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Reflections on Certification, Interpretation, and the Quest for Fraud that "Counts" Under the False Claims Act

Joan H. Krause
University of North Carolina School of Law, jhkrause@email.unc.edu

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REFLECTIONS ON CERTIFICATION, INTERPRETATION, AND THE QUEST FOR FRAUD THAT "COUNTS" UNDER THE FALSE CLAIMS ACT

*Joan H. Krause**

The False Claims Act ("FCA") is the primary tool used by the federal government to stem fraudulently obtained payments. The June 2016 Supreme Court opinion in Universal Health Services, Inc. v. United States ex rel. *Escobar upheld the applicability of the FCA to a defendant who falsely implied that it was in compliance with health care licensure and supervision requirements in order to obtain Medicaid payment. In a unanimous opinion, the Justices affirmed the validity of this "implied certification" theory but warned that misrepresentations must meet the demanding standard of being "material" to the government's decision to pay. Without citing to the extensive appellate case law, and relying little on the statutory text, the Justices declined to set bright-line rules, opting instead for a fact-intensive, common-sense approach to determining materiality. However, the opinion left open many questions regarding the definition of materiality, as well as the issue of which of the vast number of possible misrepresentations should be encompassed within FCA liability.*

This Article aims to provide guidance regarding the types of misrepresentations that should suffice for FCA liability under implied certification. Given the sheer number of regulatory requirements applicable to the federal health care programs, it is difficult to argue that each and every instance of noncompliance should be actionable under the FCA. Ultimately, while the implied certification theory survived Escobar*, without more definitive guidance the lower courts will be left to sort out confusing, highly fact-specific cases.*

* Dan K. Moore Distinguished Professor of Law, University of North Carolina School of Law; Professor of Social Medicine (Secondary Appointment), University of North Carolina School of Medicine; Adjunct Professor, Health Policy & Management, Gillings School of Global Public Health. I am grateful to Neal Fowler, Robert Leandro, Stephen Obermeier, James Wyatt, and the participants in the Parker Poe 2016 Health Care Symposium and the 2017 American Society of Law, Medicine & Ethics Health Law Professors Conference for their thoughts on these issues. Research assistance was provided by Ariana Johnson, Madisyn Klairter, and Lenore Livingston. All errors are mine alone.

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"Better to remain silent and be thought a fool than to speak out and remove all doubt."

– Abraham Lincoln[1]

I. INTRODUCTION

Sometimes, we lie when we speak; sometimes, we lie when we don't. Striking the right balance was the essence of the 2016 Supreme Court opinion in *Universal Health Services, Inc. v. United States* ex rel. *Escobar*,[2] which challenged the applicability of the Civil False Claims Act ("FCA")[3] to situations in which a defendant falsely implies that it has complied with regulatory requirements to obtain government payment.[4] *Escobar* was brought by the parents of a young woman who died after receiving Medicaid-covered mental-health treatment from a Massachusetts clinic that failed to satisfy state licensing and supervision rules. Arguing that the clinic's Medicaid claims contained implied representations that it was in full compliance with the regulations, the parents alleged

1. THE YALE BOOK OF QUOTATIONS 466 (Fred R. Shapiro, ed. 2006) (citations omitted).
2. 136 S. Ct. 1989 (2016).
3. 31 U.S.C. § 3729 (2012).
4. *Escobar*, 136 S. Ct. at 1993.

that those claims were fraudulent under the FCA.[5] The district court granted the clinic's motion to dismiss,[6] but the First Circuit reversed and remanded,[7] setting forth a broad implied certification theory at odds with decisions in several other Circuits.[8]

In a unanimous opinion written by Justice Thomas, the Supreme Court affirmed the validity of the implied certification theory: in situations where a defendant "makes specific representations about the goods or services provided, but knowingly fails to disclose . . . noncompliance with a statutory, regulatory, or contractual requirement[,] . . . liability may attach if the omission renders those representations misleading."[9] Warning that such misrepresentations must meet the "demanding" standard of being "material to the Government's payment decision," however, the Court nonetheless reversed and remanded because the First Circuit had applied an impermissibly broad test.[10] While both parties were quick to claim victory, ultimately the decision is likely to satisfy no one and to raise as many questions as it answers, particularly with regard to federal health care programs such as Medicare and Medicaid.

Ironically—or perhaps fittingly—for a case that was expected to define the contours of fraudulent omissions, the opinion was notable as much for what it did *not* say as for what it did. Without citing to the extensive appellate case law on either FCA implied certification or materiality, and relying little on the statutory text itself, the Justices drew primarily on common-law concepts.[11] They explicitly declined to set bright-line rules—refusing, for example, to decide whether the definition of materiality contained in a separate section of the FCA should apply to implied certification as well.[12] Instead, the Justices opted for a fact-intensive, commonsense approach more reminiscent of Justice Stewart's famous proclamation regarding pornography ("I know it when I see it.").[13] Questions were answered not by doctrine but rather by a litany of

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5. *Id.*

6. United States *ex rel.* Escobar v. Universal Health Servs., Inc., No. 11-11170-DPW, 2014 WL 1271757, at *13 (D. Mass., Mar. 26, 2014).

7. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 780 F.3d 504, 508 (1st Cir. 2015).

8. *E.g.*, United States *ex rel.* Badr v. Triple Canopy, Inc., 775 F.3d 628, 636 (4th Cir. 2015) (holding that the government "pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'"); United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711–12 (7th Cir. 2015) (declining to adopt the "so-called doctrine of implied false certification"); United States *ex rel.* Davis v. District of Columbia, 793 F.3d 120, 124 (D.C. Cir. 2015) (holding that to "establish knowledge on the basis of an implied false certification, [Appellant] had to prove that [Appellee]…knew both that it violated a legal obligation and that its compliance was a condition of payment."); Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001) (holding that implied certification should apply only in limited circumstances).

9. *Escobar*, 136 S. Ct. at 1995.

10. *Id.* at 1996.

11. *Id.* at 1999.

12. *Id.* at 2002.

13. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand de-

examples, virtually guaranteeing that befuddled litigants would need to seek clarity through future litigation.

This Article seeks to shed light on the fundamental question underlying this litigation: what types of fraud should "count" under the FCA? The Supreme Court long ago warned that the FCA "was not designed to reach every kind of fraud practiced on the Government."[14] Yet, the vision of actionable harm emerging from the case law is broad, and the Court later noted that the statute reaches "all fraudulent attempts to cause the Government to pay out sums of money."[15] The problem arises because in the federal health care program context, as long as items or services were actually provided, a claim can be considered implicitly false or fraudulent only by reference to the voluminous statutes, regulations, and contract provisions that govern program participation.[16] Given the sheer quantity of these requirements, it is difficult to argue that each and every instance of noncompliance should create extensive FCA liability.[17] Yet neither the statutory language, nor nearly 150 years of case law, provides a coherent mechanism for distinguishing irrelevant noncompliance from more significant misrepresentations that go to the heart of what the government believes it is buying.

This Article situates the implied certification debate, and *Escobar* itself, within the historical context of the FCA as applied to the health care industry. Part II analyzes the development of implied certification, from its roots in traditional government contracting cases to its modern revival as a tool to combat health care fraud. Part III addresses a number of issues left open—or raised for the first time—by the *Escobar* opinion, including: 1) whether there is a coherent test for implied certification; 2) when a misrepresentation is considered to be material; 3) which elements of the FCA are subject to a materiality analysis; 4) the vantage point from which materiality should be assessed; 5) the timing of the materiality assessment; and 6) the practical impact of these debates, particularly on the pressure to settle. Ultimately, *Escobar* represents a lost opportunity to confront the challenges posed by implied certification, a failing that undoubtedly will lead to more litigation in the future.

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scription [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

14. United States v. McNinch, 356 U.S. 595, 599 (1958).

15. United States v. Neifert-White Co., 390 U.S. 228, 233 (1968).

16. *Id.*

17. Indeed, one court recently estimated that the Code of Federal Regulations sections governing the federal health care programs comprise over 175,000 pages, and the Centers for Medicare and Medicaid Services ("CMS") website contains more than 37,000 guidance documents. *See* Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969–70 (10th Cir. 2016) (internal citations omitted).

II. DIMENSIONS OF FALSITY AND FRAUD UNDER THE FCA

Implied certification did not spring full-blown, Athena-like, from the brow of the First Circuit. While the term may be of recent vintage, the theory is based on a longstanding line of cases applying the FCA to defendants who falsely claim entitlement to government benefits. To appreciate that context, it is important to understand how these FCA theories first developed.

A. The FCA

It may be surprising to recognize that today's powerful FCA provisions are rooted in the Civil War, when the "Informer's Act" was passed to prohibit what would now be considered rather mundane forms of fraud against the Union Army: selling sick mules to Union troops, for example, or substituting sand for gunpowder.[18] The Act has been amended several times, but the focus remains on falsely demanding (or retaining) payment from the government. The basic *false claims* provision, currently found in 31 U.S.C. § 3729(a)(1)(A), prohibits defendants from knowingly presenting, or causing to be presented, "a false or fraudulent claim for payment or approval"; the accompanying *false records/statements* prohibition in § 3729(a)(1)(B) applies when the defendant "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[19] Among other things, the law also prohibits conspiracies, and "reverse" false claims that understate a defendant's obligation to (re)pay the government.[20]

"Knowledge" under the FCA includes not just actual knowledge, but also deliberate ignorance or reckless disregard of falsity.[21] Since the 1990s, FCA violations have been subject to civil penalties of $55,000 to $11,000 per claim plus three times the government's damages; under a provision of the Bipartisan Budget Act of 2015, however, penalties assessed after August 1, 2016, rose to between $10,781 and $21,563 per claim.[22] Combined with the threat of exclusion from federal health care

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18. The original legislation was enacted as the Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. *See generally* S. REP. NO. 99-345, at 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273; Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act*, 36 GA. L. REV. 121, 129 (2001).

19. 31 U.S.C. §§ 3729(a)(1)(A)–(B) (2012).

20. *Id.* §§ 3729(a)(1)(C)–(G). The Fraud Enforcement and Recovery Act of 2009 ("FERA") made several substantive changes to the FCA, adding the false records materiality requirement, broadening the definition of a claim, expanding the conspiracy prohibition, and applying reverse false claims liability to the retention of overpayments. Pub. L. No. 111-21, 123 Stat. 1617 (2009). The Patient Protection and Affordable Care Act ("ACA") further clarified the relationship between the FCA and payments made in connection with the new Health Care Exchanges, and provided that the knowing retention of an overpayment for more than sixty days after identification may be a reverse false claim. Pub. L. No. 111-148, §§1313(a)(6) & 6402(a), 124 Stat. 119, 185, 753 (2010).

21. 31 U.S.C. § 3729(b) (2012).

22. *Id.* § 3729(a)(1); Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015); 28 CFR § 85.3(a)(9) & 85.5 (2016).

programs, these massive penalties are the key reason health care providers often settle rather than defend against FCA allegations in court.

The broad reach of the FCA is due in part to the law's *qui tam* provision, which permits a private person ("relator") to sue on the government's behalf in return for a portion of any proceeds—15–25% if the government intervenes, 25–30% if not.[23] After amendments in 1986 modernized the Act and made it more lucrative to pursue *qui tam* actions, the number of health care-related FCA suits grew exponentially: two-thirds of the *qui tam* suits filed in 2015 raised allegations of fraud in the federal health care programs, compared to only 10% in 1987.[24] The *qui tam* mechanism ensures that FCA cases will be filed by a wide range of individuals and entities other than federal prosecutors, including competitors, employees, and patients or their representatives (such as Yarushka Rivera's parents).

B. Dimensions of Falsity and Fraud

While the FCA contains no definition of the terms "false or fraudulent," the Supreme Court has held, both in *Escobar* and previous cases, that the statute incorporates common-law concepts of fraud.[25] Historically, most health care FCA cases involved straightforward, "factually false" claims requesting payment for more expensive categories of care than were delivered or for services that were never provided.[26] Over time, both federal prosecutors and *qui tam* relators began to invoke the law against "legally false" claims as well, where items or services were provided but the claimant had also violated an underlying legal requirement.[27] Under this theory, it is the defendant's untruthful *certification* of compliance with a statute, regulation, or contractual provision—rather than a misrepresentation about the item or service itself—that establishes falsity and fraud. Prosecutors and relators have leveraged the legal fal-

23. 31 U.S.C. § 3730(d) (2012). The intervention decision may be lengthy. *See, e.g.*, United States *ex rel.* Franklin v. Parke-Davis, 210 F.R.D. 257, 258 n.3 (D. Mass. 2002) ("[T]his action was filed in 1996 and the government has still not decided whether to intervene. Molasses moves more quickly.").

24. *See* DOJ, FRAUD STATISTICS: OVERVIEW (Nov. 23, 2015, 11:56 AM), https://www.justice.gov/opa/file/796866/download. For an empirical analysis of *qui tam* litigation, see generally David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014); David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013) [hereinafter Engstrom, *Public Regulation of Private Enforcement*].

25. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1999 (2016) (citing Neder v. United States, 527 U.S. 1, 22 (1999)). For an argument situating the FCA within contract theory, see Michael Holt & Gregory Klass, *Implied Certification Under the False Claims Act*, 41 PUB. Cont. L.J. 1, 3 (2011) (arguing that the FCA "is designed to enable the Government to contract for information about performance—information for which the Government has a special need").

26. *See, e.g.*, United States *ex rel.* Conner v. Salina Regional Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008) (describing "a run-of-the-mill 'factually false' case"); United States v. Krizek, 859 F. Supp. 5 (D.D.C. 1994) (alleging that psychiatrist billed for more extensive—and more expensive—types of therapy than he provided).

27. *Conner*, 543 F.3d at 1217.

sity theory to file *qui tam* suits based on violations of a myriad of legal provisions that do not themselves provide private rights of action.[28]

The federal courts have recognized two distinct theories of legal falsity. *Express certification* applies when a defendant makes an explicitly false certification of compliance with an underlying program condition, such as by signing a false certification statement on an invoice.[29] In the absence of an explicit misrepresentation, some courts have been willing to *imply* that claims for government payment contain similar, unstated assurances of compliance.[30] Under this theory of *implied certification*, the "act of submitting a claim for reimbursement itself implies compliance with governing federal rules."[31] Where express certification is by definition limited to those provisions with which a defendant must affirmatively certify compliance before being paid, implied certification extends to the defendant's *silence* regarding a failure to comply with thousands of additional program conditions that are not reflected in any explicit compliance statement.

The roots of implied certification can be found in a longstanding line of cases applying the FCA to defendants who made false representations in order to secure government contracts. Often characterized as "false negotiation" or "fraud-in-the-inducement," the theory posits that an initial falsity can taint subsequent claims for payment, even if those claims are for legitimate goods or services.[32] The tainted-claims theory, in turn, evolved from bid-rigging cases, where it was feared that collusion might produce artificially high or low bids that would fraudulently entitle the winning bidder to a future stream of government revenue.[33] This theory soon was extended to situations such as the submission of false price or cost information in connection with securing a government contract, misrepresentations regarding an applicant's ability to perform the contract terms, and misrepresentations of eligibility for restricted government programs.[34] Indeed, the Senate sponsors of the 1986 FCA amendments were clear that "each and every claim submitted under a contract,

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28. *See* Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1392–1409 (2002) [hereinafter Krause, *"Promises to Keep"*].

29. *See Conner*, 543 F.3d at 1217–18. An explicitly false representation of compliance, such as a false certification on a claim form, should be considered a false record/statement under 31 U.S.C. § 3729(a)(1)(B) (2012).

30. *See* Krause, *"Promises to Keep," supra* note 28, at 1377.

31. Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001); *see* also Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1995 (2016) ("According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim 'false or fraudulent' under § 3729(a)(1)(A).").

32. Krause, *"Promises to Keep," supra* note 28, at 1373–76. *See generally* Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 IND. L.J. 525 (2001).

33. *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543–44 (1943) (alleging collusive bidding).

34. *See, e.g.*, United States *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494, 499–500 (8th Cir. 2016) (citing examples of fraudulent inducement).

loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct . . . constitutes a false claim."[35]

Implied certification developed as an offshoot of fraudulent inducement focusing specifically on false representations of *eligibility* for government programs.[36] The clearest example occurs when a defendant untruthfully represents that it has satisfied *initial* eligibility criteria; it is but a small step, however, to extend the theory to an implied promise of *continued* compliance with program requirements as well. The major case in this area was the 1994 decision in *Ab-Tech Construction Inc. v. United States*, in which the Court of Federal Claims awarded the government statutory penalties against a minority-owned small business that had failed to obtain Small Business Association approval to engage in business with a nonminority-owned subcontractor.[37] Finding the defendant's subsequent claims to be false, the court stated that "[t]he payment vouchers represented an *implied certification by Ab-Tech of its continuing adherence* to the requirements for participation in the program."[38] By reading an implied certification into *all* of the claims submitted, the *Ab-Tech* Court linked the defendant's regulatory compliance to its *continued* program eligibility—simultaneously grounding the decision in FCA precedent while opening the door that led, twenty years later, to *Escobar*.

The evolution in health care fraud cases resembled that in government contracting. The first regulatory targets were physician-anti-referral restrictions, followed by quality-of-care requirements.[39] In the early 1990s, *qui tam* relators brought a spate of tainted claims suits based on allegations that health care providers had violated anti-referral provisions (such as the Medicare & Medicaid Anti-Kickback Statute and "Stark Law" self-referral prohibition) in connection with services covered for by Medicare, Medicaid, and other federal health care programs.[40] As in *Ab-Tech*, this alleged fraud arose during the provision of

35. S. REP. NO. 99–345, at 9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

36. Indeed, the theories are so close that commentators at times disagree as to whether they can be distinguished at all. *Compare* Krause, *"Promises to Keep," supra* note 28, at 1375 n.51 (arguing that "it is preferable to treat misrepresentations used to gain initial entitlement to a government program as tainted claims, reserving the false certification category for cases involving misrepresentations made to obtain subsequent payment"), *with* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (4th ed., 2016) (CCH) § 1.6 (including with false certifications those situations in which "parties avail themselves of benefits of some type, such as loan guarantees or agricultural supports, through false statements that create eligibility where otherwise it would not exist.").

37. 31 Fed. Cl. 429, 435 (Fed. Cl. 1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

38. *Id.* at 434 (emphasis added); *see also id.* ("In short, the Government was duped by Ab-Tech's active concealment of a fact vital to the integrity of that program. The withholding of such information—information critical to the decision to pay—is the essence of a false claim.").

39. *See* Krause, "*Promises to Keep," supra* note 28, at 1391–1406.

40. *See* 42 U.S.C. §§ 1320a-7b(b) (Anti-Kickback Statute), 1395nn (Ethics in Patient Referrals Act, *i.e.*, the "Stark Law," nicknamed for its sponsor Rep. Fortney "Pete" Stark); *see, e.g.*, United States *ex rel.* Roy v. Anthony, 914 F. Supp. 1504, 1506–07 (S.D. Ohio 1994) (relator "could produce evidence that would show that the kickbacks allegedly paid to the defendant physicians somehow tainted the claims for Medicare.").

services, rather than in the initial application to join the programs: "[u]nder this new theory of liability, the [] anti-kickback allegation renders a subsequent Medicare claim 'false' no matter how medically necessary and competently administered the services were, or how bona fide the claim for payment actually is."[41] While at first received favorably by courts, the theory soon foundered as applied to the Anti-Kickback Statute because it was unclear whether services provided in violation of the statute automatically were ineligible for payment.[42]

Rather than relying on the argument that regulatory violations *per se* tainted subsequent claims, other relators began to invoke implied certification, alleging that claims "were nonetheless fraudulent because by submitting the claims, Defendants implicitly certified that they had complied with all statutes, rules, and regulations governing the Medicare Act, including federal anti-kickback and self-referral statutes."[43] With *Ab-Tech* as a model, these cases also generated some initial success; even while questioning the tainted claims approach, the Fifth Circuit approved of express certification in cases where "the government has conditioned payment of a claim upon certification of compliance."[44] As with tainted claims, however, certification cases alleging Anti-Kickback violations had to confront the question of whether compliance with the statute truly was a precondition to payment.[45]

By the late 1990s, relators and federal prosecutors had begun to extend implied certification beyond the anti-referral context to reach broader allegations of substandard care. Quality-of-care cases are attractive because of the wide variety of quality-related requirements applicable to the federal health care programs, ranging from staffing ratios in nursing homes to detailed laboratory and equipment testing standards. Moreover, as a litigation strategy, it is far more compelling to depict patients—rather than a faceless bureaucratic agency—as victims of the fraud. Many of these quality provisions are "conditions of participation,"

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41. Lisa Michelle Phelps, Note, *Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003, 1005 (1998) (internal citations omitted).

42. *See* United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997). At that time, the Anti-Kickback Statute differed markedly from the Stark Law in this respect: while the Anti-Kickback Statute required proof of *mens rea* and did not list denial of payment as a potential penalty, the Stark Law was a strict liability statute under which violations explicitly were subject to payment denial or refund. *Compare* 42 U.S.C. §§ 1320a-7b(b) (Anti-Kickback Statute), *with id.* § 1395nn(g)(1)–(2) (Stark Law penalties). *See generally* John T. Boese & Beth C. McClain, *Why* Thompson *is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1 (1999). The Affordable Care Act closed this loophole, clarifying that a claim resulting from a violation of the Anti-Kickback Statute "constitutes a false or fraudulent claim" under the FCA. 42 U.S.C. § 1320a-7b(g) (2012).

43. United States *ex rel.* Pogue v. Am. Healthcorp., Inc., 914 F. Supp. 1507, 1509 (M.D. Tenn. 1996).

44. *Thompson*, 125 F.3d at 902.

45. United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp, 20 F. Supp. 2d 1017, 1041–42 (S.D. Tex. 1998) (relying, on remand, on affidavit from Medicare official stating that payment was dependent on truthful completion of compliance statement on Cost Report); Krause, *"Promises to Keep," supra* note 28, at 1398–99.

meaning that providers will need to bring themselves back into compliance if they want to continue to be paid for treating federal health care program patients.[46] Rather than nonpayment, however, most violations are subject to a set of graduated administrative sanctions, such as a corrective action plan or payment of civil monetary penalties.[47] Particularly where disputes concern technical quality standards, courts have been reluctant to allow FCA implied certification allegations to proceed.[48] In contrast, cases alleging systemic quality-of-care violations, such as pervasive understaffing or unsafe facilities, have had better success.[49] For many courts, the distinguishing factor has remained the same as in the government contracting context: whether compliance with the statute or regulation is a *condition for payment* of the claim.[50] As the cases progressed, however, that criterion would prove both elusive and controversial.

*C. Pre-*Escobar *Approaches to Implied Certification*

Twenty years after *Ab-Tech*, it was clear that in many Circuits implied certification was a viable theory extending FCA liability from misrepresentations about initial eligibility to implied promises of continued compliance with program criteria.[51] The question, of course, was *which* program requirements: the totality of *all* regulations applying to the relevant federal program, including those that subjected the defendant only to administrative sanctions, or only those where "adherence to the statutory or regulatory mandate lies at the core of [the] agreement with the Government?"[52] In short, what types of noncompliance were important enough to "count" under the FCA?

In general, the courts adopting implied certification have taken one of two broad approaches to defining the universe of actionable violations. The Second Circuit, in an oft-cited 2001 opinion, limited implied

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46. *See, e.g.*, 42 C.F.R. pt. 482 (2016) (listing conditions of participation for hospitals).

47. *See, e.g.*, 42 C.F.R. § 488.406 (2016).

48. *See, e.g.*, Mikes v. Straus, 274 F.3d 687, 699–701 (2d Cir. 2001) (rejecting allegations that claims submitted after defendants failed to calibrate spirometry equipment in accordance with one particular set of standards violated the FCA).

49. *See, e.g.*, United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149, 1153 (W.D. Mo. 2000) (alleging that a nursing home was "so severely understaffed that it could not have possibly" provided the required care); United States *ex rel.* Aranda v. Cmty. Psychiatric Ctrs., 945 F. Supp. 1485 (W.D. Okla. 1996) (alleging that psychiatric hospital had failed to provide a "reasonably safe" environment for patients). These cases may be successful, in part, because they go beyond certification and tainted claims to allege basic violations of the FCA: billing for a level of services that were not provided, and realistically could not have been. *See* Krause, *"Promises to Keep," supra* note 28, at 1404–05.

50. *See, e.g.*, *Mikes*, 274 F.3d at 700 (limiting implied certification to situations in which compliance expressly is required as a condition of payment).

51. Prior to *Escobar*, only the Seventh Circuit had expressly declined to recognize the theory. United States v. Sanford-Brown Ltd., 788 F.3d 696, 711–12 (7th Cir. 2015); *see also* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1998–99 (2016) (recognizing Seventh Circuit's rejection).

52. United States *ex rel.* Mikes v. Straus, 84 F. Supp. 2d 427, 435 (S.D.N.Y. 1999); *see also* Monica P. Navarro, *Materiality: A Needed Return to Basics in False Claims Act Liability*, 43 U. MEM. L. REV. 105, 110 (2012) ("[T]he factual or legal falsity must pertain to something that is important to or goes to the essence of that for which the government agreed to pay.").

certification to violations of statutes or regulations clearly identified as *express conditions of payment*.[53] At the other end of the spectrum, the First Circuit in *Escobar* focused instead on the *materiality* of the misrepresentation to the payment decision, regardless of whether compliance was expressly required for payment.[54] To add to the confusion, courts often have referred to the two approaches using similar language; indeed, the distinctions appear so intertwined and interdependent, and are at times interpreted in ways so circular, so as to nearly collapse.[55] Yet the theories differ dramatically, both in theory and in function. The confusion reached the breaking point in 2015, with no fewer than four major federal appellate courts considering the validity of implied certification, setting up the showdown in *Escobar*.[56]

1. Preconditions to Payment

Recognizing that government programs such as Medicare and Medicaid impose thousands of conditions on participants, some mission-critical and others merely clerical, the Second Circuit in *United States* ex rel. *Mikes v. Straus* adopted a widely cited rule limiting implied certification to violations of requirements that are clear prerequisites to government payment: "[l]iability under the Act may properly be found therefore when a defendant submits a claim for reimbursement while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant."[57] The *Mikes* approach has been described

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53. *Mikes*, 274 F.3d at 700.

54. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 780 F.3d 504, 512–13 (1st Cir. 2015), *vacated*, 136 S. Ct. 1989 (2016).

55. *See, e.g.*, Holt & Klass, *supra* note 25, at 22–23, 30–32 (describing an alternate "certification-condition" approach, used by some courts, that appears to conflate the express and implied certification theories). *Cf.* John T. Boese, *The Past, Present, and Future of "Materiality" Under the False Claims Act*, 3 ST. LOUIS U.J. HEALTH L. & POL'Y 291, 305 (2010) (arguing that, regardless of the standard, "[m]ost rational courts are not going to allow a miscarriage of justice.").

56. *See, e.g.*, *Escobar*, 780 F.3d at 512 (adopting "material precondition of payment" approach); United States *ex rel*. Badr v. Triple Canopy, Inc., 775 F.3d 628, 636 (4th Cir. 2015) (applying theory to the knowing failure to comply with a material contractual requirement); United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711 (7th Cir. 2015) (rejecting theory entirely as applied to "the thousands of pages of federal statutes and regulations incorporated by reference into [certain participation agreements]"); United States *ex rel.* Davis v. District of Columbia, 793 F.3d 120, 124–25 (D.C. Cir. 2015) (explicitly limiting theory to compliance with clear conditions of payment). Soon after deciding *Escobar*, the Court also remanded *Triple Canopy* and *Sanford-Brown* for further proceedings, along with another 2015 case construing materiality in the context of fraudulent inducement. *See* United States *ex rel.* Miller v. Weston Educ., Inc., 784 F.3d 1198, 1204 (8th Cir. 2015), *vacated and remanded*, 136 S. Ct. 2505 (2016); United States *ex rel.* Nelson v. Sanford-Brown, Ltd., 136 S. Ct. 2506 (2016) (granting cert. and vacating judgment); Triple Canopy, Inc. v. United States *ex rel.* Badr, 136 S. Ct. 2504, 2504 (2016) (granting *cert.* and vacating judgment). Subsequently, the appellate courts have affirmed the original decisions in all four cases. United States *ex rel.* Badr v. Triple Canopy, Inc., 857 F.3d 174 (4th Cir. 2017); United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 112 (1st Cir. 2016); United States v. Sanford-Brown, Ltd., 840 F.3d 445, 448 (7th Cir. 2016); United States *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494, 508 (8th Cir. 2016).

57. *Mikes*, 274 F.2d at 700; *see also* Susan C. Levy et al., *The Implied Certification Theory: When Should the False Claims Act Reach Statements Never Spoken or Communicated, But Only Implied?*, 38 PUB. CONT. L.J. 131, 147–49 (2008) (arguing that requirement must be found in a binding law or regulation, rather than nonbinding government guidance).

as a "compliance-condition rule,"[58] a "condition precedent to payment,"[59] and a "precondition to payment" approach.[60] Regardless of the moniker, the import is clear: before imposing liability, the court must find that payment of the claim was *contingent* on the defendant's compliance with the underlying provision.

Two aspects of these payment-contingent cases are notable. First, before *Escobar* ultimately rejected the requirement,[61] the *Mikes* approach demanded not only that the violation be a *de facto* condition of payment, but also that the relationship be spelled out explicitly in the underlying law or regulations: "implied false certification is appropriately applied only when the underlying statute or regulations upon which the plaintiff relies *expressly* states the provider must comply in order to be paid."[62] The *Mikes* court grounded its analysis in federalism, concerned that permitting *qui tam* actions based on alleged violations of broad and vague medical standards "would promote federalization of medical malpractice, as the federal government or the *qui tam* relators would replace the aggrieved patient as plaintiff," and warning that "the courts are not the best forum to resolve medical issues concerning levels of care."[63] The *Mikes* approach would stand in marked contrast to those decisions focusing instead on materiality, which ultimately prevailed in *Escobar*.

Second, conditions of *payment* are distinct from the conditions of *participation* mentioned above, which set out criteria governing participation in federal programs.[64] Although there are similarities to the traditional false negotiation or fraud-in-the-inducement theories, conditions of participation usually focus on the continuing eligibility of a provider who did not enter the program under false pretenses. The hallmark of a condition of participation is that violations are subject to a series of esca-

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58. Holt & Klass, *supra* note 25, at 22.

59. Rob Sneckenberg, *The Importance of a Condition Precedent to Payment Requirement for Implied Certification Liability Under the Civil False Claims Act*, J. CONT. MGMT., Summer 2012, at 76.

60. *See, e.g.*, Benjamin A. Dacin, *Legal Materiality and the Implied Certification Theory of the False Claims Act: Why Courts Have Rejected the Traditional Standards of Materiality in Favor of a Precondition to Payment Requirement*, 17 MICH. ST. U.J. MED. & L. 31, 33 (2012). Dacin describes the key inquiry as "whether the government could use noncompliance with that particular statute or regulation as a defense to an action for payment by the prospective payee." *Id.* at 54.

61. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2001–02 (2016).

62. *Mikes*, 274 F.3d at 700 (emphasis in original); *see also* United States *ex rel.* Wilkins v. United Health Group, Inc., 659 F.3d 295, 309–10 (3d Cir. 2011) (finding no provisions that conditioned payment on compliance); United States *ex rel.* Chesbrough v. VPA, P.C., 655 F.3d 461, 468 (6th Cir. 2011) (relators failed to allege that defendant "was expressly required to comply with [specific] standards as a prerequisite to payment of claims."). The "express condition of payment" requirement is somewhat confusing, as it sounds similar to the separate and distinct "express certification" theory of falsity described above. Adding to the confusion, *Mikes* actually involved an express certification on a claim form, but one that did not address the misrepresentation in question. *Mikes*, 274 F.3d at 697. The focus of the two concepts is entirely different, however: express certification focuses on the *defendant's statements* of compliance, while the express condition of payment requirement looks to the *statute and regulations* to identify payment preconditions.

63. *Mikes*, 274 F.3d at 700.

64. *See, e.g.*, *id.* at 701 (finding that statutory provision identified by the relator was "directed at the provider's continued eligibility in the Medicare program, rather than any individual incident of noncompliance" and did "not explicitly condition payment upon compliance").

lating administrative remedies, rather than simple denial of payment.[65] As the Tenth Circuit explained:

> Conditions of participation, as well as a provider's certification that it has complied with these conditions, are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program . . . . Conditions of payment are those which, if the government knew they were not being followed, might cause it to actually refuse payment.[66]

The varying penalties for violating conditions of participation reflect the fact that "periodic noncompliance is anticipated and built into the administration of" many federal programs.[67] For example, while nursing homes are expected to be in "substantial compliance" with Medicare and Medicaid regulations, they often are faulted for failing to satisfy one or more of the detailed regulations that govern everything from food storage temperatures to square footage.[68] Unless patients are found to be in "immediate jeopardy," however, the facility generally is given a chance to correct the problem while remaining in (and being paid by) the program, subject to penalties that range from fines to corrective action plans to exclusion, depending on the severity and pervasiveness of the issues.[69]

Some would argue that this is a distinction without a difference: if a violation leads to the defendant's removal from the program, the defendant obviously will no longer be eligible for payment. The *Escobar* Court made just that point, rejecting the express condition of payment criterion because it would be nonsensical if "misrepresenting compliance with a condition of eligibility to even participate in a federal program when submitting a claim" could not be actionable.[70] Yet this ignores the fact that the structure of escalating administrative penalties is designed to bring participants into compliance with program requirements, not to terminate the relationship at the first sign of trouble. Why? Because bringing providers into compliance furthers program aims, particularly for federal programs designed to assist disadvantaged populations. In some situations a quick termination might be harmful; nursing-home patients, for example, are notoriously vulnerable to "transfer trauma" when they are forced to relocate, sometimes ending up in facilities far from

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65. *See, e.g.*, *id.* at 702 (limiting implied certification to conditions of payment, and refusing to apply the theory to allegations that defendants' failure to properly calibrate medical testing equipment rendered tests and resulting claims false).

66. United States *ex rel.* Conner v. Salina Regional Health Ctr., Inc., 543 F.3d 1211, 1220 (10th Cir. 2008).

67. Malcolm J. Harkins, III, *The Ubiquitous False Claims Act: The Incongruous Relationship Between a Civil War Era Fraud Statute and the Modern Administrative State*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 131, 153, 173 (2007) ("[M]any statutes, including several provisions of the Medicare Act, give the agency power to waive a contractor's liability or continue payment in certain circumstances, despite apparent noncompliance with regulatory standards.").

68. *Id.* at 161.

69. *See, e.g.*, 42 C.F.R. § 488.402 (2016); Harkins, *supra* note 67, at 160–61 (discussing nursing home process).

70. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016).

their family and friends.[71] This also is true, for example, in the federal housing-assistance context: payments may be made despite the fact that a property is out of compliance, as long as the owner is working to correct the deficiencies.[72] As one district court noted, "[t]he fact that a [payment] is intended to be used as a corrective tool indicates that the property for which [payment] is sought is not expected to be in perfect shape at the time a [claim] is filed."[73]

The range of penalties available for breaching a condition of participation, therefore, reflects an affirmative decision—by both Congress and the overseeing agency—as to how best to achieve program goals. Refusing payment to a property owner whose units are out of compliance may deny that owner the only financial resources available to bring those units up to code. From that vantage point, it makes sense, at least initially, to continue to pay owners who are working to remedy the problems. Threatening those owners instead with FCA liability if they seek payment would drive many participants out of the program entirely, raising the possibility that tenants would lose their housing—a "state of affairs [that] would be unacceptable to all parties and wholly inconsistent with federal housing policy."[74] Phrased another way, "the FCA is a blunt instrument for the enforcement of statutory and regulatory compliance, especially where there exist administrative and other mechanisms that can provide more tailored or nuanced responses to the underlying wrongs."[75]

*2. Pre-*Escobar *Materiality*

In contrast to *Mikes*, the First Circuit "eschewed [the] distinctions between factually and legally false claims, and those between implied and express certification . . . ."[76] Instead, the court took a broad view, asking "simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a *material precondition* of payment"—a condition that "need not be 'expressly designated,' but

71. *See, e.g.*, Terri D. Keville, *Studies of Transfer Trauma in Nursing Home Patients: How the Legal System Has Failed to See the Whole Picture*, 3 HEALTH MATRIX 421, 422 (1993).

72. *See, e.g.*, United States v. Intervest Corp., 67 F. Supp. 2d 637, 649 (S.D. Miss. 1999).

73. *Id.*

74. United States v. Southland Mgmt. Corp., 326 F.3d 669, 675 (5th Cir. 2003). The Tenth Circuit similarly rejected the analogous argument that an annual hospital cost report certification "condition[s] the government's payment on perfect compliance," on the basis that "[r]eading the FCA otherwise would undermine the government's own administrative scheme for ensuring that hospitals remain in compliance and for bringing them back into compliance when they fall short of what the Medicare regulations and statutes require." United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1220 (10th Cir. 2008); *see also* Harkins, *supra* note 67, at 165 ("Allowing FCA actions based on regulatory violations, despite comprehensive administrative enforcement programs, essentially eliminates an agency's remedial discretion and replaces Congress's menu of remedies with mandatory damages and penalties.").

75. Holt & Klass, *supra* note 25, at 42; *see also* Dacin, *supra* note 60, at 48 (noting importance of "whether there are other statutory or administrative remedies available to the government instead of, or prior to, withholding payment.").

76. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 780 F.3d 504, 512 (1st Cir. 2015).

must be determined by 'a close reading of the foundational documents, or statutes and regulations, at issue.'"[77] Rather than looking to the written payment rules alone, this approach requires a review of *all* applicable regulations to determine whether any of them are, implicitly, conditions of payment. In *Escobar*, for example, the First Circuit interpreted state regulations as preconditions to MassHealth payment, despite the district court's characterization of them as mere conditions of participation.[78] In short, the materiality approach looks to the *potential* for the violation to affect the payment decision, even in the absence of any law or regulation clearly linking that violation to payment.[79]

Materiality is not a new concept under the FCA, although it has had a rather convoluted history.[80] Prior to 2009, the statute contained no explicit materiality requirement, yet numerous Circuits had ruled that "[l]iability under each of the provisions of the False Claims Act is subject to the further, judicially-imposed requirement that the false statement or claim be material."[81] As applied, however, the concept has led to seemingly arbitrary results. For example, statements regarding Medicare coverage of off-label uses of prescription drugs, misrepresentations made to induce approval of a subcontract, and the failure to disclose prohibited industry funding in a grant application have all been found to be material, at least for the purposes of summary judgment or motions to dismiss,[82] while allegations of improper laboratory testing procedures and misrepresentations of other types of information have failed the test.[83]

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77. *Id.* at 512–13 (internal citations omitted) (emphasis added).

78. *Id*. at 513.

79. As one court explained, "[t]he existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not . . . a necessary condition." United States v. Science Applications Intl. Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010).

80. *See* Boese, *supra* note 55, at 295 (attributing roots of materiality to language in United States v. McNinch, 356 U.S. 595, 599 (1958) (holding that statute "was not designed to reach every kind of fraud practiced on the Government.")).

81. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999). *Accord* United States *ex rel.* Longhi v. Lithium Power Tech., Inc., 575 F.3d 458, 467 (5th Cir. 2009) ("In addition to the requirements found in the text, our jurisprudence holds that a false or fraudulent claim or statement violates the FCA only if it is material."); United States *ex rel*. Berge v. Trustees of the Univ. of Ala., 104 F.3d 1453, 1459 (4th Cir. 1997) ("If previously unclear, we now make explicit that the current civil False Claims Act imposes a materiality requirement."). Other courts have applied the concept without detailed discussion, noting only that under the facts presented, the defendant's misrepresentations could not have been material. *See, e.g.*, United States v. Data Translation, Inc., 984 F.2d 1256, 1267 (1st Cir. 1992) (noting nondisclosure "could not have been material to the price negotiated.").

82. *See, e.g.*, *Harrison*, 176 F.3d at 791 (holding that false statements regarding subcontract were material to government's decision to approve payment); United States *ex rel.* Cantekin v. University of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999) (holding that failure to disclose industry funding on grant application was material); United States *ex rel.* Franklin v. Parke-Davis, 147 F. Supp. 2d 39, 53 (D. Mass. 2001) (holding that relator adequately alleged that false statements regarding off-label use of prescription drugs were material to government's payment decision). The Senate Committee Report concerning the False Claims Amendments of 1986 contained a passing reference to "a material false statement," without elaboration. S. REP. NO. 99-345, at 20, (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5285; False Claims Amendments of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

83. *See, e.g.*, *Harrison*, 176 F.3d at 788–89 (holding that alleged false claims regarding scope of contract were not material because the contract permitted such costs); United States *ex rel.* Lamers v.

Relying on pre-*Escobar* FCA materiality to define implied certification, however, posed several problems. For one thing, earlier cases had addressed materiality as a general element of FCA liability, not as a method of proving falsity or fraud through implied certification.[84] Indeed, the *Mikes* court made clear that the implied certification analysis was "distinct from a requirement imposed by some courts that a false statement or claim must be material to the government's funding decision."[85] The situation was complicated by the passage of the Fraud Enforcement and Recovery Act of 2009 ("FERA"), which added an explicit materiality requirement to the FCA false records and reverse false claims prohibitions—but *not* to the basic false claims provision that forms the basis for implied certification.[86]

A more vexing problem was the question of how, exactly, to define materiality. By the late 1990s, the Supreme Court had given somewhat inconsistent advice regarding materiality as applied to complex civil statutes such as the FCA. In the criminal context, the Court held in *Kungys v. United States* that "a concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed."[87] In the context of federal fraud statutes, however, the Court drew instead on the test used in the Restatement of Torts:

> [Whether] (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[88]

Extrapolating the commonalities of both standards suggested that the core question would be whether the misrepresentation was *capable of influencing* the government's decision.

Under Supreme Court precedent as it existed in the late 1990s, moreover, the applicability of materiality to the FCA itself remained unclear. In *United States v. Wells*, the Court declined to require a showing of materiality under a criminal statute penalizing the making of false statements to federally insured banks.[89] Two years later, in *Neder v. United States*, the Court required materiality under the federal mail, wire, and

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Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999) (holding that "lie" was immaterial because compliance was not required); *Berge*, 104 F.3d at 1460–61 (holding that grant application did not actually require disclosure of the information allegedly misrepresented); Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir. 1999) (holding there was no evidence that failure to undertake a specific type of testing was material to government's decision).

84. Holt & Klass, *supra* note 25, at 31–32.

85. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).

86. Fraud Enforcement and Recovery Act of 2009, 31 U.S.C. §§ 3729(a)(1)(B), 3729(a)(1)(G), 3729(b)(4) (2012).

87. 485 U.S. 759, 770 (1988).

88. Neder v. United States, 527 U.S. 1, 22 n.5 (1999) (quoting RESTATEMENT (SECOND) OF TORTS § 538 (AM. LAW. INST. 1976)).

89. 519 U.S. 482, 489 (1997).

bankfraud statutes but distinguished in a footnote those federal statutes prohibiting "both 'false' and 'fraudulent' statements or information."[90] The FCA prohibits not only false or fraudulent *claims* but also the use of false *records or statements* used to get claims paid, thus straddling both of the *Neder* categories.

At that point a curious split developed in the lower courts, based less on Supreme Court precedent than on differing concepts of the basis for materiality. As the Ninth Circuit explained:

> The Fourth and Sixth Circuits have adopted a "natural tendency test" for materiality, which focuses on the potential effect of the false statement when it is made rather than on the false statement's actual effect after it is discovered. . . . The Eighth Circuit has adopted a more restrictive "outcome materiality test," which requires a showing that the defendant's actions (1) had the "purpose and effect of causing the United States to pay out money it is not obligated to pay," or (2) "intentionally deprive[d] the United States of money it is lawfully due."[91]

The Fifth Circuit offered a slightly different explanation, situating the split within the "natural tendency" test itself:

> Some courts have defined the standard to require "outcome materiality"—"a falsehood or misrepresentation must affect the government's ultimate decision whether to remit funds to the claimant in order to be 'material.'" . . . [while] []other court[s] require[] what is termed "claim materiality"—"a falsehood or misrepresentation must be material to the defendant's claim of right in order to be considered 'material' for the purposes of the FCA."[92]

Under any formulation, the distinction essentially rested on whether the misrepresentation must have the actual *ability* to affect the government's payment decision, or merely the *potential* to do so.

This was more than a mere academic exercise. As applied, the two approaches differed significantly. The Fifth Circuit, for example, enunciated a broad and relatively weak test for "claim" materiality, requiring "only that the false or fraudulent statements either (1) make the government prone to a particular impression, thereby producing some sort of effect, or (2) have the ability to effect the government's actions, even if this is a result of indirect or intangible actions on the part of the Defendants."[93] Yet, Judge Edith Jones warned that the "outcome" test was an important tool to prevent the government from "eras[ing] the crucial distinction between 'punitive' FCA liability and ordinary breaches of con-

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90. *Neder*, 527 U.S. at 23 n.7.

91. United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008) (adopting natural tendency test). *Cf. Wells*, 519 U.S. at 501 (Stevens, J., dissenting) ("There is a clear distinction between the concept of materiality—whether the information provided could have played a proper role in the…approval process—and the concept of reliance—whether the information did play a role in the process.").

92. United States *ex rel.* Longhi v. United States, 575 F.3d 458, 468–69 (5th Cir. 2009).

93. *Id.* at 470.

tract . . . ."[94] Similarly, the Eighth Circuit expressed a strong preference for "a materiality standard stricter than mere relevancy."[95]

The disagreement, while intense, was also short-lived. In 2009, FERA explicitly defined FCA materiality as "having a natural tendency to influence, or be[ing] capable of influencing, the payment or receipt of money or property."[96] The statute did not specifically address the outcome/claim debate, but courts and commentators roundly interpreted the legislation as adopting the lower "relevancy" threshold.[97] As the Fifth Circuit explained, "[i]f Congress intended materiality to be defined under the more narrow-outcome materiality standard, it had ample opportunity to adopt the outcome-materiality standard in FERA."[98] By 2010, the FCA thus appeared to incorporate a relatively low materiality threshold for false records and reverse false claims. What remained unclear, however, was whether that standard also applied to implied certification cases arising under the basic (and un-amended) § 3729(a)(1)(A) false claims prohibition. As it turned out, *Escobar* would provide surprising answers in both respects.

D. Escobar

At first glance, the fact-intensive *Escobar* case—requiring the courts to parse language not only in the federal Medicaid statute, but also in the MassHealth and general health care licensure regulations—made the case an unlikely candidate for certiorari. Of the 2015 implied certification cases, however, *Escobar* offered an unusually emotionally compelling set of facts: alleged medical supervision failures that led to the death of a young woman.[99] Perhaps for that reason, *Escobar* became the vehicle through which implied certification finally reached the Supreme Court.[100]

Petitioner Universal Health Services ("UHS") asked the Court to resolve the circuit split by declining to recognize the implied certification theory at all, relying on the Restatement (Second) of Torts § 551 for the

94. United States v. Southland Mgt. Corp., 326 F.3d 669, 680 (5th Cir. 2003) (Jones, J., concurring).

95. United States *ex rel.* Costner v. United States, 317 F.3d 883, 887 (8th Cir. 2003). It was possible, however, for defendants to prevail even under the stricter natural tendency test. *See, e.g.*, United States *ex rel.* Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453 (4th Cir. 1997) (reversing jury verdict in favor of relator).

96. 31 U.S.C. § 3729(b)(4) (2012).

97. *See, e.g.*, *Longhi*, 575 F.3d at 470.

98. *Id.*; *see also* Boese, *supra* note 55, at 299–302 (describing DOJ strategy and passage of FERA).

99. Universal Health Servs., Inc. v. Escobar, 136 S. Ct. 1989, 1997 (2016).

100. One could make a strong argument that the most important of the 2015 cases should have been United States *ex rel.* Badr v. Triple Canopy, Inc., in which a military contractor was alleged to have falsified marksmanship scores for Ugandan security guards. 775 F.3d 628, 636 (4th Cir. 2015). While the prospect of the government contracting with security guards at an airbase in Iraq who were unable to shoot certainly should give one pause, the Fourth Circuit's rather dry analysis of "Theater-Wide Internal Security Services Task Orders" clearly lacked *Escobar's* emotional impact. For a discussion of *Triple Canopy*, see Joan H. Krause, *Holes in the Triple Canopy: What the Fourth Circuit Got Wrong*, 68 S.C.L. REV. 845 (2017).

proposition that a failure to disclose noncompliance is not fraudulent in the absence of an affirmative duty to disclose; as a fallback, UHS asked the Court to restrict implied certification to violations of expressly designated conditions of payment, as in *Mikes*.[101] The respondents, supported by the United States as *amicus curiae*, responded that a defendant who knowingly bills the government for services without disclosing a failure to satisfy material conditions for the delivery of those services has submitted a false claim, and they argued that Restatement § 529 applies to a party that knows its failure to disclose additional information renders its statements materially misleading.[102] In essence, UHS sought to restrict the theory to situations where a claimant *speaks* falsely, while the relators and the government sought to apply it when the claimant remains *silent* as well. While few observers expected the Court to abolish implied certification entirely, at oral argument the Justices appeared deeply divided as to the scope of the theory and any limiting principles that could distinguish relevant from irrelevant misrepresentations.[103]

Not surprisingly, the Court declined the invitation to preclude implied certification suits, holding that omissions may give rise to liability "when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose . . . noncompliance with a statutory, regulatory, or contractual requirement."[104] The Justices also had little trouble rejecting the request to limit the theory to violations of expressly designated conditions of payment, noting that such a limit would be both over- and underinclusive.[105] Such a rule could allow defendants to escape liability for violations that, while not risking payment, might have prevented them from participating in Medicaid in the first place; conversely, the government might explicitly condition payment on compliance with *every* regulatory provision, creating the very unlimited liability UHS feared.[106]

Mere noncompliance, however, was not enough. The Justices definitively held that a misrepresentation also must be *material* to the government's payment decision.[107] Given the history of FCA materiality, UHS might have been forgiven for assuming at that point that the case was lost. Yet here the opinion shifted significantly, and perhaps surprisingly, in the petitioners' favor. Rather than adopting the government's view that *any* violation is material as "long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation," the Justices instead characterized the materiality standard as

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101. *Escobar*, 136 S. Ct. at 2001–02.

102. *Id.* at 1999–2000.

103. Transcript of Oral Argument at 9–10, 19–20, 35–37, 49, Universal Health Servs., Inc. v. United States *ex rel*. Escobar, 136 S. Ct. 1989 (2016) (No. 15-7).

104. *Escobar*, 136 S. Ct. at 1995.

105. *Id.* at 1996.

106. *Id.* at 2002. Note that the Justices appear to have conflated the "condition of participation" analysis with the traditional "fraud-by-the-inducement" theory of FCA liability. *See supra* Subsection II.C.1.

107. *Escobar*, 136 S. Ct. at 2002.

"demanding."[108] Although they did not provide a clear definition,[109] the Justices proceeded to reject essentially all of the standards adopted by the lower courts over the years. Instead, the Justices turned back to the common law, identifying a common focus on the *effect* of the misrepresentation on the government—either because a reasonable person would find the misrepresentation important or because the defendant knew the government actually considered it important to the payment decision.[110] As the Court explained:

> A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's compliance. Materiality, in addition, cannot be found where the noncompliance is minor or insubstantial.[111]

While perhaps a refreshing breath of common sense in the midst of a typically legalistic Supreme Court term, the *Escobar* opinion left many questions unanswered, and added more than a few of its own.

III. THE COURT REMAINS SILENT

Ironically—or perhaps fittingly—for a case that rests on the distinction between speaking and remaining silent, the *Escobar* opinion left open a number of important issues, including the threshold question of whether we now have a coherent test defining implied certification. Crucially, the opinion failed to answer a number of questions regarding the concept of materiality, including: 1) when a misrepresentation is considered to be material; 2) which elements of the FCA are subject to materiality analysis; 3) the vantage point from which materiality should be assessed; 4) the timing of the materiality assessment; and 5) the practical effects of these standards, particularly given the pressure to settle. *Escobar* not only missed an opportunity to resolve some of these debates, but also introduced confounding new questions that are likely to generate more, rather than less, litigation over the implied certification theory.[112]

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108. *Id.* at 2004.

109. *Id.* at 2002–03.

110. *Id.*

111. *Id.* at 2003.

112. As of August 2017, it appears that eight Circuits have issued opinions applying *Escobar* to implied certification, including the First Circuit's decision on remand. *See, e.g.*, United States *ex rel.* Badr v. Triple Canopy, Inc., 857 F.3d 174 (4th Cir. 2017) (concluding that government properly stated a claim under the FCA); Abbott v. BP Exploration & Prod., Inc., 851 F.3d 384 (5th Cir. 2017) (affirming grant of summary judgment for defendants); United States *ex rel.* Campie v. Gilead Sci., Inc., No. 15-16380, 2017 WL 2884047 (9th Cir., July 7, 2017) (holding that the relators' complaints were suffi- cient to survive dismissal); United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325 (9th Cir. 2017) (af- firming grant of summary judgment in favor of defendant); United States ex *rel.* McBride v. Hallibur- ton Co., 848 F.3d 1027 (D.C. Cir. 2017) (affirming grant of summary judgment in favor of defendant); D'Agostino v. ev3, Inc., 845 F.3d (1st Cir. 2016) (affirming district court's denial of motion to amend complaint); United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103 (1st Cir. 2016) (reversing and remanding district court's dismissal of claims); United States *ex rel.* Petratos, 855 F.3d

A. A Coherent Test for Implied Certification?

The *Escobar* Court set forth what appeared to be a standard, two-pronged test for implied certification under § 3729(a)(1)(A):

> [T]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations half-truths.[113]

But what, exactly, is a "specific representation" about goods or services? Clearly it is not limited to an *explicit* representation, which should be actionable under the separate false-records provision in § 3729(a)(1)(B). Yet the parties advanced drastically different visions of the types of implicit representations, if any, encompassed within a claim for government payment. The relators (supported by the government) argued that *all* submitted claims include an implicit representation that the claimant is *legally entitled* to payment, and the failure to disclose violations threatening that entitlement makes a claim misleading; UHS, in contrast, argued that claimants need not disclose noncompliance absent an affirmative duty to do so.[114] The Justices explicitly declined to resolve the question of whether submission of a claim signals legal entitlement, relying instead on the common-law rule that "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations."[115] Here, those half-truths

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481 (3d Cir. 2016) (affirming dismissal of complaint); United States v. Sanford-Brown, 840 F.3d 445 (7th Cir. 2016) (affirming district court's dismissal of implied certification allegations); United States *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494 (8th Cir. 2016) (reversing district court's dismissal of fraudulent inducement allegations for lack of materiality); United States *ex rel.* Presser v. Acacia Mental Health Clinic, LLC, 836 F. 3d 770 (7th Cir. 2016) (affirming in part and reversing in part district court's dismissal of FCA claims under Fed. R. Civ. P. 9(b)). *Cf.* United States *ex rel.* Nargol, No. 16-1442 (1st Cir., July 26, 2017) (affirming in part and reversing in part dismissal of relators' claims under Fed. R. Civ. P. 9(b)); United States *ex rel.* Prather v. Brookdale Senior Living Communities, Inc., 838 F.3d 750, 761–62 n.2 (6th Cir. 2016) (declining to address potential effect of *Escobar* because parties did not raise the issue on appeal).

113. *Escobar*, 136 S. Ct. at 2001. Interestingly, there appears to be disagreement at the district court level as to whether the words "at least" were meant to signify that the test is non-exclusive, rather than mandatory. *Compare, e.g.*, Rose v. Stephens Inst., No. 09-CV-05966-PJH, 2016 WL 5076214, at *5 (N.D. Cal. Sept. 20, 2016) (concluding that *Escobar* did "not purport to set out, as an absolute requirement, that implied false certification liability can attach only when these two conditions are met") (emphasis in original), *with* United States *ex rel.* Ctr. For Employment Training, 2:13-cv-01697-KJM-KJN, 2016 WL 4210052, at *5 (E.D. Cal., Aug. 9, 2016) (stating that "to establish implied false certification, a plaintiff must" meet the two-part test) (emphasis added). In a July 2017 opinion, the Ninth Circuit appeared to treat the test as mandatory, although without referencing to the debate. *Campie*, 2017 WL 2884047, at *6 ("The Supreme Court held that although the implied certification theory can be a basis for liability, two conditions must be satisfied.") (emphasis added).

114. *Escobar*, 136 S. Ct. at 1999–2000.

115. *Id.* at 2000. The Justices' silence regarding the broader legal entitlement argument may have created another nascent Circuit split. Noting that the Supreme Court had left the issue open, the Fourth Circuit answered that question in the affirmative. United States *ex rel.* Badr v. Triple Canopy, Inc., 857 F.3d 174, slip op. at 8 n.3 (4th Cir. 2017). The Ninth Circuit, in contrast, appears to have refused to construe general claims as containing specific representations of compliance. *See Kelly*, 846 F.3d at 332–33 (concluding that general vouchers submitted by defendants did not make specific rep-

included UHS's representations that specific types of therapy had been performed by specific categories of mental health professionals, as well as the staffers' use of identification numbers reserved for licensed individuals with particular qualifications.[116]

The problem is that the Justices offered no guidance for determining *when* such specific representations have been made, or how specific they need be. By differentiating claims incorporating specific representations from claims that "merely request payment," the Court suggested that there are, in fact, some claims that make *no* such representations. Yet it is difficult to imagine a claim for payment that does not implicitly suggest, at the very least, that the claimant has done whatever it needs to do to be paid. Viewed in that light, the universe of claims that do not make specific representations may well be a null set.[117]

The Court did suggest that not *all* representations are actionable—just those rendered misleading by the failure to disclose noncompliance. In *Escobar*, for example, it was misleading for UHS to file claims implying that therapy had been provided by appropriately licensed individuals. We are left to surmise that silence regarding some unspecified, less-relevant factor would not suffice. In turn, this suggests that it is not the specificity of the representation, but rather its *importance*—or in lay terms, its "materiality"—that determines whether the omission is misleading. But materiality comprises the second prong of the Court's implied certification test, not the first. If the only way to determine whether a representation is specific enough to satisfy the first prong is to assess whether it is material under the second prong, then the test, *ipso facto*, collapses into itself.

B. Material Questions

Defining implied certification by reference to materiality is not a groundbreaking concept. Yet the Court's acontextual analysis of materiality served to unmoor the concept from both the FCA text and prior case law, while simultaneously claiming to follow precedent. More importantly, the centrality of materiality as the defining factor in implied certification cases will require future courts to grapple with crucial issues of scope, temporality, and competing authority—none of which the Justices acknowledged.

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resentations about performance). *See also* United States *ex rel.* McBride v. Halliburton Co., 848 F.3d 1027, 1031 n.4 (D.C. Cir. 2017) (recognizing but declining to address the issue).

116. *Escobar*, 136 S. Ct. at 2000–01. Oddly, the other sources cited by the Court for this proposition included a 1938 New York case involving the failure of a seller to mention that not two but three new roads might affect a parcel of property offered for sale, as well as a Vermont case involving an adjunct professor's failure to explain that his "retirement" was in fact a prison term. *Id.* at 2000 (citations omitted).

117. Of course, failure of proof remains a defense. *See Sanford-Brown*, 840 F.3d at 447 (relator "offered no evidence that defendant . . . made any representations at all in connection with its claims for payment, much less false or misleading representations.").

1. When is a Misrepresentation Material?

The single biggest weakness in the *Escobar* opinion is the failure to clearly define materiality. As noted above, FERA explicitly required a showing of materiality under the false records and reverse false claims prohibitions,[118] defining the term as "having a natural tendency to influence, or be[ing] capable of influencing, the payment or receipt of money or property."[119] Instead of taking the straightforward path by confirming that the FERA definition also applies to the false claims prohibition in § 3729(a)(1)(A), the Justices merely noted that the FERA test is similar to those derived from the common law. At oral argument, the Justices had explored at length whether the FCA should be interpreted through the lens of common law tort definitions of fraud, or instead the traditional contract law distinction between material and nonmaterial contract terms.[120] Once again declining the opportunity to lay down a bright-line rule, the opinion simply noted that the tort and contract definitions were "substantially similar" and equivalent to the FERA language: "[u]nder any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'"[121]

While perhaps a sensible middle ground, the problem is that these various conceptions of materiality, at least as applied under the FCA, historically have not been treated as equivalent. The Justices went on to characterize the materiality standard as "demanding," noting the allegation that UHS's noncompliance was "so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations."[122] Judging materiality by virtue of the "centrality" of the noncompliance to the payment decision, however, evokes the separate and distinct condition-of-payment standard: whether compliance "lies at the core of [defendant's] agreement with the Government [such that] the Government would have refused to pay had it been aware . . . ."[123] In effect, the Justices rejected the payment-prerequisite standard as the defining characteristic of implied certi-

118. 31 U.S.C. § 3729(a)(1)(B) (2012) (prohibiting "a false record or statement *material* to a false or fraudulent claim"); *id.* § 3729(a)(1)(G) (prohibiting "a false record or statement *material* to an obligation to pay or transmit money or property to the Government") (emphasis added).

119. *Id.* § 3729(b)(4).

120. Transcript of Oral Argument at 9–10, 19–20, 35–37, 49, *Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7).

121. *Escobar*, 136 S. Ct. at 2002 (citations omitted). On remand, the First Circuit cited a (non-implied certification) post-*Escobar* case in which the panel had concluded that "the fundamental inquiry is 'whether a piece of information is sufficiently important to influence the behavior of the recipient.'" United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 110 (1st Cir. 2016) (citing United States *ex rel.* Winkelman v. CVS Caremark Corp., 827 F.3d 201, 211 (1st Cir. 2016)).

122. *Escobar*, 136 S. Ct. at 2004.

123. United States *ex rel.* Mikes v. Straus, 84 F. Supp. 2d 427, 435 (S.D.N.Y. 1999).

fication,[124] only to seemingly resurrect that standard as the core of the materiality test.

Rather than a bright-line rule, the Justices offered a set of illustrations:

> [T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[125]

As described, however, this "demanding" form of materiality is almost entirely *unlike* FCA materiality as it has been applied to date. Far from universally being interpreted as a high bar, FERA's "natural tendency to influence" language has long been viewed as signifying a relatively low threshold for implied certification compared to the alternatives.[126] Indeed, the government itself had argued, consistent with the First Circuit's decision, that *any* violation should be considered material as "long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation"—a proposition the Justices flatly rejected.[127] The Court's approach harkens back to the short-lived, pre-FERA debate over "claim" and "outcome" materiality, a debate resolved by the widespread assumption that FERA had adopted the lower threshold.[128] Without any acknowledgement of the implications (or even the history), the Court seemingly adopted the more stringent outcome approach.

2. Which FCA Elements Are Subject to Escobar *Materiality Analysis?*

A related concern is the question of which elements of the FCA will be governed by this new standard of materiality. There is a significant difference between invoking materiality as a *theory* of falsity and imposing it as an additional *element* of the basic FCA cause of action. That distinction has been clear since the days of *United States* ex rel. *Mikes v. Straus*, in which the Second Circuit clarified that implied certification and

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124. *Escobar*, 136 S. Ct. at 2003 (cautioning that "[a] misrepresentation cannot be deemed material merely because the Government designates compliance . . . as a condition of payment")).

125. *Id.* at 2003–04.

126. *See, e.g.*, Boese, *supra* note 55, at 298–301 (describing history).

127. *Escobar*, 136 S. Ct. at 2004.

128. *See, e.g.*, United States *ex rel.* Longhi v. Lithium Power Tech., Inc., 575 F.3d 458, 470 (5th Cir. 2009) (explaining that Congress had rejected "the more narrow outcome materiality standard.").

materiality were separate concepts: "A materiality requirement holds that only a subset of admittedly false claims is subject to False Claims Act liability . . . . We rule simply that not all instances of regulatory noncompliance will cause a claim to become false."[129] Moreover, defining implied certification by reference to materiality is curious in light of the fact that FERA established materiality as a separate and distinct element of the FCA false records and reverse false claims prohibitions. In contrast, implied certification cases such as *Escobar* arise under the basic false claims provision in § 3729(a)(1)(A), which Congress did not amend. Without addressing the fundamental distinction identified by *Mikes*, the Court tacitly appeared to ratify the conclusions of the lower courts that have read materiality into § 3729(a)(1)(A) as well.[130]

Yet the Court utterly failed to consider the effect of grafting a potentially distinct "*Escobar* materiality" standard on to the FERA definition in the statute. By stating that the common law and FERA materiality standards were equivalent—and then applying an interpretation not seen outside the few circuits adopting the pre-FERA "outcome" materiality approach—the Court created an intriguing dilemma. If *Escobar* is limited to § 3729(a)(1)(A) false claims, then the statute will encompass two different materiality standards: one for false claims and another for false records and reverse false claims. In contrast, if *Escobar* is merely the Court's interpretation of the existing statutory definition—perhaps unlikely, given the Justices' refusal to decide whether the § 3729(b)(4) definition applies to § 3729(a)(1)(A) as well—then the Court effectively (and once again tacitly) may have redefined materiality for false records and reverse false claims as well. Preliminary indications suggest that the appellate courts may apply the new test broadly.[131]

If that wasn't enough, the opinion also failed to clarify whether materiality is required only in suits brought under the implied certification theory or whether it applies to *all* suits under § 3729(a)(1)(A), including garden-variety, factually false allegations. At first blush this may not seem problematic: demanding payment for a product that was not provided, or for treating a patient who was never seen by the physician, seems a quintessentially material misrepresentation. But factually false claims also encompass other situations where the falsity or fraud may be far more tangential. Imagine, for example, a provider whose reckless

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129. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).

130. *See, e.g.*, United States *ex rel.* Badr v. Triple Canopy Inc., 775 F.3d 628, 634 (4th Cir. 2015) (identifying materiality as one of the four elements of 31 U.S.C. § 3729(a)(1)(A)); *Longhi*, 575 F.3d at 467 (reading general materiality requirement into statute); Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CAL. L. REV. 227, 234 (2013).

131. *See, e.g.*, United States *ex rel.* Campie v. Gilead Sci., Inc., No. 15-16380 (9th Cir. July 7, 2017), 2017 WL 2884047 at *9 (applying FERA definition while citing to *Escobar*); United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103 (1st Cir. 2016) (reaffirming initial decision to reverse the district court's dismissal of the suit); United States *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494 (8th Cir. 2016) (applying *Escobar's* definition of materiality to a fraudulent inducement case arising under the false records provision in 31 U.S.C. § 3729(a)(1)(B)).

oversight of the billing process routinely leads to the submission of bills for services actually rendered, but with slightly incorrect dates of service. It might be difficult for such allegations to satisfy a stringent materiality standard, despite the claims being factually—and "knowingly"—inaccurate. The Justices offered no guidance as to whether *Escobar* was intended to reach these types of suits as well.

3. Whose View of Materiality Prevails?

In addition to raising problems in the definition and application of materiality, the *Escobar* decision offers little clarity regarding the vantage point from which materiality must be assessed. The opinion itself is internally inconsistent regarding whether materiality is dependent on what the government *does* or on what the defendant *knows*. At the beginning of the opinion, the Court stated that "[w]hat matters is not the label the Government attaches to a requirement, but *whether the defendant knowingly violated a requirement that the defendant knows is material* to the Government's payment decision."[132] Under that formulation, the analysis appears to turn not only on what the government considers material, but also on whether the defendant is *aware* of that interpretation, or at least acts with reckless disregard or deliberate indifference as to the possibility.[133] Yet by the time the Court turned to a fuller discussion of materiality, consideration of the defendant's knowledge had all but dropped out, replaced instead by a detailed analysis of how to determine whether the misrepresentation was, in fact, material to the government as the *recipient* of the information.[134]

At one level, this may not be surprising: the fact that a representation is material to the government's payment decision is, logically, a precondition to the defendant being aware of that fact. And yet, it is curious that nowhere in the detailed analysis of materiality (nor in the final paragraphs summarizing the holding) does the Court return to the seemingly central question of whether it is materiality to the government alone, or the defendant's *knowledge* thereof, that matters. As a result, the opinion may be read to require proof of *scienter* regarding materiality as well as falsity or fraud, a holding that may favor defendants in FCA litigation.

The Court's emphasis on the effect of the misrepresentation on "the government's" payment decision also obscures a crucial fact in FCA cases, especially those arising in the health care context: there is usually more than one government entity involved. The *Escobar* materiality approach treats the government as a monolithic claims determination entity when, in fact, at least two separate agencies are involved: (a) the agency that makes the payment determination, usually CMS and/or a state Medicaid agency; and (b) the Department of Justice ("DOJ"), which repre-

132. *Escobar*, 136 S. Ct. at 1996 (emphasis added).
133. *Id.* at 2001–02.
134. *See id.* at 2002.

sents the United States in FCA litigation.[135] As Michael Herz and Neal Devins warned in the analogous context of the Environmental Protection Agency, while "academics and government lawyers alike take for granted that DOJ ought to speak the government's voice in court," that approach may be inconsistent with the regulatory agency's substantive control of the program.[136] The argument for DOJ control may be strong in criminal prosecution, but "is far more attenuated in the case of civil judicial enforcement actions, and may cut the other way in a challenge to agency regulations brought in the court of appeals on the administrative record, on a legally and factually complex and technical point."[137] Medicare and Medicaid FCA allegations often fall into this latter category.

While the views of federal health care program regulators and prosecutors often may be in sync,[138] there have been notable exceptions. For example, in *Northern Health Facilities, Inc. v. United States*,[139] a nursing and rehabilitation center resolved FCA allegations with the DOJ by entering into a Consent Order that permitted the facility to continue participating in Medicare. Soon afterwards, the Health Care Financing Administration ("HCFA"), the predecessor to CMS, decided to terminate the facility's Medicare participation.[140] When the facility sued to enjoin the termination, arguing that HCFA was thwarting the remedial measures adopted by the Consent Order, the district court denied the motion because the agency had not been a party to the original FCA suit.[141] But the judge went on to express concern about the "inequitable result":

> [T]he Court wishes to express its concerns about the fairness of this action . . . . Plaintiff has argued that "Greenbelt and its residents are caught in a conflict between competing Governmental objectives which they cannot control." . . . The Court agrees with this proposition . . . . It is clear that two different arms of the Federal Government, with two different views on how Greenbelt's programs should be addressed, were involved in these cases.[142]

The different views stem from the fact that the individuals charged with administering federal programs and those charged with investigating and prosecuting fraud may have different training, different goals, and different core mindsets.

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135. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345 (2000).

136. *Id.* at 1346. Herz and Devins posit three ways in which this may be reflected: a reduction in the scope and effectiveness of the agency's own enforcement efforts, avoidable losses in court, and the potential for DOJ to interfere with agency decision-making. *Id.*

137. *Id.* at 1363. Herz and Devins advocate for DOJ to take more "seriously its role as lawyer for" the agency as its client. *Id.* at 1375.

138. Not surprisingly, where DOJ and agency views are in sync—particularly in opposition to the relator's claims—courts are inclined to agree. *See, e.g.*, Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732–33 (7th Cir. 1999) (noting that relator had failed to provide any evidence that the failure to perform her preferred plasma testing "was material to the United States' buying decision; the [DOJ] has conspicuously declined to adopt Luckey's position or to prosecute this claim on its own behalf.").

139. 39 F. Supp. 2d 563 (D. Md. 1998).

140. *Id.* at 566.

141. *Id.* at 576.

142. *Id.* at 577.

As Professor David Hyman has argued (albeit with some hyperbole), while the primary motivation of program administrators is to assure that the program runs efficiently and meets its goals, fraud control personnel are by contrast "[s]uspicious by nature and training . . . [and] view every provider as a potential exploiter of the public fisc and every claim as the tip of a proverbial fraudulent iceberg."[143] Logically, program integrity should complement program administration: preventing limited program funds from being lost to fraud is necessary to achieve the program's goals. But clashes may occur when regulators and prosecutors have different interpretations of the same facts, in the service of different policy goals.[144]

Particularly relevant to the implied certification debate, administrators may sometimes find that the program's goals are better served by quietly ignoring certain types of violations. "Indeed, noncompliance with contractual requirements can become the norm, as both providers and program administrators recognize that legislative standards are simply aspirational or cannot be accomplished for the amounts the government is willing to pay."[145] Thus, it is not difficult to imagine a situation—not unlike *Escobar* itself—where CMS and/or a state Medicaid agency has paid a set of claims despite a tacit misrepresentation, yet the DOJ argues that the misrepresentation should have been material to the payment determination and therefore violates the FCA.

A certain level of comfort might be derived from the fact that, as a practical matter, it will be difficult for the DOJ to pursue a case post-*Escobar* when the paying agency disagrees that the noncompliance was material and refuses to cooperate. But the same cannot be said in cases brought by *qui tam* relators, who may sue based on interpretations of statutes or regulations that differ not only from that of the paying agency but also from DOJ priorities.[146] Indeed, the parents in *Escobar* argued that the mental health clinic violated regulations that were critical to the MassHealth payment decision, yet Massachusetts regulators imposed minimal, nonpayment-related penalties—leading UHS to argue that the

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143. David A. Hyman, *Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust "Reposed in the Workmen,"* 30 J. LEGAL STUD. 531, 544–46 (2001).

144. Of course, this does not mean that program administrators are always correct in their interpretations. As the Tenth Circuit recently noted in a blistering opinion: "This case has taken us to a strange world where [CMS] itself . . . seems unable to keep pace with its own frenetic lawmaking. . . . [A]n agency decision that loses track of its own controlling regulations and applies the wrong rules in order to penalize private citizens can never stand." Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 976–77 (10th Cir. 2016).

145. Hyman, *supra* note 143, at 545; *see also id.* at 563 ("It is bad if the program goals dog bites off its fraud control tail, but it is worse if the fraud control tail starts wagging the program goals dog."). Prosecutors, of course, have another name for this phenomenon: collusion between the agency and the defendant.

146. Indeed, Herz and Devins describe the FCA *qui tam* provisions as an example of when "the litigator's role is taken out of the hands of government attorneys altogether." Herz & Devins, *supra* note 135, at 1346–47; *see also* Boese, *supra* note 55, at 297 (describing differing motivations). For discussion of broader concerns regarding agency control of litigation, see generally, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013).

relators were "usurp[ing] the government's primary role in evaluating and adjudicating violations of its regulations."[147]

The *Escobar* Court's concept of materiality, emphasizing the likely rather than the potential effect of the misrepresentation on the payment decision, provides some protection against far-fetched implied certification allegations. Yet before a court can apply the *Escobar* standard, defendants will be required to incur the substantial costs of defending the suit through the motion to dismiss or summary judgment stage—if they can wait that long before settling.[148] Moreover, courts will be called to make this determination long after the fact, with no guarantee that the judges will interpret the effect of a particular provision on payment consistent with the paying agency.[149] Of course, an implied misrepresentation alone does not prove a violation of the FCA; the government or relator must still establish the remaining FCA elements, most notably *scienter*. The fact that two branches of the government come to differing interpretations as to the materiality of a violation, however, may well bolster the argument that the defendant was at least reckless in disregarding that possibility.

4. When is Materiality Assessed?

The *Escobar* opinion also raises an interesting question regarding the temporal relationship between the misrepresentation and the payment decision: must the government know of the misrepresentation *before* the payment decision is made and pay the claim anyway, or can the government *subsequently* determine that the misrepresentation would not have been material? In its list of examples illustrating materiality, the Court seemingly adopted a prospective approach:

> [I]f the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite *actual knowledge* that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[150]

147. Brief for the Petitioner at 51, Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016) (No. 15-7).

148. *See infra* Section III.C.

149. To put it another way, "[i]t is cheaper and more effective for the agency to decide the scope of FCA certification ex ante than it is for courts to do so ex post." Holt & Klass, *supra* note 25, at 52; *see also* Harkins, *supra* note 67 at 134 (criticizing decision in United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166 (9th Cir. 2006), in which the Ninth Circuit "adopted a sweeping interpretation of 'false or fraudulent' that effectively nullified the Department of Education's (DOE) discretionary decision to treat alleged statutory and regulatory infractions as administrative enforcement matters, not as fraud upon the government."). The potential for differing interpretations is clear just from the *Escobar* litigation itself. On remand, the First Circuit bluntly stated "that the government conditioned MassHealth's payments on compliance with the licensing and professionalism regulations," despite the district court's contrary factual findings. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 111 (1st Cir. 2016).

150. *Escobar*, 136 S. Ct. at 2003–04 (emphasis added).

This suggests that payment will provide the strongest evidence of nonmateriality when the government is aware of the underlying problem and chooses to pay anyway, such as when the Department of Housing and Urban Development ("HUD") continues to make housing assistance payments for an unsatisfactory property in the hope that the funds will enable the owner to bring the units into compliance.[151] It also suggests little sympathy, although not an absolute bar, for situations in which the government did not become aware of the problems until *after* the claims were paid. Yet the Court's acknowledgement that nonmateriality can be based on payment decisions *over time* suggests a tacit recognition that materiality contains retrospective elements as well: in the absence of a change in official position, claimants are entitled to rely on the fact that noncompliant claims "regularly" have been paid in the past.

The *Escobar* facts suggest a further permutation of the problem: what happens when the government, now fully aware of the problem, *continues* to pay claims? After Yarushka Rivera's death, her parents requested investigations by multiple Massachusetts state agencies.[152] The Massachusetts Department of Public Health concluded that the facility had violated fourteen regulations related to staff supervision and licensure, and required the facility to enter into a plan of correction; the Board of Registration of Social Workers imposed supervised probation on the clinical director and required a staffer who improperly held herself out as a psychologist to enter into a consent agreement and pay a $1,000 civil penalty.[153] Yet there is no indication that MassHealth ever sought repayment of the funds, nor threatened to suspend or revoke the facility's right to submit future claims. Although the state did not have knowledge of the violations prior to paying the claims, it clearly had that knowledge after the investigation. While this obviously cannot establish the *bona fides* of an improper claim, an after-the-fact determination that future claims are not barred may nonetheless be relevant to materiality.[154]

On remand, however, the First Circuit resisted this broad reading, construing materiality in a narrowly defined timeframe. First, the court noted that there was no evidence in the record suggesting that MassHealth had continued to pay UHS after discovering the fraud: the allegations only concerned alleged fraud in reimbursements paid *before* the filing of the complaint, which occurred close to a year before the

151. *See, e.g.*, United States v. Southland Mgmt. Corp., 326 F.3d 669, 683–84 (5th Cir. 2003) ("HUD's policy of approving continued subsidy payments notwithstanding the property's declining condition was based not on its ignorance of the true condition but upon the imperative to provide housing for the tenants while HUD supervised the use of the limited funds it allocated to the project.").

152. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 780 F.3d 504, 510 (1st Cir. 2015).

153. Id.

154. *See* BOESE, *supra* note 36, § 2.03[F][1][b] (describing *post hoc* government "ratification" of claims); *see also* United States v. Sanford-Brown, Ltd., 840 F.3d 445, 447 (7th Cir. 2016) (noting that federal agencies had investigated the claimed misrepresentations and declined to impose penalties).

Massachusetts agencies completed their investigations.[155] Second, because the allegations focused only on the treatment of Yarushka Rivera, which by definition ended at the time of her death, no later reimbursement practices were relevant.[156] While acknowledging evidence that MassHealth had continued to pay UHS despite being aware of the noncompliance might well "come to light during discovery," the court held that it was not necessary at this early stage of the litigation.[157] Whether most circuits adopt this narrow timeframe remains to be seen.

Restricting the analysis to the government's *a priori* awareness also conflates materiality with the distinct concept of a "government knowledge" defense, which posits that in some circumstances the government's prior awareness of noncompliance may preclude FCA liability.[158] To the extent it is recognized, courts have approached government knowledge from two vastly different vantage points. Early FCA cases appeared to hold that government knowledge negated the falsity itself, emphasizing that by paying a known noncomplaint claim, "[t]he government knew what it wanted, and it got what it paid for."[159] It strains credulity, however, to argue that the government's awareness can transform a false representation into a truthful one: MassHealth's knowledge of the UHS licensure issues, for example, could not miraculously convert the unlicensed therapist into a licensed psychologist. The far more logical approach is to consider government knowledge relevant not to the issue of falsity itself, but rather to the defendant's *scienter*: a defendant who truly believes the government is willing to pay despite the noncompliance has not acted with *knowledge* that the government considers the claim to be false or fraudulent.[160]

Escobar raises a third, largely unrecognized alternative: considering government knowledge relevant not just to falsity or *scienter*, but also to *materiality*. The Court never addressed the concept of government knowledge directly. But by suggesting that the government's affirmative decision to pay noncompliant claims may render the noncompliance *im-*

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155. *See* United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 112 (1st Cir. 2016).

156. Id.

157. *Id.* The Ninth Circuit took a similar approach in a case alleging fraud on the Food & Drug Administration. United States *ex rel.* Campie v. Gilead Sci., Inc., No. 15-16380, 2017 WL 2884047 (9th Cir., July 7, 2017). While acknowledging that "[r]elators thus face an uphill battle in alleging materiality sufficient to maintain their claims," the court nevertheless characterized the issues as "matters of proof, not legal grounds to dismiss relators' complaints." *Id.* at *9, 11. The court concluded, "[a]lthough it may be that the government regularly pays this particular type of claim in full despite actual knowledge that certain requirements were violated, such evidence is not before us." *Id.* at *11.

158. *See, e.g.*, United States v. Southland Mgmt. Corp., 326 F.3d 669, 682–83 (5th Cir. 2003) (internal quotation marks omitted).

159. United States *ex rel.* Durcholz v. FKW Inc., 189 F.3d 542, 545 (7th Cir. 1999).

160. *See, e.g.*, Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000) ("There may still be occasions when the government's knowledge of or cooperation with a contractor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA."); Michael J. Davidson, *The Government Knowledge Defense to the Civil False Claims Act: A Misnomer by Any Other Name Does Not Sound as Sweet*, 45 IDAHO L. REV. 41, 42 (2008) (arguing that government knowledge is a defense only to the scienter element).

material, especially when done repeatedly, the opinion invoked a very similar concept.

C. Materiality in the Context of FCA Procedure and Penalties

For all the discussion of applying common-law concepts of fraud within the context of twenty-first-century government contracting, the Justices all but avoided perhaps the most crucial FCA issue: the relentless drive toward settlement. Due to the magnitude of the potential statutory penalties and damages,[161] as a practical matter the vast majority of health care FCA cases will settle rather than proceeding to trial, particularly after the denial of a motion to dismiss or for summary judgment. *Escobar* is unlikely to stem that tide. In what someday may come to be known as "the infamous *Escobar* footnote 6," the Court rejected the argument that materiality would prove an unworkable standard in early-stage FCA litigation:

> We reject Universal Health's assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment. The standard for materiality that we have outlined is a familiar and rigorous one. And False Claims Act plaintiffs also must plead their claims with plausibility and particularly under Federal Rules of Civil Procedure 8 and 9(b), for instance.[162]

What the Justices failed to acknowledge, perhaps due to their misconception that they were applying a standard identical to traditional FCA materiality, is that satisfying this "demanding" materiality test may well require further development of the record compared to prior FCA cases.

In a jurisdiction adopting either a narrow, natural-tendency materiality test or the precondition-to-payment test, the issues to be addressed at the dismissal or summary judgment stage were straightforward and largely textual: under the relevant statute, regulations, or contract, could the misrepresentation have affected the payment decision? That was the posture of *Escobar* in the district court, which dismissed the relators' complaint.[163] Proving that the defendant's misrepresentation *actually* affected the outcome, as the Court appears to require, will demand a far more fact-intensive inquiry into the government's payment procedures—not just for this defendant, but also potentially for similarly situated providers as well. That inquiry may require the review of evidence that nei-

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161. 31 U.S.C. § 3729(a)(1) (2012); 28 C.F.R. § 85.3(a)(9) (2012).

162. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2004 n.6 (2016). For an example of a 9(b) case arising in this context, see United States *ex rel.* Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770, 781–82 (7th Cir. 2016) (affirming dismissal of majority of FCA claims for failure to satisfy Rule 9(b) because allegations were based solely on relator's opinion, but reversing dismissal of allegations based on express false statements regarding billing codes). Regardless, it is doubtful the footnote will rival that of the famed *Carolene Products* Footnote 4. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

163. United States *ex rel.* Escobar v. Universal Health Servs., Inc., Civ. A. No. 11-11170-DPW, 2014 WL 1271757, at * 1, * 13 (D. Mass. Mar. 26, 2014).

ther the defendant nor the relator have in their possession early in the litigation.[164]

Observers did not have to wait long for the first indication that post-*Escobar* implied certification allegations would likely proceed to the discovery stage. Less than six months after the Supreme Court decision, the disposition of *Escobar* on remand offered a clear example. The First Circuit rejected the defendant's arguments that the government had continued to pay UHS after becoming aware of the noncompliance, noting not only the lack of evidence in the record but also the extreme difficulty of obtaining such evidence at this stage of the litigation:

> We see no reason to require Relators at the Motion to Dismiss phase to learn, and then to allege, the government's payment practices for claims unrelated to services rendered to the deceased family member in order to establish the government's views on the materiality of the violation. Indeed, given applicable federal and state privacy regulations in the healthcare industry, it is highly questionable whether Relators could have even accessed such information.[165]

While such information might "come to light during discovery," the court held that the relators had stated a claim that was sufficient to survive the motion to dismiss.[166] If other circuits follow suit, these concerns may be justified.[167]

Although courts frequently consider materiality at similar stages in non-FCA litigation, it is not clear that implied certification cases will be equally amenable to resolution. A decision that implied certification allegations must survive until more facts are developed will put enormous pressure on defendants to settle early, especially coupled with the increased FCA penalties that took effect in August 2016. With penalties now ranging from $10,781 to $21,563 per claim, defendants may under-

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164. The only entity with that information may prove to be the government itself. This may put an even higher premium on the government's intervention decision, particularly the option of intervening and then moving to dismiss weak claims. *See* Engstrom, *Public Regulation of Private Enforcement*, *supra* note 24 (discussing government's role in *qui tam* suits).

165. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 112 (1st Cir. 2016).

166. *Id. See also* United States *ex rel.* Campie v. Gilead Sci., Inc., No. 15-16380, 2017 WL 2884047 (9th Cir., July 7, 2017) (reversing dismissal of claims).

167. In contrast, "courts need not opine in the abstract when the record offers insight into the Government's actual payment decisions." United States *ex rel.* McBride v. Halliburton Co., 848 F.3d 1027, 1032, 1034 (D.C. Cir. 2017) (noting that the government had investigated the relator's "allegations and did not disallow any charged costs."). *See also* United States *ex rel.* Nargol, No. 16-1442 (1st Cir. July 26, 2017), slip op. at 12 ("the lack of any further action also shows that the FDA viewed the information, including that furnished by Relators, differently than Relators did."); United States *ex rel.* Petratos, 855 F.3d 481, 490 (3d Cir. 2016) (noting that relator "does not dispute that CMS would reimburse these claims even with full knowledge of the alleged reporting deficiencies."); D'Agostino v. ev3, Inc., 845 F.3d 7 (1st Cir. 2016) ("The fact that CMS has not denied reimbursement for Onyx in the wake of D'Agostino's allegations casts serious doubt on the materiality of the fraudulent representations . . . ."). *But see Campie*, 2017 WL 2884047 at *11 ("Although it may be that the government regularly pays this particular type of claim in full despite actual knowledge that certain requirements were violated, such evidence is not before us.").

standably be hesitant to press their luck at trial.[168] Settlement pressures may also be heightened by the 2015 "Yates Memorandum," in which the DOJ vowed to pursue action against the individuals involved in corporate wrongdoing as well as against the corporation itself.[169] In the early stages of a highly fact-intensive implied certification suit, corporations may face difficult settlement decisions that potentially pit corporate interests against those of individual employees, officers, and directors.

Ultimately, *Escobar* seems unlikely to increase the number of defendants willing and able to vet these issues more fully at trial. As I have argued previously, while settlement may satisfy the short-term goals of the parties, it also has the effect of precluding judicial oversight over the development of the law.[170] An uptick in settlements may be good news for federal coffers, but bad news for the development of coherent FCA jurisprudence over the long term. More importantly, a Supreme Court opinion that fails to acknowledge this reality—or worse, posits an alternate reality in which trial courts dispose of these allegations with ease—will exacerbate rather than ameliorate longstanding FCA settlement pressures.

IV. CONCLUSION: THINKING FORWARD

So who "won" *Escobar*? In reality, everyone—and no one. While it comes as little surprise that the implied certification theory survived, future relators will be forced to litigate (or settle) under a far more demanding materiality standard than the First Circuit applied. If *Escobar* ultimately proceeds to trial—admittedly a questionable proposition—the fact that Massachusetts regulators imposed fairly minimal penalties on the UHS providers, and apparently did not seek to suspend MassHealth payments, may loom large. UHS lost both of its major arguments, failing to convince the Court either to reject implied certification or to impose an explicit precondition-to-payment test, yet secured a materiality standard with considerably more "bite" than prior cases had suggested. Moreover, because *Escobar*'s formulation of materiality cannot be determined solely by looking to the wording of the statute or regulations alone, it will require courts to engage in more detailed scrutiny of the government's procedures for paying claims—potentially leading courts to conclude that factual development beyond that available at the motion to dismiss or summary judgment stage is necessary, as the First Circuit did on remand. Perhaps the ultimate winner, then, will be the federal government, which

168. Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491, 42,494 (June 30, 2016); 28 C.F.R. § 85.5 (2016).

169. Memorandum from Sally Quillian Yates, Deputy Attorney Gen. on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

170. Krause, *supra* note 18, at 202–10. *See also* Holt & Klass, *supra* note 25, at 42 (arguing that when FCA claims are more likely to survive a motion to dismiss, the end result is to increase the costs of entering into government contracts).

will continue to reap the benefits of health care FCA settlements while the lower courts are left to sort out the confusion.