fraud/false-claims-act/what-is-a-false-claim/ [http://perma.cc/N7NZ-GWEH] (detailing healthcare fraud scenarios which include false billing, false cost reports, kickbacks, and Stark law violations). Accordingly, since the terms are not defined by the courts and are in effect treated the same, there seems to be no meaningful distinction in the statute.

43 *See* 31 U.S.C. § 3729.

44 *See* U.S. DEP'T OF JUST., *Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020* (Jan. 14, 2021), http://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [http://perma.cc/B87Y-B72E].

programs are Medicare[45] and Medicaid.[46] In 2020, there were over 62.8 million Medicare beneficiaries and 75.3 million Medicaid beneficiaries.[47] Medicare coverage is limited to products and services deemed "reasonable and necessary" for diagnosis or treatment and within the scope of benefits.[48] When a patient presents to a physician with Medicare or Medicaid coverage, the physician certifies the medical necessity to the government for reimbursement of services.[49] A service is "reasonable and necessary" if it "meets, but does not exceed, the patient's medical need," and is "[f]urnished in accordance with accepted standards of medical practice for the diagnosis or treatment of the patient's condition . . . in a setting appropriate to the patient's medical needs and condition."[50] In layman's terms, this means health care services "needed to diagnose or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of medicine."[51]

Hospice care, a federally-funded Medicare benefit,[52] is one program often the subject of FCA lawsuits.[53] In fact, "51.6 percent of all Medicare decedents were enrolled in hospice at the time of death in 2019."[54] Similar to other Medicare certifications, when a

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45 *See How is Medicare Funded?*, MEDICARE.GOV, http://www.medicare.gov/about-us/how-is-medicare-funded [http://perma.cc/AH5T-U6LS] (last visited Jan. 23, 2023).

46 *See Financial Management*, MEDICAID.GOV, http://www.medicaid.gov/medicaid/financial-management/index.html [http://perma.cc/7JK4-KQ44] (last visited Jan. 23, 2023).

47 *See CMS Fast Facts,* CTRS. FOR MEDICARE & MEDICAID SERVS., (Aug. 2022), http://data.cms.gov/sites/default/files/2022-08/4f0176a6-d634-47c1-8447-b074f014079a/CMSFastFactsAug2022.pdf [http://perma.cc/VU3G-ZCH7].

48 *See Medicare Coverage Determination Process*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Medicare/Coverage/DeterminationProcess [http://perma.cc/W6DS-8TXT] (last modified Mar. 3, 2022, 6:48 AM); *see also Quality, Safety & Oversight - Certification & Compliance*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Oct. 8, 2021, 4:55 PM), http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc [http://perma.cc/Q9QB-ANPJ] (acknowledging while states set their own standards for Medicaid, facilities that accept federally-standardized Medicare must meet the standards for Medicaid as well).

49 *See Physician Liability for Certifications in the Provision of Medical Equipment and Supplies and Home Health Services*, OFF. OF INSPECTOR GEN., (Jan. 1999), http://oig.hhs.gov/documents/special-fraud-alerts/872/dme.htm [http://perma.cc/JZ4B-JEBT].

50 CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE PROGRAM INTEGRITY MANUAL § 13.5.4 (2019), http://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/pim83c13.pdf [http://perma.cc/Q5Z3-3FWC].

51 CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE & YOU: THE OFFICIAL U.S. GOVERNMENT MEDICARE HANDBOOK 121 (2023), http://www.medicare.gov/Pubs/pdf/10050-medicare-and-you.pdf [http://perma.cc/QMU6-TALY].

52 *See Hospice Care*, MEDICARE.GOV, http://www.medicare.gov/coverage/hospice-care [http://perma.cc/2EF4-ES5F] (last visited Jan. 24, 2023).

53 *See, e.g.,* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 91 (3d Cir. 2020).

54 *See NPHCO's New Facts and Figures Report Shows Changes in Hospice Patient Diagnoses*, NAT'L HOSPICE & PALLIATIVE CARE ORG., (Oct. 28, 2021), http://www.nhpco.org/nhpcos-new-facts-and-figures-report-shows-changes-in-hospice-patient-diagnoses/ [http://perma.cc/9EN4-D6PS].

physician certifies a patient for hospice, the physician attests that the patient has six months or less to live.[55] Beyond the general time-based guidelines, there are disease-specific guidelines that can be employed for hospice certification if the patient meets the specific criteria established for the disease in question.[56] Patients diagnosed with diseases or conditions such as cancer, amyotrophic lateral sclerosis, dementia, heart disease, HIV, liver disease, pulmonary disease, renal disease, acute renal failure, chronic kidney disease, stroke, and coma can qualify for hospice certification upon meeting certain criteria.[57] Additionally, hospice patients must have a Palliative Performance Scale[58] below seventy percent and exhibit dependency on a minimum of two activities of daily living to qualify.[59] Finally, qualification for hospice certification can be achieved by meeting the "Decline in Clinical Status Guidelines" or presenting with certain diagnoses such as brain, small cell, or pancreatic cancer.[60] Despite this abundance of protocols and criteria, physicians' original prognoses can still prove inaccurate.[61]

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55 *See Hospice Certification/Recertification Requirements*, CGS: A CELERIAN GRP. CO., http://www.cgsmedicare.com/hhh/coverage/coverage_guidelines/cert_recert_requirements.html [http://perma.cc/K5KJ-22G5] (last updated Dec. 8, 2021).

56 *See* BY THE BAY HEALTH, DETERMINING A PATIENT'S PROGNOSIS OF SIX MONTHS OR LESS FOR HOSPICE 1–2 (2021), http://bythebayhealth.org/wp-content/uploads/2021/05/determining-a-patients-prognosis-of-six-months-or-less-5-19-20.pdf [http://perma.cc/9G73-UFAN].

57 *See id*. at 2–12.

58 The Palliative Performance Scale is a tool used to measure functional performance of, and predict survival among palliative care patients, based on measurements of "ambulation, activity level and evidence of disease, self-care, oral intake, and level of consciousness." *See* Dawon Baik et al., *Using the Palliative Performance Scale to Estimate Survival for Patients at the End of Life: A Systematic Review of the Literature*, 21 J. PALLIATIVE MED. 1651 (2018), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC6211821/pdf/jpm.2018.0141.pdf.

59 *See* BY THE BAY HEALTH, *supra* note 56, at 2. Activities of daily living are "essential and routine tasks that most young, healthy individuals can perform without assistance," such as walking, feeding and dressing oneself, and bathroom care including personal hygiene, toileting, and continence. *See* Peter F. Edemekong et al., *Activities of Daily Living*, NAT'L LIBR. MED.: NAT'L CTR FOR BIOTECH. INFO. (Nov. 19, 2022), http://www.ncbi.nlm.nih.gov/books/NBK470404/ [http://perma.cc/4UJQ-YD6N].

60 *See* BY THE BAY HEALTH, *supra* note 56, at 1–2, 12–14.

61 One study found 13.4% of hospice patients outlive their original prognosis. *See* Pamela S. Harris et al., *Can Hospices Predict Which Patients Will Die Within Six Months?*, J. PALLIATIVE MED. 894, 895 (2014), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4118712/ [http://www.perma.cc./C67U-42DS]. It also found only 48.4% of stroke patients, 36.6% of dementia patients, and 89.1% of cancer patients died within the expected time frame. *See id.* Medicare figures noted hospice survival figures exceeding six months in 11.8% of patients in 2010 and 11.4% of patients in 2011. *See id.*

All such certifications are subject to the FCA.[62] While guidelines exist to help physicians make these determinations,[63] it often comes down to judgment calls.[64] Unsurprisingly, physicians often disagree about these complex decisions.[65] The question of how these disagreements should be treated under the FCA, namely whether and when a treating physician can be held liable for making a false statement if a plaintiff's expert physician disagrees with the medical determination,[66] has been of great interest to courts in recent years.[67]

B. Circuit "Split" in the Healthcare Context

Lately, federal courts have explored the meaning of "false" within the healthcare context of the FCA. Some courts take a flexible approach to the potential for medical opinions constituting falsehoods under the FCA. The Third, Ninth, and Tenth Circuits have, in certain scenarios, found that differences in opinion qualify as "false" under the FCA.[68] Other courts appear more stringent

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62 *See* 31 U.S.C. § 3729(a)(1)(A).

63 *See, e.g., Determining a Patient's Prognosis of Six Months or Less for Hospice*, *supra* note 56; *Hospice Determining Terminal Status*, MEDICARE COVERAGE DATABASE, http://www.cms.gov/medicare-coverage-database/view/lcd.aspx?LCDId=34538. 63 *See, e.g.,* BY THE BAY HEALTH, *supra* note 56.

64 *See, e.g.,* Troy Parks, *Judgment on Life Expectancy at Issue in Medicare Fraud Case*, AM. MED. ASS'N (Nov. 1, 2016), http://www.ama-assn.org/practice-management/medicare-medicaid/judgment-life-expectancy-issue-medicare-fraud-case [http://www.perma.cc/5BYZ-XPLD].

65 *See, e.g.,* United States *ex rel.* Polukoff v. St. Mark's Hosp., 895 F.3d 730, 734 (10th Cir. 2018).

66 Worth noting is the public policy concerns of over-subjecting physicians to liability when plaintiffs engage in "expert shopping" to find physicians willing to condemn the treating physician's approach, even when most physicians would not. *See, e.g.*, Alaw Gray, *Expert Shopping: An Overview and Top Tips*, HILL DICKINSON (June 28, 2018), http://www.hilldickinson.com/insights/articles/expert-shopping-overview-and-top-tips [http://www.perma.cc/PFC4-M9VQ] (discussing judicial discouragement of "expert shopping," which notably only targets the practice of changing experts after retaining an expert, and does nothing to prevent vetting experts before retaining by looking at their history of favoring plaintiffs or defendants, or interviewing them to get a sense of how they might testify).

67 In the year 2020, petitions for certiorari were filed in the Third and Ninth Circuits. *See* Brief for Petitioner at 1, Care Alts. v. United States *ex rel.* Druding, No. 20-371, 2020 WL 5657690 (Sept. 16, 2020); Brief in Opposition at 9, Care Alts. v. United States *ex rel.* Druding, No. 20-371, 2021 WL 146848 (Jan. 8, 2021); Petition for Writ of Certiorari at 1, RollinsNelson LTC Corp. v. United States *ex rel.* Winter, No. 20-805, 2020 WL 7356622 (Dec. 3, 2020). However, the Supreme Court denied certiorari, leaving the various rulings of the circuits intact. *See* Laura F. Laemmle-Weidenfeld et al., *Supreme Court Declines to Resolve Circuit Split on Falsity Under the FCA*, JONES DAY (Apr. 2021), http://www.jonesday.com/en/insights/2021/04/supreme-court-declines-to-resolve-circuit-split-on-falsity-under-the-fca [http://www.perma.cc/2CNS-KQKR].

68 *See* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 91 (3d Cir. 2020); Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1112–13 (9th

about when an opinion can be false under the FCA. The Fourth and Seventh Circuits have required "objective falsehood" to establish falsity,[69] and the Eleventh Circuit recently echoed that sentiment in the healthcare context when it held that a reasonable difference in medical opinion cannot constitute a false statement pursuant to the FCA.[70]

The Third Circuit appears to embrace a flexible approach in *United States ex rel. Druding v. Druding*, where it rejected the objective falsehood requirement for FCA falsity.[71] In *Druding*, the defendant's former employees (many of whom served on an interdisciplinary team of clinicians that conducted a bimonthly review of patients up for hospice recertification) initiated the FCA action, alleging that the defendant, a hospice-care provider, instructed its employees to inappropriately alter admitted patients' Medicare certifications to reflect eligibility, when in truth those patients were ineligible for hospice care.[72] Since hospice eligibility depends upon a patient having six months or less to live,[73] the alleged falsehood here dealt with the accuracy of the patients' prognoses.[74] The pertinent evidence included two competing expert reports: one by the relators' expert, and one by the defendant's expert.[75] The relators' expert noted in his report "[d]etermining the prognosis of patients with a serious terminal illness referred to hospice is a difficult task that depends on the judgment and experience of clinicians and the consideration of

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Cir. 2020); United States *ex rel.* Polukoff v. St. Mark's Hosp., 895 F.3d 730, 734 (10th Cir. 2018). The Sixth Circuit also appears to align with these courts. *See* Laura F. Laemmle-Weidenfeld et al., *supra* note 67. Although not in the context of the FCA, the Sixth Circuit has found medical opinions false under criminal fraud statutes. *See* United States v. Paulus, 894 F.3d 267, 270 (6th Cir. 2018). In *United States v. Paulus*, a jury convicted defendant cardiologist of committing healthcare fraud and making false statements, where he allegedly exaggerated the extent of arterial blockages when interpreting angiograms to charge for unnecessary procedures. *See id.* The district court acquitted the defendant after determining that angiogram interpretations "are not facts subject to proof or disproof," and thus cannot form the basis of false statements. *Id.* The Sixth Circuit explicitly rejected this reasoning and reversed the district court's ruling. *See id.*

69 *See* United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 377 (4th Cir. 2008) (finding defendants' alleged representations about relatively vague maintenance provisions did not constitute objective falsehoods and accordingly could not establish a falsehood under the FCA); United States *ex rel.* Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 837 (7th Cir. 2011) (holding defendant manufacturers did not violate the FCA in a sale of fighter jets because there was insufficient evidence to prove the price was objectively false).

70 *See* United States v. AseraCare, Inc., 938 F.3d 1278, 1281 (11th Cir. 2019).

71 *United States ex rel. Druding*, 952 F.3d at 91.

72 *See id.* at 91–92.

73 *See Hospice Certification/Recertification Requirements*, *supra* note 55.

74 *See United States ex rel. Druding*, 952 F.3d at 91.

75 *See id.*

survival evidence from the literature,"[76] but went on to opine of the forty-seven patient records the expert reviewed, thirty-five percent of the defendant's patients were inappropriately certified for hospice care.[77] The defendant's expert disagreed, testifying instead that a reasonable physician would have found each of the contested hospice certifications contained accurate attestations of those patients' hospice eligibility.[78] When the defendant moved for summary judgment, the district court granted the motion upon finding that the experts' "diverging opinions d[id] not create a genuine issue of material fact about the falsity of a physician's determinations that the patient [met] hospice eligibility" without evidence of objective falsity.[79] When the relators appealed the district court's decision, the Third Circuit considered whether conflicting expert testimony could generate a genuine dispute regarding a Medicare claim's falsity and found in the affirmative, even going so far as to explicitly reject the objective falsehood requirement for FCA falsity.[80]

The Ninth Circuit also rejected the objective falsity standard. In *Winter ex rel. United States v. Gardens Regional Hospital & Medical Center, Inc.*, the defendants' former Director of Care Management accused them of falsely certifying to Medicare that patients' inpatient hospitalizations proved medically necessary.[81] In the course of her employment, relator noticed a trend of an unusually high number of patients from the defendant nursing home being admitted to the defendant hospital, and detailed sixty-five incidences of allegedly improper hospital admission that were certified to Medicare for reimbursement.[82] Here, unlike *Druding*, the record did not yet contain any expert opinions, but merely the allegations in the complaint which included lack of support in the

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76 Druding v. Care Alts., Inc., 346 F. Supp. 3d 669, 681 (D.N.J. 2018).

77 *See United States ex rel. Druding*, 952 F.3d at 91.

78 *See id.*

79 *Care Alts., Inc.*, 346 F. Supp. 3d at 688.

80 See United States ex rel. Druding, 952 F.3d at 91–92.

81 Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1112 (9th Cir. 2020).

82 Relator determined these admissions did not meet defendant hospital's admission criteria and were unsupported by the patients' records. *See id.* at 111

> Admitting a patient to the hospital for inpatient—as opposed to outpatient—treatment requires a formal admission order from a doctor 'who is knowledgeable about the patient's hospital course, medical plan of care, and current condition.' Inpatient admission 'is generally appropriate for payment under Medicare Part A when the admitting physician expects the patient to require hospital care that crosses two midnights,' but inpatient admission can also be appropriate under other circumstances if 'supported by the medical record.

Id. at 1113–14 (citations omitted).

medical records, when the district court granted defendants' motions to dismiss for failure to state a claim, upon deeming determinations of medical necessity "subjective medical opinion[] that cannot be proven to be objectively false."[83] On appeal, the Ninth Circuit was unpersuaded by the district court's rationale.[84] The Ninth Circuit expressly rejected the "objective falsity" requirement, noting that Congress imposed no such constraint and that "[a] doctor, like anyone else, can express an opinion that he knows to be false, or that he makes in reckless disregard of its truth or falsity."[85]

The Tenth Circuit appears to be aligned with the Third and Ninth Circuits on the question of objective falsity, given all three circuits have found opinions to be false under the FCA. In *United States ex rel. Polukoff v. St. Mark's Hospital*, the relator accused his coworker, a physician, of performing thousands of unnecessary heart surgeries he fraudulently certified to Medicare as medically necessary.[86] The relator also sued the employing hospital for complicity in the physician's scheme.[87] The complaint alleged the physician "fully understands, but rejects, the standard of care" and describes the surgeries at issue as "preventative."[88] The defendants thereafter filed motions to dismiss.[89] The district court granted the defendants' motions, reasoning that a physician's medical judgment cannot be false under the FCA.[90] The Tenth Circuit reversed the district court's dismissal.[91] Unlike the district court, which found that the treating physician's certification could not be false absent a regulation clarifying the conditions under which it will or will not reimburse a procedure, the appellate court agreed with the position articulated by the Government (as *amici*), that "[a] Medicare claim is false if it is not reimbursable, and a Medicare claim is not reimbursable if the services provided were not medically necessary."[92] Accordingly, the Tenth Circuit concluded that while FCA liability must be predicated on an objectively verifiable fact, verification of that fact can rely on clinical judgments which are

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83 *Id.* at 1116.
84 *See id.* at 1113.
85 *Id.* at 1113.
86 *See* United States *ex rel.* Polukoff v. St. Mark's Hosp., 895 F.3d 730, 734 (10th Cir. 2018).
87 *See id.*
88 *Id.* at 737–38.
89 *See id.* at 739.
90 *See id.* at 734.
91 *See id.* at 746.
92 *Id.* at 739, 742.

vulnerable to proof of truth or falsity.[93] Put succinctly, the court "did not create a bright-line rule that a medical judgment can never serve as the basis for an FCA claim."[94]

The Third Circuit interpreted the Eleventh Circuit to embrace a different standard in *United States v. AseraCare, Inc.*, which also addresses the potential falsity of hospice certifications.[95] In *AseraCare*, Relators filed the *qui tam* FCA lawsuit against their former employers, operators of hospice facilities.[96] The Government intervened, alleging defendants submitted documentation falsely certifying certain Medicare recipients as terminally ill, when the Government determined otherwise.[97] Like *Druding*,[98] the relevant evidence here was both parties' expert testimony.[99] The Government's expert testified that out of 223 of defendants' patients, he would only have concluded 100 of them were eligible for hospice.[100] However, the Government's expert did not stop there. He went on to clarify that his testimony solely reflected "his own clinical judgment based on his after-the-fact review of the supporting documentation."[101] He further conceded his inability to discuss whether a treating physician was wrong about their patient's eligibility.[102] He also declined to refute defendant's expert's testimony that the prognoses were accurate.[103] The Government's expert never testified that no reasonable doctor could have concluded at the time of certification the patients at issue were terminally ill.[104] Moreover, as the proceedings progressed, the Government's expert actually changed his opinion concerning some of the patients' hospice eligibility.[105] The district court sided with the defendants, granting their motion for summary judgment.[106] On appeal, the Eleventh Circuit considered whether a physician's clinical judgment that a patient is terminally ill can be deemed false "based merely on the existence of a reasonable difference of opinion between experts as to the accuracy of that prognosis."[107] The court

93 *See id.* at 742.
94 *Id.*
95 *See* United States v. AseraCare, Inc., 938 F.3d 1278, 1281 (11th Cir. 2019).
96 *See id.* at 1282, 1284.
97 *See id.* at 1284.
98 *See* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 91 (3d Cir. 2020).
99 *See AseraCare*, 938 F.3d at 1285, 1287.
100 *See id.* at 1284–85.
101 *Id.* at 1287.
102 *See id.*
103 *See id.*
104 *See id.*
105 *See id.* at 1287–88.
106 *Id.* at 1281.
107 *Id.*

agreed with the district court, holding a battle of experts is insufficient to establish falsity.[108]

C. The (Mis)perceived Difference Between the Third and Eleventh Circuits' Rulings

Since the *AseraCare* opinion, legal scholars have grappled with how to interpret "false" within the meaning of the FCA.[109] Even the courts are disagreeing with each other's rulings and engaging in statutory construction and congressional intent analyses to bolster their approaches.[110] This debate has led to widespread perception of major differences between *AseraCare*, on the one hand, and the Third, Ninth, and Tenth Circuit rulings, on the other, when in fact no consequential distinctions exist – certainly nothing to constitute a split.[111]

In *Druding*, the Third Circuit specifically addressed the *AseraCare* ruling, finding the Eleventh Circuit also "determined that clinical judgments cannot be untrue."[112] The *Druding* court explicitly disagreed with *AseraCare* and claimed it "reach[ed] the opposite determination."[113] The Third Circuit interpreted the objective falsity standard as requiring a factual inaccuracy that can never be proven since opinions are subjective.[114] The opinion then took a tangent, expressing concern that the *AseraCare* standard improperly conflated the statute's falsity and scienter elements.[115] The Third Circuit suggested that concerns about exposure of medical professionals to FCA liability whenever the Government procures an expert with a contrary opinion is better addressed solely through the scienter element.[116] The *Druding* opinion turned to the Supreme Court's analysis of false statements

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108 *See id.* Of note, the district court's grant of summary judgment in favor of defendant was vacated and remanded on a separate issue, namely the district court's failure to consider the entirety of the evidence by constraining the Government to solely rely on the trial record. *See id.* at 1281, 1305.

109 *See*, *e.g.*, Melissa E. Najjar, *When Medical Opinions, Judgments, and Conclusions Are "False" Under the False Claims Act: Criminal and Civil Liability of Physicians Who Are Second-Guessed by the Government*, 53 SUFFOLK U. L. REV. 137 (2020); SCOTT F. ROYBAL & MATTHEW LIN, 7 PRATT'S GOVERNMENT CONTRACTING LAW REPORT § 72.02 (2021); Jameson Steffel, *End of Life Uncertainty: Terminal Illness, Medicare Hospice Reimbursement, and the "Falsity" of Physicians' Clinical Judgments*, 89 U. CIN. L. REV. 779 (2021).

110 *See*, *e.g.*, United States *ex rel.* Druding v. Druding, 952 F.3d 89, 95–99 (3d Cir. 2020).

111 *See* discussion *infra* Part I.C.

112 *See United States ex rel. Druding*, 952 F.3d at 100 (citing United States v. AseraCare, Inc., 938 F.3d 1278, 1297 (11th Cir. 2019)).

113 *Id.*

114 *See id.* at 95–97.

115 *See id.* at 96.

116 *See id.*

under securities laws, wherein it found an opinion can be considered false and establish liability under common law.[117] The Third Circuit then held that since common law is the appropriate place to turn because Congress did not define "false," opinions can be false under the FCA if the facts contained within the claim are untrue or the holder falsely certifies compliance with a statute or regulation that is a condition for Government reimbursement.[118] These are called factual and legal falsities, respectively.[119] Applying this theory, the Third Circuit concluded that "a difference of medical opinion is enough evidence to create a triable dispute of fact regarding FCA falsity," and the Government need only prove the claim submitted as reimbursable was not in fact reimbursable to establish FCA falsehood.[120]

The Third Circuit contends that the Eleventh Circuit's *AseraCare* decision, which held a reasonable difference in medical opinion remains insufficient to subject a medical professional to FCA liability, is on the other end of the spectrum.[121] The Eleventh Circuit found the underlying clinical judgment must reflect an objective falsehood to trigger FCA liability.[122] The court further delineated this requirement:

> Objective falsehood can be shown in a variety of ways. Where, for instance a certifying physician fails to review a patient's medical records or otherwise familiarize himself with the patient's condition before asserting that the patient is terminal, his ill-formed "clinical judgment" reflects an objective falsehood. The same is true where a plaintiff proves that a physician did not, in fact, subjectively believe that his patient was terminally ill at the time of certification. A claim may also reflect an objective falsehood when expert evidence proves that *no reasonable physician* could have concluded that a patient was terminally ill given the relevant medical records. In each of these examples, the clinical judgment on which the claim is based contains a flaw that can be demonstrated through verifiable facts.[123]

The Eleventh Circuit contrasted objective falsehood with a *reasonable* difference of opinion, or in other words "[a] properly formed and sincerely held clinical judgment," among physicians reviewing medical documentation after the fact, which is insufficient on its own to prove those judgments and associated

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117 *See id.* (citing Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 183–86 (2015)).

118 *See id.* at 95–97.

119 *See id.* at 96–97.

120 *See id.* at 97, 100.

121 *See* United States v. AseraCare, Inc., 938 F.3d 1278, 1281 (11th Cir. 2019).

122 *See id.* at 1296–97.

123 *Id.* at 1297 (emphasis added).

claims for reimbursement are false pursuant to the FCA.[124] In arriving at the conclusion that an FCA claim fails as a matter of law if plaintiff neglects to prove anything beyond a mere reasonable difference of medical opinion, the Eleventh Circuit relied on the same Supreme Court precedent used by the Third Circuit to discredit the *AseraCare* ruling.[125]

Although the Third Circuit specifically singled out the Eleventh Circuit's ruling in *AseraCare,* the rulings are not in conflict with one another. *AseraCare* subtly distinguished between reasonable and unreasonable.[126] A careful application of that distinction to the different facts of the various cases elucidates a clear common denominator amongst the circuits – that reasonable differences in medical opinions can prove false.

The Third Circuit interpreted *AseraCare* to hold "that clinical judgments cannot be untrue."[127] Yet, this interpretation is not supported by the case itself.[128] In fact, *AseraCare* specifically listed ways in which a medical provider's judgment can be objectively false in the context of the FCA: where the medical provider (1) does not have a basis for the opinion due to failure to assess the patient's medical records or condition, (2) does not actually believe the opinion asserted, or (3) comes to a conclusion no reasonable physician, nurse, etc., would have reached.[129] To understand the *AseraCare* ruling—and its implicit agreement with *Druding* on the falsity standard—it is critical to closely parse the language and discern the difference between a reasonable and unreasonable medical opinion.[130]

In *AseraCare*, the Government's expert disagreed with some of the treating physician's certifications but did not find the treating physician's determinations unreasonable.[131] In contrast, the difference in opinion in *Druding* was not as clear cut. In *Druding*, relators' expert did not make as many concessions and found certification inappropriate in a number of instances.[132] Thus, *Druding* was a fitting case for the third type of objective falsity,

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124 *See id.*

125 *See id.* at 1297, 1301 (citing Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175 (2015)); *see also* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 95–96 (3d Cir. 2020) (citing *Omnicare*, 575 U.S. at 183–86).

126 *See AseraCare*, 938 F.3d at 1297.

127 *See United States ex rel. Druding*, 952 F.3d at 100 (citing United States v. AseraCare, Inc., 938 F.3d 1278, 1297 (11th Cir. 2019)).

128 *See AseraCare*, 938 F.3d at 1297.

129 *See id.*

130 *See id.*

131 *See id.* at 1287.

132 *See United States ex rel. Druding*, 952 F.3d at 91.

wherein relators were trying to prove an unreasonable difference in medical opinion.[133] Similarly, the physician in *Polukoff*, the aforementioned Tenth Circuit case, who certified unnecessary heart surgeries to Medicare for reimbursement, faced liability under the second theory of objective falsity because his concession that the surgeries were merely preventative showed that he never actually believed the surgeries were medically necessary.[134] Finally, although the Ninth Circuit also explicitly rejected the objective falsity requirement on the theory that physician's judgment is not insulated from liability, the facts of *Winter* fall under objective falsity, namely the first type wherein the treating physician lacked a basis for the opinion, because relator determined the admissions at issue did not meet defendant hospital's admission criteria and were not supported by the patients' records.[135]

Indeed, the Ninth Circuit, which the Third Circuit perceived as aligned with it, aptly noted its ruling in *Winter* was not incongruous with *AseraCare*.[136] The Ninth Circuit correctly honed in on the reasonable and unreasonable distinction, explaining:

> [T]he Eleventh Circuit was not asked whether a medical opinion could ever be false or fraudulent, but whether a reasonable disagreement between physicians, *without more*, was sufficient to prove falsity at summary judgment. (citation omitted) . . . [T]he court clearly did not consider all subjective statements—including medical opinions—to be incapable of falsity, and identified circumstances in which a medical opinion would be false.[137]

In short, the Eleventh Circuit never asserted "clinical judgments cannot be untrue," as the Third Circuit suggested and so vehemently disagreed with.[138]

The Third Circuit led itself astray by accusing the Eleventh Circuit of conflating scienter and falsity in a case that did not implicate scienter at all.[139] Scienter is somewhat implicated in the second theory of objective falsity, wherein the certifying physician

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133 *See id.*

134 *See* United States *ex rel.* Polukoff v. St. Mark's Hosp., 895 F.3d 730, 734, 737–38 (10th Cir. 2018).

135 *See* Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1115, 1117 (9th Cir. 2020).

136 *See id.* at 1118 ("The Eleventh Circuit's recent decision in *United States v. AseraCare, Inc.* is not directly to the contrary.") (citation omitted).

137 *See id.* at 1118–19 (citing United States v. AseraCare, Inc., 938 F.3d 1278, 1297–98 (11th Cir. 2019)).

138 *See United States ex rel. Druding v. Druding*, 952 F.3d at 100 (citing United States v. AseraCare, Inc., 938 F.3d 1278, 1297 (11th Cir. 2019)).

139 *See id.* at 95–96; *see also* United States v. AseraCare, Inc., 938 F.3d 1278, 1297 (11th Cir. 2019).

must not actually hold the asserted opinion, because that involves a physician knowing he or she is lying.[140] Similarly, the first approach to objective falsity, namely lack of support for the opinion due to failure to examine or review medical records, would involve a knowing act because a physician would know if he or she neglected to familiarize him or herself with the patient.[141] The interplay ends there. Approaching liability under the third objective falsity premise of reaching an unreasonable conclusion certainly does not implicate scienter.[142] Nothing in the *AseraCare* opinion implicitly required the physician to know his position was unreasonable; only that it must indeed be unreasonable.[143] Therefore, the *AseraCare* case, which falls under the third objective falsity premise, in no way implicated scienter.

The Third Circuit so engrossed itself with this irrelevant scienter analysis that it failed to notice the reasonable-unreasonable distinction in *AseraCare*. Indeed, the Third Circuit contrasted *AseraCare*'s conclusion that "[a] reasonable difference of opinion . . . is not sufficient on its own to suggest that those judgments . . . are false under the FCA" with its own conclusion that "a difference of medical opinion is enough evidence to create a triable dispute of fact regarding FCA falsity" and failed to realize the importance of the term "reasonable."[144] The Eleventh Circuit limited falsity to unreasonable differences of medical opinion.[145] By omitting "reasonable" from its holding, the Third Circuit left open the possibility that both reasonable or unreasonable differences in medical opinion could be false under the FCA.[146] Thus, on the core issue, the two circuits agree that unreasonable differences in medical opinion can be false.[147] The only outlier is whether the Third Circuit also allows reasonable differences in medical opinion to constitute falsity under the FCA—an absurd premise once one considers the extraordinary liability physicians would face whenever exercising clinical judgment in any situation not purely black and white.[148] In short, all circuit courts that have addressed physician liability under the FCA treat objective falsity very similarly.

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140 *See AseraCare*, 938 F.3d at 1297.

141 *See id.*

142 *See id.*

143 *See id.*

144 *United States ex rel. Druding*, 952 F.3d at 89, 100 (quoting *AseraCare*, 938 F.3d at 1297).

145 *See AseraCare*, 938 F.3d at 1297.

146 *See United States ex rel. Druding*, 952 F.3d at 100.

147 *See id.*

148 *See id.*

The circuit courts failed to recognize that they each reached the same basic conclusion—that opinions might be a basis for false claims. This perceived circuit split where none exists is not concerning in and of itself. Rather, it is a symptom of the disease, namely a widespread mishandling of health law by the courts deserving of attention.[149] By overlooking the reasonableness requirement, the *Druding* ruling muddles case law by (1) engaging in a confusing analysis culminating in a tangent about scienter,[150] and (2) leaving open the possibility of subjecting physicians to FCA liability for reasonable differences in medical judgment, which poses obvious public policy concerns.[151]

The fact that the Third Circuit overlooked the reasonableness requirement at least raises the question of whether federal courts of general jurisdiction are prepared to handle the complexities of healthcare law. Lawyers and judges confront the reasonable person standard in many areas of law, from contracts,[152] to torts,[153] to criminal law.[154] The Third Circuit missed this analysis in the FCA context because the reasonable

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149 It is worth noting the Third Circuit's misconstruction of the Eleventh Circuit's reasoning is but one example of the extraordinary complexity involved in applying legal concepts in the context of healthcare. Courts have misinterpreted medicine in a variety of areas, not just during adjudication of FCA claims:

> [M]isleading statements about medical realities are not uncommon when judges make medical decisions. I also claim that the result of such misleading statements by judges is costly. The credibility of the courts is undermined in the eyes of the medical profession, and the credibility of the medical profession is undermined in the eyes of the public. The result is greater public distrust of both law and medicine. A loss of faith in both professions is the result of the vicious circle of counterproductive moves set in motion by these flawed decisions.

See Alan A. Stone, *Judges as Medical Decision Makers: Is the Cure Worse than the Disease?*, 33 CLEV. ST. L. REV. 579, 581 (1984); Joe Hernandez & Selena Simmons-Duffin, *The Judge Who Tossed Mask Mandate Misunderstood Public Health Law, Legal Experts*, NPR (Apr. 19, 2022, 6:23 PM), http://www.npr.org/sections/health-shots/2022/04/19/1093641691/mask-mandate-judge-public-health-sanitation [http://perma.cc/MEH4-3V37] (criticizing a court's analysis of whether masks qualified as "sanitation" under the Public Health Service Act).

150 *See United States ex rel. Druding*, 952 F.3d at89, 95–96 (3d Cir. 2020).

151 *See id.* at 100.

152 *See* RESTATEMENT (SECOND) OF CONTRACTS § 43 cmt. d (AM. L. INST. 1981) ("The basic standard to which the offeree is held [in determining the legitimacy of an offeror's indirect revocation] is that of a reasonable person acting in good faith.").

153 *See* RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (AM. L. INST. 1965) ("The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it."); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. L. INST. 2010) (noting the tort for negligence imposes upon actors a duty of reasonable care).

154 *See, e.g.*, People v. Hurtado, 63 Cal. 288, 292 (1883) (holding murder is reduced to manslaughter "when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person").

doctor standard is not quite as conspicuous. For example, determining whether someone acted reasonably in failing to put up wet floor signs near wet, slippery stairs[155] involves drawing on personal experience common to most individuals, whereas ascertaining whether a doctor formed a reasonable conclusion regarding a hospice certification, which involves consideration of numerous complex medical factors,[156] is not so easily decided by someone without medical knowledge. Indeed, *Druding* and *AseraCare* dealt with these hospice factors.[157] Moreover, before judges can even hope to weigh complex medical factors such as those involved in a hospice certification, they need to learn the corresponding medical terminology. Understanding medicine requires fluency in terminology unfamiliar to the average individual.[158] Learning medical terminology is akin to learning a foreign language—there are whole dictionaries dedicated to the subject.[159] When medical terminology becomes inextricably intertwined with legal concepts, such as the reasonable doctor analysis in the FCA context, the legal principals themselves also become muddled, resulting in erroneous opinions. This explains why the Third Circuit took a wrong tangent and accidentally overlooked the reasonable-unreasonable distinction entirely.

II. RECOMMENDATIONS FOR REFORM

A. Inaccurate Healthcare Rulings Have Led to Numerous Externalities Demonstrating the Need for Specialized Healthcare Courts

The lack of nuanced medical understanding in legal opinions, such as the above FCA rulings, has led to confusion in the legal and medical communities about when liability is imposed on medical practitioners,[160] and has created a risk of imposing liability where none should exist.[161] These outcomes

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155 *See, e.g.*, Galef v. Univ. of Colo., 2022 COA 91, ¶ 4.

156 *See Determining a Patient's Prognosis of Six Months or Less for Hospice*, *supra* note 56–60 and accompanying text; *see also supra* text accompanying notes 56–61.

157 *See* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 91 (3d Cir. 2020); *see* United States v. AseraCare, Inc., 938 F.3d 1278, 1281 (11th Cir. 2019).

158 *See, e.g.*, *Understanding Health Literacy*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/healthliteracy/learn/Understanding.html [http://perma.cc/F5RV-Q5QX] (last visited Sept. 13, 2022) (detailing the problems presented by the pervasiveness of health illiteracy).

159 *See generally* DONALD VENES, TABER'S CYCLOPEDIC MEDICAL DICTIONARY (24th ed. 2021); MERCK MANUAL PROFESSIONAL VERSION, http://www.merckmanuals.com/professional [http://perma.cc/WK6L-Z3SW] (last visited Mar. 15, 2022).

160 *See* discussion *supra* Part I.B regarding alleged FCA "circuit split."

161 *See supra* note 156 and accompanying text.

have fostered discontent within the medical community.[162] Multiple organizations, including the American Medical Association ("AMA") and the Institute of Medicine, have proposed health courts.[163] The 2017 reform objectives from the AMA include a goal to "reduce regulatory burdens that detract from patient care and increase costs," an objective that the increased efficiency offered by health courts could further.[164] Many of the proposals for health courts in the arena of medical malpractice are for the state level.[165] However, the same arguments that can be made for state health courts, such as to avoid defensive medicine[166] and promote efficient ruling to remedy court congestion,[167] can also be made at the federal level, especially since medical practitioners are defending their professional choices both when facing a state lawsuit for medical malpractice or a federal lawsuit for violation of the FCA.[168]

Moreover, since at least the 1960's, issues surrounding overburdened federal courts have existed due to the burgeoning volume and complexity of cases channeled into the system.[169] Fast forward nearly another thirty years, and Congress continues to examine the issue of clogged courts caused by "overwhelming caseloads, substantial litigation delays and spiraling costs."[170] The Third Circuit, at a minimum, aggravated this backlog by wasting resources in investing time into a belabored analysis of an

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162 *See, e.g.*, MICHELLE M. MELLO, ET AL., "HEALTH COURTS" AND ACCOUNTABILITY FOR PATIENT SAFETY, 459 (The Milbank Q., 2006) (describing how the medical malpractice crisis has spurred proposals for removing cases to health courts).

163 *See, e.g.*, Peters, *supra* note 163, at 228 (discussing moving medical malpractice cases out of civil courts).

164 *See AMA Vision on Health Care Reform*, AMA, http://www.ama-assn.org/delivering-care/patient-support-advocacy/ama-vision-health-care-reform [http://perma.cc/B9SS-UFNH] (last visited Feb. 18, 2023).

165 *See, e.g.*, Peters, *supra* note 163, at 228 (discussing moving medical malpractice cases out of civil courts).

166 Defensive medicine is when physicians base medical decisions on a desire to avoid liability, instead of considering what is in the best interests of the patient. *See* Philip K. Howard & Rebecca G. Maine, *Health Courts May Be Best Cure for What Ails the Liability System*, BULL. OF THE AM. COLL. OF SURGEONS (Mar. 2, 2013) http://bulletin.facs.org/2013/03/health-courts-best-cure/ [http://perma.cc/UP5F-K2U2].

167 *See* Nuno Garoupa, et al., *Assessing the Argument for Specialized Courts: Evidence from Family Courts in Spain*, 24 INT'L J. OF L., POL'Y & THE FAM. 54, 54–55 (2009).

168 *See, e.g.*, JUD. COUNCIL OF CAL. CIV. JURY INSTR. NO. 500 (2022) (noting medical malpractice involves a breach of a medical professional's duty).

169 *See* C.J. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 2–3 (1993).

170 *See* Kristina Davis, *Overwhelmed Federal Courts Ask Congress for More Judges*, SAN DIEGO UNION TRIB. (Feb. 25, 2021, 4:41 PM), http://www.sandiegouniontribune.com/news/courts/story/2021-02-25/federal-courts-congress-relief [http://perma.cc/BL9F-ZKTL].

inconsequential scienter tangent and promoted further delay for future courts attempting to grapple with the ruling that misconstrued the basic underlying law in the process.[171]

B. Structure of Reform

1. Federal Healthcare Courts with Article III Review

a. Proposed Federal Healthcare Court Structure

Congress should designate Medicare administrative law judges and Appeals Council as generalized federal healthcare courts, expand their purview to address all civil federal health law disputes, including the FCA, and add judges as needed for caseload management. Medicare uses administrative law judges and a Medicare Appeals Council to make determinations regarding authorization or payment for healthcare, the amount health plans require enrollees to pay, and limits on quantity of items or services.[172] Specifically, Medicare determinations are appealable as follows: (1) redetermination by a Medicare Administrative Contractor; (2) reconsideration by a Qualified Independent Contractor; (3) hearing before an administrative law judge; (4) review by the Medicare Appeals Council; and (5) judicial review in a United States District Court.[173] The federal health courts or federal health administrative agency proposed in this Note should thus be an expansion of this program to encompass all Medicare and Medicaid lawsuits, including those related to the FCA and other fraud statutes. The healthcare cases contemplated by this Note would begin at the third stage in a hearing before an administrative law judge, then progress through the appellate structure. The benefits of this small subset of non-FCA Medicare disputes already being addressed in an administrative agency is three-fold. First, it decreases the cost of getting a new system up and running since some logistics are already in place. While the existing Medicare Appeals Council houses judges in eleven field

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171 *See* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 96 (3d Cir. 2020) (fixating on scienter).

172 *See Federal District Court Review*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Medicare/Appeals-and-Grievances/MMCAG/Fed [http://perma.cc/WCJ7-4PQ7] (last modified Jan. 12, 2023, 1:15 PM); *Organization Determinations*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Medicare/Appeals-and-Grievances/MMCAG/ORGDetermin [http://perma.cc/8G59-TRZT] (last modified Dec. 1, 2021, 7:02 PM).

173 *See* U.S. DEP'T OF HEALTH & HUM. SERVS., HHS PRIMER: THE MEDICARE APPEALS PROCESS, 1–2, HHS.GOV, http://www.hhs.gov/sites/default/files/omha/files/medicare-appeals-backlog.pdf [http://perma.cc/F3XF-8EXP] (last visited Feb. 18, 2023).

offices,[174] the existing pool of health expert judges[175] will decrease the costs significantly. Even if Congress were to establish federal healthcare courts in every state, which is not necessarily required,[176] each judge already in existence would save approximately $900,000.[177] Moreover, these judges are already experienced in Medicare issues and accustomed to weighing evidence from medical experts, texts, and research.[178] As such, these judges could identify difficult issues for people from a non-healthcare background to understand, which could then be the focus of a training program for any additional judges for the federal healthcare courts. Second, it bolsters the proof of the need for specialized courts and the presence of a sufficient number of cases to justify them. Namely, the creation of the Medicare appeals process indicates the traditional court system could not, on its own, handle adjudication of such cases.[179] Third, Medicare and the FCA are both federal healthcare statutes,[180] and the Medicare Appeals Council constitutionally presiding over Medicare appeals implies that piggybacking off that same system to augment the caseload with similar litigation would also be constitutional.

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174 *See Contact the Office of Medicare Hearings and Appeals*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.hhs.gov/about/agencies/omha/contact/index.html [http://perma.cc/QC2D-FV2N] (last visited Nov. 10, 2021).

175 The Office of Medicare Hearings and Appeals also makes use of trained mediators to lessen the workload for ALJ teams. *See* HHS PRIMER: THE MEDICARE APPEALS PROCESS, *supra* note 173, at 88.

176 Although this Note justifies establishing health courts in each district, similar to the bankruptcy court system, it is worth noting this may go above and beyond what is necessary—should Congress create health courts as legislative courts, it might be able to do so by merely establishing a centralized federal health court system in Washington, D.C., similar to Tax Court. *See* MARK DESGROSSEILLIERS, PERSONAL JURISDICTION IN BANKRUPTCY CASES: YOU'VE GOT MAIL 8 (The Federal Lawyer, 2019) ("The Supreme Court has not, to date, directly decided the extent to which the Fifth Amendment might impose limits on a *federal* court's exercise of personal jurisdiction over an out-of-state defendant in cases involving federal questions, including but not limited to bankruptcy-related matters.").

177 *See* Madison Alder, *Congress Weighs First District Court Expansion Since 1990 (1)*, BLOOMBERG L. (Aug. 9, 2021, 10:37 AM), http://news.bloomberglaw.com/us-law-week/congress-weighs-district-judge-bills-after-decades-of-inaction [http://perma.cc/Y578-8H9L] ("[I]t costs roughly $900,000 to add a new judgeship. That accounts for salary, benefits, staff, equipment, and travel, but doesn't include the cost of additional space or security."). Using an existing system with judges already in place that can simply expand their caseload to accommodate FCA and other healthcare cases will mean adding fewer judgeships than creating a whole new system.

178 *See* MARY ASHKA & PAUL GRABOWSKI, NAT'L CTR. ON L. & ELDER RTS., MEDICARE ADMINISTRATIVE LAW JUDGE HEARINGS: ADVOCACY TIPS 4 (2020).

179 In 2016, the administrative law judges processed 409,908 appeals, and the Medicare Appeals Council handled 3,723. *See HHS Primer: The Medicare Appeals Process*, 4, HHS.GOV, http://www.hhs.gov/sites/default/files/omha/files/medicare-appeals-backlog.pdf. The number of pending cases for each level of review totaled 658,307 and 22,707, respectively. *See* HHS PRIMER: THE MEDICARE APPEALS PROCESS, *supra* note 173, at 4.

180 *See* 42 C.F.R. § 484.10 (2012).

Specialized review at both the trial and appellate levels is necessary because the struggle to understand the complexities of medicine affects both trial and appellate judges. While the FCA analysis above focused on the appellate courts' confusion, the underlying district court ruling in *Druding* distorted caselaw, potentially contributing to the Third Circuit's confusion.[181] However, the Third Circuit's misunderstanding cannot be entirely attributed to the district court's distortion, especially since it rejected the district court's interpretation of the caselaw and independently came to a different conclusion, opposite to that of the district court.[182] Since medical misunderstanding pervades trial and appellate courts, a second layer of specialized review is necessary to ensure the medical-legal analysis is fully fleshed out and persuasive when a healthcare case reaches a non-expert review by a district court.

Administrative agencies serving as adjuncts to Article III courts—as would be the case with the proposed FCA courts since step five involves judicial review in a district court—may make findings of fact subject only to a higher standard of review.[183] But, findings of law must face de novo review in an Article III court.[184] Within the existing Medicare system, into which the federal healthcare courts could integrate, the Medicare Appeals Council's legal conclusions are reviewable de novo, and findings of fact are subject to substantial evidence review.[185] Even though questions of law will be subject to de novo review, the multiple layers of expert review by specialized courts with their own appellate panels will lend greater credence to the opinions, thus making the Article III courts hesitate before reversing. Consequently, situations like the outcome in the FCA "split"—such as where the Third Circuit completely rejected the district court's analysis—would be avoidable.[186] Additionally, courts give

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181 The district court ruled that:

> The difference of opinion of an expert cannot be false . . . . diverging opinions do not create a genuine issue of material fact about the falsity of a physician's determinations that the patient meets hospice eligibility where, as here, there is no factual evidence that Defendant's certifying doctor was making a knowingly false determination. This is because the ultimate issue is not whether the certification of hospice eligibility was correct or incorrect, but rather whether it was knowingly false.

See Druding v. Care Alts., Inc., 346 F. Supp. 3d 669, 688 (D.N.J. 2018).

182 *See* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 100 (3d Cir. 2020).

183 S*ee* Crowell v. Benson, 285 U.S. 22, 51 (1932).

184 *Id.*

185 *See, e.g.*, San Bois Health Servs. v. Hargan, No. CIV-14-560-RAW, 2017 U.S. Dist. LEXIS 183406, at *22–24 (E.D. Okla. Nov. 6, 2017)

186 *See* Howard & Maine, *supra* note 166 and accompanying text.

substantial deference to the agency's reasonable interpretations, even when conducting a de novo review.[187] Further, the specialty court opinions will set forth factual findings that will benefit from a substantial evidence standard,[188] which will help address the complexities of the underlying medicine and free up the Article III courts to focus on legal issues when reviewing appeals.[189] This will insulate the medical facts from non-specialized Article III judges lacking medical backgrounds.

b. Specialty Healthcare Courts are Constitutional

Before explaining how these courts will solve the problem demonstrated by the FCA confusion, it is important to address the threshold issue of whether such courts are constitutional. Article III of the U.S. Constitution established the Supreme Court and gave Congress the power to create lower Article III courts to preside over the types of cases enumerated therein.[190] Article III judges benefit from life tenure, assuming good behavior, as well as salaries that cannot be decreased during the judges' terms of office.[191] Article III grants jurisdiction over various enumerated cases and controversies.[192] Applied to the FCA, which Congress enacted in 1863,[193] Article III courts have

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187 *See* Sta-Home Home Health Agency, Inc. v. Shalala, 34 F.3d 305, 308 (5th Cir. 1994).

188 *See, e.g.*, John Balko & Assocs. v. Sebelius, No. 12cv0572, 2012 U.S. Dist. LEXIS 183052, at *12 (W.D. Pa. Dec. 28, 2012) (first citing 42 U.S.C. § 405(g); and then citing Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 292 (3d Cir. 2012)).

189 *See, e.g.*, *97. The "Who, What, When, Where, Why, and How" of Appeals in Bankruptcy Proceedings—Standard of Review, Mootness, Etc.*, U.S. DEP'T OF JUST., http://www.justice.gov/jm/civil-resource-manual-97-standard-review-mootness-etc [http://perma.cc/NE89-MJV5] (last visited Feb. 18, 2023) (describing a parallel review scheme in bankruptcy courts).

190 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

191 *See id.*

192 Article III of the Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof;—and foreign States, Citizens or Subjects.

See U.S. CONST. art. III, § 2.

193 *See* Department of Justice, *The False Claims Act*, U.S. DEP'T OF JUST., http://www.justice.gov/civil/false-claims-act [http://perma.cc/44CL-XDBS] (last visited Dec. 10, 2022).

jurisdiction under the federal question doctrine.[194] Other Medicare and Medicaid lawsuits addressed by existing specialty courts also involve federal questions because they likewise deal with federal statutes.[195]

The Constitution empowers Congress to create Article III specialized courts.[196] For example, the U.S. Court of International Trade is an Article III court with "nationwide jurisdiction over civil actions arising out of the customs and international trade laws of the United States."[197] Congress could similarly create an Article III court with jurisdiction over civil actions arising from federal healthcare laws, such as the FCA, Medicare, and Medicaid. If Congress did this, no constitutional issues would arise, provided judges have life tenure and salary protection.[198]

More often, Congress creates specialty courts under Article I, (sometimes referred to as legislative courts) to handle complex areas of law.[199] For example, bankruptcy courts are non-Article III courts,[200] and the Environmental Protection Agency, Social Security Administration, and Employee Benefits Security Administration, also not created under Article III, all make use of administrative law judges.[201] These judges have the requisite

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194 *See* U.S. CONST. art. III, § 2.

195 Medicare is a federal statute, and Medicaid is a federally funded program. *See* 42 U.S.C. § 1396 (2022); *Financial Management*, *supra* note 46.

196 *See Congressional Power to Establish Article III Courts: Doctrine and Practice*, CORNELL [hereinafter *Congressional Power to Establish Article III Courts*], http://www.law.cornell.edu/constitution-conan/article-3/section-1/congressional-power-to-establish-article-iii-courts-doctrine-and-practice [http://perma.cc/3T5A-BJJW] (last visited Dec. 10, 2022) ("By virtue of its power 'to ordain and establish' courts, Congress has occasionally created courts under Article III to exercise a specialized jurisdiction.").

197 *See* U.S. COURT OF INT'L TRADE, http://www.cit.uscourts.gov/ [http://perma.cc/SHE8-AF3G] (last visited Mar. 25, 2022).

198 *See Congressional Power to Establish Article III Courts, supra* note 196.

199 *See, e.g.*, *Court Role and Structure*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/court-role-and-structure [http://perma.cc/VM3N-YM3V] (last visited Dec. 10, 2022) (stating Congress has created several Article I courts, including U.S. Court of Appeals for Veterans Claims, U.S. Court of Appeals for the Armed Forces, and U.S. Tax Court).

200 *See* Cathy Moran, *Speak Fluent Bankruptcy: Guide to Essential Bankruptcy Terms*, THE SOAP BOX (2017), http://www.bankruptcysoapbox.com/speak-fluent-bankruptcy/ [http://perma.cc/D755-RBBF] (noting "[b]ankruptcy has its own language").

201 *See* Samuel R. Henninger, *Bankruptcy Courts and the Constitution*, AM. BAR ASS'N (Dec. 9, 2020), http://www.americanbar.org/groups/business_law/publications/blt/2020/12/bankruptcy-courts/#:~:text=Bankruptcy%20judges%20are%20not%20Article,Bankruptcies%20throughout%20the%20United%20States.%E2%80%9D [http://perma.cc/8BWG-2QQK]; *Filings, Procedures, Orders and Decisions of EPA's Administrative Law Judges*, U.S. ENV'TL PROT. AGENCY, http://www.epa.gov/alj#:~:text=EPA's%20Administrative%20Law%20Judges%20(ALJs,be%2C%20regulated%20under%20environmental%20laws [http://perma.cc/TX9U-YR7P] (last updated July 8, 2022); *What Do I Need to Know About Requesting a Hearing Before an Administrative Law Judge*, SOC. SEC. ADMIN.,

expertise to address the complicated issues involved in the relevant practice areas. For instance, merit selection panels, which are often largely composed of bankruptcy practitioners, choose bankruptcy judges.[202] While there is no requirement that new judges possess bankruptcy experience, the bankruptcy community is very exclusive.[203] Indeed, many judges obtain their positions after hearing about vacancies through word-of-mouth or personal relationships in the bankruptcy community.[204]

Legal scholars have debated whether the Constitution authorizes Congress to create non-Article III courts.[205] The constitutional objection to non-Article III courts is that Congress might weaken the judicial branch by removing some of its power and reallocating it to judges lacking the independence of Article III. Specifically:

> Article I contains no guarantee that the judges of Article I courts have life appointments. Nor does it provide that their salaries may not be reduced during their term of office. On the other hand, the tenure of an Article III judge is during "good behaviour"; moreover, Article III provides that its judges shall have a compensation that "shall not be diminished during their Continuance in Office."[206]

Nonetheless, for 200 years, Congress has created courts without the tenure and salary protections of Article III and given them

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http://www.ssa.gov/appeals/hearing_process.html [http://perma.cc/LV38-YDG4] (last visited Dec. 10, 2022); *Employee Retirement Income Security Act of 1974 (ERISA) Collection*, OFF. OF ADMIN. L. JUDGES, http://www.dol.gov/agencies/oalj/topics/libraries/LIBRIS [http://perma.cc/9WD4-6S9Z] (last visited Dec. 11, 2022).

202 *See* Malia Reddick &and Natalie Knowlton, *A Credit to the Courts: The Selection, Appointment, and Reappointment Process for Bankruptcy Judges*, 9–10, QUALITY JUDGES INITIATIVE, (Apr. 2018) http://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf [http://perma.cc/993Q-QDZB].

203 *See id.* at 12 (quoting a bankruptcy judge remarking "[n]inety percent of lawyers don't understand bankruptcy").

204 *See id.* at 7 (interviewing twenty-five judges, twenty-three of whom "learned of the vacancy for which they were selected by word-of-mouth or through personal relationships within the bankruptcy community").

205 *See, e.g.,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 235 (7th ed. 2016); *id.* at 223 ("The Constitution offers no authority for granting other bodies the power to decide Article III judicial matters."). *But see* Craig A. Stern, *What's a Constitution Among Friends: Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1076 (1998) ("The text of the Constitution permits courts-martial, territorial courts, executive adjudication of public rights, and the participation of judicial adjuncts . . . .").

206 Glidden Co. v. Zdanok, 370 U.S. 530, 593 (1962) (quoting U.S. CONST. art. III, § 1).

authority to adjudicate Article III matters,[207] a factor weighing in favor of their constitutionality.[208]

The generally accepted circumstances include three "narrow exceptions" to Article III: territorial courts, military courts, and the adjudication of "public rights."[209] Public rights are defined as "disputes between the Government and others," not including criminal matters.[210] More recently, the Court has allowed non-Article III courts that might not fall into one of those three exceptions so long as "'the essential attributes' of judicial power are retained in the art. III court."[211] As the Court has explained:

> Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the power to adjudicate "private rights" must be vested in an Art. III court, . . . "this Court has accepted factfinding by an administrative agency, . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master.[212]

"Private rights" address "private unalienable rights of each individual,"[213] such as one individual's liability to another,[214] and are inherently judicial. This is contrasted with "public rights" that

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207 *See* CHEMERINSKY, *supra* note 205, at 234; *see, e.g.*, I.R.C. §§ 7441, 7446 (1982) (creating Tax Court, where judges sit for fifteen-year terms); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 460–61 (1977) (discussing the constitutionality of Congress empowering the Occupational Safety and Health Commission, an administrative agency, to impose civil penalties for matters within the cases and controversies enumerated in Article III).

208 *See* CHEMERINSKY, *supra* note 205, at 235–36 (citing American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (noting the Supreme Court has long recognized the constitutionality of non-Article III courts).

209 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–68, 94 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015). Public rights generally refer to cases where private citizens sue the government; however, non-Article III courts and administrative agencies are often granted authority under the public rights doctrine to assess penalties on private individuals, despite the lack of life tenure for administrative law judges and commissioners. *See* CHEMERINSKY, *supra* note 205, at 237. Indeed, the Supreme Court acknowledged "[f]amiliar illustrations of administrative agencies created for the determination of [public rights] matters are found in connection with the exercise of the congressional power as to . . . public health." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Therefore, while this Note proceeds under the adjunct exception leaving the "essential attributes of judicial power" to Article III courts, it is worth noting there might also be a public rights argument justifying the creation of federal healthcare courts. *N. Pipeline Constr. Co.*, 458 U.S. at 81.

210 *See id.* at 69–70, n.24.

211 *Id.* at 81.

212 *Id.* at 77–78 (quoting Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 460 (1977), citing Crowell v. Benson, 285 U.S. 22, 51–65 (1932)).

213 Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 713 (2015).

214 *See Crowell*, 285 U.S. at 51.

are not inherently judicial because they can start in the courts but can also be resolved by the executive and legislative branches.[215]

The proposed federal healthcare courts fit within this constitutional framework. The Supreme Court treats federal statutes involving quasi-public rights akin to public rights, condoning review by non-Article III courts without consent of the parties and with little review.[216] Specifically, in connection with the Federal Insecticide, Fungicide, and Rodenticide Act provision authorizing the Environmental Protection Agency to consider data already in its files when evaluating a new applicant's request for "if the applicant has made an offer to compensate the original data submitter," the Supreme Court addressed the constitutionality of a federal law mandating binding arbitration with limited judicial review for resolving disputes among private parties that fail to agree on a compensation amount.[217] It upheld the constitutionality of the arbitration provision, finding that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[218] Specifically, the private right to compensation in *Thomas* was integral to the federal regulatory scheme of encouraging competition and streamlining research, because it spread the cost among applicants instead of each applicant repetitively shouldering the entire cost individually.[219] Similarly, the existence of compensation for relators in *qui tam* causes of action is integral to the federal scheme of rooting out fraud because it encourages individuals to assist the government with enforcement by bearing the burden of the cost and time investments associated with prosecution.[220] Indeed, legal scholars classify *qui*

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215 *See N. Pipeline Constr. Co.*, 458 U.S. at 68, 107 ((J. Burger, J., dissenting).

216 *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985).

217 *See id.* at 571, 573–74.

218 *Id.* at 593–94; *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 835–36, 858 (1986) (finding even ancillary jurisdiction of state law counterclaims constitutional where the Commodity Futures Trading Commission ("CFTC") adjudicated "reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers' violations of the [Commodity Exchange] Act or CFTC regulations").

219 *See Thomas*, 473 U.S. at 570.

220 *See Remarks of Deputy Assistant Attorney General Michael D. Granston at the ABA Civil False Claims Act and Qui Tam Enforcement Institute*, U.S. DEP'T OF JUST. (Dec. 2, 2020), http://www.justice.gov/opa/speech/remarks-deputy-assistant-attorney-general-michael-d-granston-aba-civil-false-claims-act [http://perma.cc/EH5A-EM6R] ("Undoubtedly, the Department will continue to rely heavily on whistleblowers to help root out the misuse and abuse of taxpayer funds.").

tam actions, like the FCA, as quasi-public rights.[221] Accordingly, FCA lawsuits, where the government leaves the litigation in the hands of relators who share in a portion of the recovery, similarly involve a right to compensation under federal law closely related to a public regulatory scheme.[222] Thus, non-Article III adjudication for those cases should likewise be deemed constitutional.

Even if FCA claims are not quasi-public when involving government-initiated civil litigation—and therefore "inherently judicial"—use of a non-Article III adjunct would still be appropriate because the healthcare courts' power is limited and there is adequate review in an Article III court. In *Crowell v. Benson*, the Supreme Court upheld a requirement that workers injured in maritime accidents file their claims with the U.S. Employees' Compensation Commission.[223] The Court reasoned the Commission was constitutional because it functioned as an adjunct to Article III courts.[224] Specifically, the Commission lacked independent authority to enforce compensation orders, which were instead appealable to federal district courts, and Article III courts possessed de novo review of questions of law, constitutional facts, and jurisdictional facts.[225]

The Commodity Futures Trading Commission employs this same appeal structure for reparations it orders for individuals injured by brokers' fraudulent or illegally manipulative conduct.[226] In *Schor*, the Court found the Commission's exercise of this power to be "of unquestioned constitutional validity."[227] The real constitutional entanglement emerged in addressing the Commission's power to adjudicate counterclaims arising from the

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221 In clarifying the distinction between private and quasi-public rights, Justice Thomas relied on a law review comment that classified the individual's right to bring *qui-tam* actions as a quasi-private "privilege[]" that the government could validly supplant any time before judgment. *See* Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 344 n.2 (2015) (Thomas, J., dissenting); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 571 (Apr. 2007). Per Justice Thomas, "no matter how closely a franchise resembles some 'core' private right, it does not follow that it must be subject to the same rules of judicial interception as its counterpart." *Teva Pharm.*, 574 U.S. at 344 n.2.

222 *See Fraud Statistics – Overview: October 1, 1986 - September 30, 2021*, *supra* note 35 (delineating relators' shares of FCA awards).

223 *See* Crowell v. Benson, 285 U.S. 22, 53–54 (1932); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

224 *See Crowell*, 285 U.S. at 53–54.

225 *See id.* at 41, 53–54.

226 *See* 7 U.S.C. § 18; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986).

227 *See Schor*, 478 U.S. at 856.

same conduct, because this went beyond the traditional agency model.[228] Here, the Court leaned heavily on the idea of consent to uphold the Commission's constitutional validity.[229]

Adjuncts also adjudicate bankruptcy cases, which likewise involve private rights, with consent.[230] Initially, the Supreme Court found the grant of jurisdiction to bankruptcy courts unconstitutional,[231] and issued a plurality opinion stating bankruptcy courts could not be considered adjuncts to Article III courts because their jurisdiction was not limited to a specific area of law, but extended to all civil matters.[232] A concurring opinion that struggled with the bankruptcy court's authority to adjudicate state law matters only loosely related to bankruptcy law.[233] Of note, neither of these constitutional concerns would pose a problem for the proposed federal healthcare courts, which would have jurisdiction over a specific area (healthcare) and would not entangle with state law matters. However, bankruptcy courts are of course still operating today, with the option for parties to appeal to the Bankruptcy Appellate Panel ("BAP").[234] The constitutional defects were remedied by the limit of jurisdiction to "core" proceedings involving debtor's property, whereas "noncore" matters cannot be heard by the bankruptcy courts, except the issuance of proposed findings of fact and law for noncore matters with an independent basis for federal jurisdiction.[235]

Similar to the commissions in *Crowell* and *Schor*, the proposed federal healthcare courts opinions would address fraud, among other healthcare statutes, and could ultimately be appealed to district courts, where legal conclusions therein would face de novo review. While *Schor* leaned on the idea of consent to uphold, and bankruptcy courts had to limit the review of "noncore" matters and rely on a consent model for BAP, federal healthcare courts do not need to incorporate consent because they do not pose the same constitutional concerns. Even with a mandatory structure that has a specialized appeals process through the Medicare Appeals Council (akin to BAP), the

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228 *See id*. at 852.

229 *See id*. at 850–51.

230 *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. §§ 152, 157.

231 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion).

232 *See id*. at 52, 84–87.

233 *See id*. at 90 (Rehnquist, J., concurring).

234 *See* 28 U.S.C. § 158; *69. Appellate Procedures in Bankruptcy*, U.S. DEP'T OF JUST., http://www.justice.gov/jm/civil-resource-manual-69-appellate-procedures-bankruptcy [http://perma.cc/P2RH-5LFY] (last visited Feb. 18, 2023).

235 *See* CHEMERINSKY, *supra* note 205, at 255–56.

ultimate decision-making remains with the independent Article III judiciary via the final step in the appeals process. Indeed, making the healthcare courts hinge on the parties' consent would undermine the goals of federal healthcare courts to provide multiple layers of guidance to unspecialized judges as a way of insulating the medical component of the rulings from misinterpretation. In short, health care courts are constitutional as public rights courts because, as structured, they will leave the "essential attributes of judicial power"[236] with Article III courts.

C. Benefits of Health Courts

1. Expertise Would Ameliorate Accuracy and Efficiency Concerns

Expanding the Medicare adjudication system into broader health courts would address the problems of inaccurate rulings and clogged courts because these health courts would employ specialized health care judges.[237] As a function of these judges developing a significant level of expertise in constantly overseeing healthcare lawsuits, they would be expected to become excellent fact finders which would promote improved quality in rulings.[238] Specific to the FCA "split," the Third Circuit's ruling in *Druding* mischaracterized the Eleventh Circuit's ruling in *AseraCare* because it hyper-focused on analyzing "objective falsity" and its scienter element.[239] A healthcare judge with a better understanding of medicine would have been able to successfully parse the Eleventh Circuit's application of the law to the facts, realize hospice certifications are complex and account for numerous imprecise factors,[240] and discern that an expert physician disagreeing with the treating physician's conclusions does not indicate the treating physician's conclusion was false, or even erroneous.[241] Accordingly, a healthcare judge would not have overlooked the reasonableness standard, and having noticed that such legal standard proved key to the case, would not have wasted time and resources on the confusing and irrelevant scienter discussion in *Druding*.

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236 *N. Pipeline Constr. Co.*, 458 U.S. at 51.

237 *See* Valarie Blake, *The Jury Is Still Out on Health Courts*, AMA J. OF ETHICS 637 (2011), http://journalofethics.ama-assn.org/article/jury-still-out-health-courts/2011-09 [http://perma.cc/5NM7-FYMZ] ("[H]ealth courts rely on specially trained health care judges.").

238 *See id.* at 639.

239 *See* United States *ex rel.* Druding v. Druding, 952 F.3d 89, 96 (3d Cir. 2020).

240 *See supra* notes 53–65 and accompanying text.

241 *See* United States v. *AseraCare*, Inc., 938 F.3d 1278, 1287 (11th Cir. 2019) (noting the expert physician clarified his review was based on "his own clinical judgment").

Moreover, specialized judges with a deeper understanding of medicine would not need to spend as much time familiarizing themselves with the medicine for each case because they would already have a strong baseline. Evidence of this efficiency is demonstrated by specialty courts adjudicating matters more quickly than traditional courts.[242] For example, bankruptcy is very similar to medicine in that it also involves its own sort of language, and without an understanding of the bankruptcy jargon, a judge cannot hope to adjudicate bankruptcy matters properly.[243] Bankruptcy Appellate Panels have demonstrated an ability to ease the burden on the docket with faster disposition as well as fewer appeals than their district court counterparts.[244] Bankruptcy Appellate Panels have an average resolution timeframe of 8.6 months with many cases handled in even shorter periods of time as procedural issues are resolved.[245] Given the parallel of complex terminology, logically health courts would accelerate judicial resolution of healthcare lawsuits much in the same way as bankruptcy courts.

2. The FCA (and Other Federal Healthcare Litigation) Constitute a Large Enough Portion of Government Revenue to Financially Justify the Recommended Health Courts

Although establishing these health courts could constitute a big undertaking, it is a well-justified cost that is lessened by piggybacking off the existing Medicare Appeals Council. The creation of healthcare courts would not only serve as a venue for FCA cases but would also serve to adjudicate other healthcare matters, including Medicare and Medicaid cases.[246] Moreover, in addition to the FCA, multiple statutes govern Medicare fraud and abuse including the Physician Self-Referral Law ("Stark Law") and Civil Monetary Penalties Law ("CMPL").[247]

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242 *See Court Insider: What Is a Bankruptcy Appellate Panel?*, U.S. CTS. (Nov. 26, 2012), http://www.uscourts.gov/news/2012/11/26/court-insider-what-bankruptcy-appellate-panel [http://perma.cc/C3RX-8GH7].

243 *See, e.g.*, Cathy Moran, *Speak Fluent Bankruptcy: Guide to Essential Bankruptcy Terms*, SOAP BOX (2017), http://www.bankruptcysoapbox.com/speak-fluent-bankruptcy/ [http://perma.cc/48DW-B3M3].

244 *See* U.S. CTS., *supra* note 242.

245 *See id.*

246 *See generally* County of Los Angeles v. Shalala, 192 F.3d 1005, 1008 (D.C. Cir. 1999) (interpreting requirements of the Medicare statute); Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1492 (9th Cir. 1997) (considering whether Medi-Cal hospital outpatient rates violated the federal Medicaid Act).

247 *See Medicare Fraud & Abuse: Prevent, Detect, Report*, MEDICARE LEARNING NETWORK BOOKLET 8 (Jan. 2021), http://www.cms.gov/Outreach-and-Education/Medicare-

Healthcare-related fraud, including that involving hospice organizations, laboratories, medical device manufacturers, drug companies, pharmacies, managed care providers, hospitals, and physicians, accounts for more than $5 billion of the $5.6 billion in total FCA settlements and judgments.[248] Healthcare fraud settlements and judgments primarily focus on Medicare, Medicaid, and TRICARE, which serves the military.[249] Not included in the data are savings realized as a consequence of deterring fraud via vigorous prosecution.[250]

For fiscal year 2021, 701 new FCA-related matters were filed, including 203 non *qui tam* and 598 *qui tam* cases with settlements and judgments totaling $3,984,299,554.[251] Of this total, the Department of Health and Human Services was responsible for $3,590,882,626, broken down into 97 non *qui tam* and 388 *qui tam* cases.[252] In 2020, despite a pandemic, the 934 new FCA cases filed represented the largest single year total, correlating to a significant percentage of the 4,125 new cases over the last five years.[253] Of note, healthcare recoveries represent over eighty percent of the past five years' worth of recoveries.[254] The government has also accelerated its involvement in rooting out fraud on its own without whistleblowers via various types of data analysis used to identify patterns of excessive billing to government programs which are then flagged for potential fraud.[255]

Learning-Network-MLN/MLNProducts/Downloads/Fraud-Abuse-MLN4649244.pdf [http://perma.cc/4Y28-KUPT].

248 *See Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021: Second Largest Amount Recorded, Largest Since 2014*, U.S. DEP'T OF JUST. (Feb. 1, 2022), http://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year [http://perma.cc/SR2R-HPQ5] (noting that while these funds were on the federal level, additional recoveries were also generated for the involved states secondary to these actions).

249 *See id.*

250 *See id.*

251 *See Fraud Statistics – Overview: October 1, 1986 –- September 30, 2021*, *supra* note 35. For a fuller picture of the portion of FCA cases and recoveries attributable to the healthcare industry, *see infra* Appendix I.

252 *See Fraud Statistics – Health and Human Services: October 1, 1986 – September 30, 2021*, U.S. DEP'T OF JUST., http://www.justice.gov/opa/press-release/file/1467811/download [http://perma.cc/2URF-TCBE].

253 *See Fraud Statistics – Overview: October 1, 1986 – September 30, 2021*, *supra* note 35.

254 *See id.*; *see also Fraud Statistics –- Health and Human Services: October 1, 1986 –- September 30, 2021*, *supra* note 252.

255 *See Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference*, U.S. DEP'T OF JUST. [hereinafter *Assistant A.G. Boynton Remarks*], http://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar [http://perma.cc/VHG8-RCB9] (Feb. 22, 2021).

The federal government has historically recognized healthcare fraud as a priority, and establishing specialized health courts would be consistent with this goal. The Senate and House of Representatives have held hearings dedicated entirely to fighting healthcare fraud.[256] More recently, in a February 2021 speech, Acting Assistant Attorney General Brian Boynton detailed the priorities of FCA enforcement.[257] Those priorities are pandemic-related fraud, opioids, fraud targeting seniors, electronic health records, telehealth, and cybersecurity.[258] Each area discussed related in some fashion to healthcare, making healthcare fraud the Civil Division's clear-cut current prosecutorial objective.[259] In connecting healthcare issues to each category, Boynton referenced pandemic-related healthcare concerns, elderly patients receiving poor or unnecessary healthcare, and the risk of cyberattacks targeting government data including medical records.[260]

3. Expanding the Existing System to Create Health Courts Would Financially Benefit Consumers

When insurers are forced to pay out claims, they reallocate those costs by increasing premiums and deductibles for policyholders.[261] When policyholders are service providers, such as hospitals, they raise the cost of services to counteract increased liability expenses.[262] The increased cost of medical services is next shifted to the patient's health insurance company, which in turn

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256 *See generally Fighting Fraud and Waste in Medicare and Medicaid*, *Hearing Before a Subcomm. of the Comm. on Appropriations U.S. S.*, 112th Cong. (2012), http://www.govinfo.gov/content/pkg/CHRG-112shrg64653/html/CHRG-112shrg64653.htm [http://perma.cc/DF4L-3FGX]; *Healthcare Fraud in Nursing Homes, Hearing Before the Subcomm. on Hum. Res. of the Comm. on Gov't Reform and Oversight H.R.*, 105th Cong. (1997), http://www.govinfo.gov/content/pkg/CHRG-105hhrg41071/pdf/CHRG-105hhrg41071.pdf [http://perma.cc/6AAW-336W]; *Healthcare Fraud and Abuse Hearing Before the Sub. on Hum. Res. and Intergovernmental Relations of the Comm. of Gov't Reform and Oversight H.R.*, 104th Cong. (1995), http://www.govinfo.gov/content/pkg/CHRG-104hhrg22275/pdf/CHRG-104hhrg22275.pdf [http://perma.cc/SD4W-F65U].

257 *See Assistant A.G. Boynton Remarks*, *supra* note 255.

258 *See id.*

259 *See id.*

260 *See id.*

261 *See* Marshall Allen, *Why Your Health Insurer Doesn't Care About your Big Bills*, NPR (May 25, 2018), http://www.npr.org/sections/health-shots/2018/05/25/613685732/why-your-health-insurer-doesnt-care-about-your-big-bills [http://perma.cc/5KTH-BXT4].

262 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO/AMID-95-159, MEDICAL LIABILITY: IMPACT ON HOSPITAL AND PHYSICIAN COSTS EXTENDS BEYOND INSURANCE (1995), http://www.govinfo.gov/content/pkg/GAOREPORTS-AIMD-95-169/html/GAOREPORTS-AIMD-95-169.htm [http://perma.cc/PX98-C6X4] (describing drug companies passing on liability expenses to hospitals and doctors in the price of products, and hospitals and doctors passing on such medical liability expenses to consumers).

raises premiums and deductibles for policyholders[263] and decreases coverage.[264] Either the patient directly bears the burden of these costs as the policyholder forced to pay increased premiums and deductibles for less healthcare coverage,[265] or the patient shares this burden with his employer.[266] When companies pay these increased premiums for their employees as part of a health insurance benefit program, the burden can ultimately land on consumers due to the increased cost of doing business, or come out of the employee's compensation.[267]

Respecting the FCA, this cost shifting affects patients in two ways. First, corporations have been assessed billions of dollars in penalties stemming from FCA violations over the past decade, generating claim payments through professional liability insurance policies, with numbers of policy holders seeking coverage continuing to increase.[268] The sheer volume of recoveries, exceeding $22 billion to companies over the last six years, clearly has a significant impact on both underwriting and claims assessments.[269] Second, according to the National Health Care Anti-Fraud Association, healthcare fraud costs the United States tens of billions of dollars annually, accounting for at least three percent of total expenditures, while others claim this figure could run as high as ten percent.[270] The Federal Bureau of Investigation reports that fraudulent billing constitutes the most serious of

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263 *See* Allen, *supra* note 261.

264 *See The Challenge of Health Care Fraud*, NAT'L HEALTH CARE ANTI-FRAUD ASS'N, http://www.nhcaa.org/tools-insights/about-health-care-fraud/the-challenge-of-health-care-fraud/ [http://perma.cc/3TFV-BC94] (last visited Dec. 20, 2022).

265 *See Health Insurance Coverage of the Total Population*, KAISER FAM. FOUND., http://www.kff.org/other/state-indicator/total-population/?dataView=0&currentTimeframe=0&sortModel=%7B%22colId%22:%222008__Non-Group%22,%22sort%22:%22desc%22%7D [http://perma.cc/C83H-EGU3] (last visited Dec. 20, 2022) (acknowledging in 2019, 5.9% of Americans purchase health insurance policies directly from the insurer, instead of through an employer).

266 *See* Elizabeth Walker, *What Percentpercent of Health Insurance Is Paidhealth insurance is paid by Employersemployers?*, PEOPLEKEEP (Oct. 3, 2022), http://www.peoplekeep.com/blog/what-percent-of-health-insurance-is-paid-by-employers [http://perma.cc/R6S3-K499] (observing on average, in 2021 employers paid eighty-three percent of health insurance premiums and employees paid the remaining seventeen percent, corresponding to $6,440 per year and $1,299 per year respectively for single coverage).

267 *See The Challenge of Health Care Fraud*, *supra* note 264; *see also* Allen, *supra* note 261.

268 *See* Richard C. Mason, *The False Claims Act and Professional Liability Insurance Policies*, 28 PRO. LIAB. UNDERWRITING SOC'Y J. 1, 1 (2015).

269 *See id.*

270 *See The Challenge of Health Care Fraud*, *supra* note 264.

these offenses.[271] This translates directly into consumer losses because, as discussed above, increasing the amount billed to patients' health insurance companies results in increased insurance premiums and coverage limits.[272]

These two problems might seem at odds with each other—the first seemingly advocating to lower FCA liability, and the latter to increase it. Nonetheless, this tension can be reconciled. Accuracy is key. Going too far would over-impose liability and result in excessive professional liability insurance payouts, where cost shifting would ultimately place the burden on consumers.[273] Not doing enough will result in a lax system ineffective at rooting out and deterring fraud—fraud that may ultimately take money out of consumers' pockets.[274] While our current court systems are not achieving this needed accuracy when it comes to healthcare rulings,[275] specialized health courts could.[276]

CONCLUSION

The Third Circuit's perception of a deep circuit split in physician liability under the FCA, and its corresponding erroneous representation of the existing caselaw, demonstrates the need for specialized review of all federal healthcare cases, including FCA issues, and not just those already addressed in the Medicare appeals system. This need for reform is further demonstrated by the clogged court system which could be relieved by increased efficiency of expert judges, the medical community's history of advocating for health courts due to discontent with the current system, and the financial considerations at play on the government and consumer level.

Congress should answer this call to action by creating an administrative agency as an expansion upon the existing Medicare Appeals Council to handle all civil federal healthcare cases. The healthcare expert judges employed by these courts would issue more accurate rulings and remedy efficiency concerns, ultimately benefiting medical providers, patients, and the government alike.

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271 *See* Katherine Drabiak & Jay Wolfson, *What Should Health Care Organizations Do to Reduce Billing Fraud and Abuse?*, AM. MED. ASS'N J. OF ETHICS (Mar. 2020), http://journalofethics.ama-assn.org/article/what-should-health-care-organizations-do-reduce-billing-fraud-and-abuse/2020-03 [http://perma.cc/4A7C-CM88].

272 *See The Challenge of Health Care Fraud*, *supra* note 264.

273 *See supra* notes 261–268 and accompanying text.

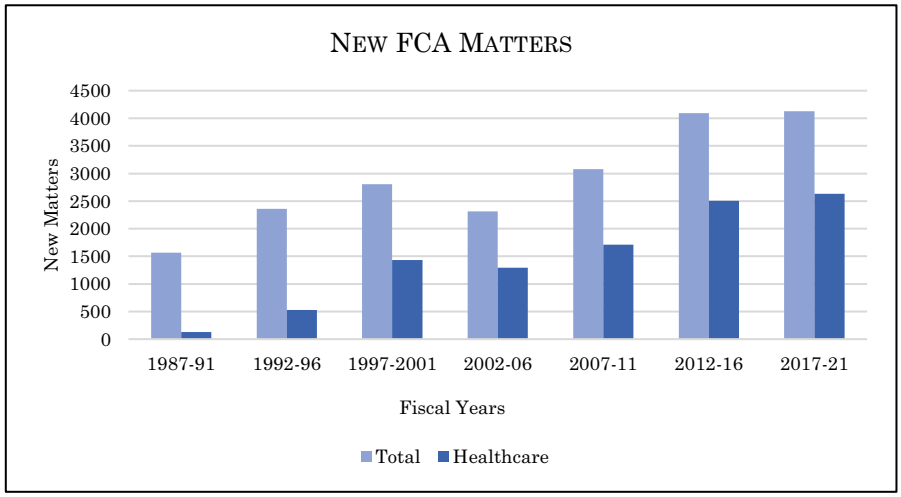
274 *See supra* notes 266–272 and accompanying text.

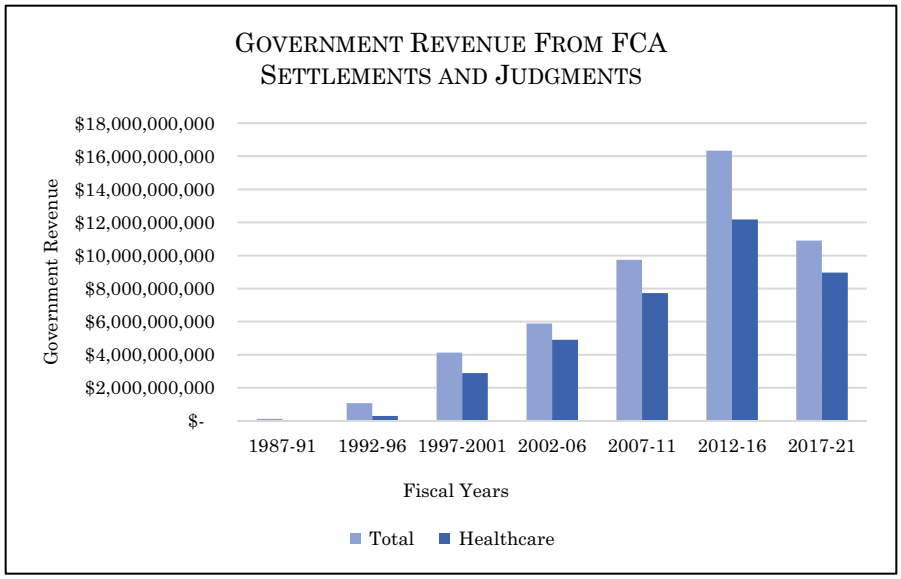
275 *See* discussion *supra* Part I.C.

276 *See* discussion *supra* Part II.C(i).

APPENDIX I: FCA CASES AND RECOVERIES ATTRIBUTABLE TO HEALTHCARE

The statistics below were obtained from the Civil Division, U.S. Department of Justice's Fraud Statistics – Overview: October 1, 1986 - September 30, 2021,[277] and Fraud Statistics – Health and Human Services: October 1, 1986 - September 30, 2021.[278]





277 *See Fraud Statistics – Overview: October 1, 1986 –- September 30, 2021*, *supra* note 35.

278 *See Fraud Statistics – Health and Human Services: October 1, 1986 –- September 30, 2021*, *supra* note 252.