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Dicta Me This: Implied False Certification to Materiality under the False Claims Act Post-Escobar

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DICTA ME THIS: IMPLIED FALSE CERTIFICATION TO MATERIALITY UNDER THE FALSE CLAIMS ACT POST-ESCOBAR

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I. INTRODUCTION

On March 2nd, 1863, the Thirty-Seventh Congress of the Union Government enacted the False Claims Act as a response to the massive frauds perpetrated against the government during the wake of the Civil War.[1] More than one hundred and fifty years later, the False Claims Act has been repeatedly amended, but the principle aim has remained the same: Those who present or directly induce the submission of false or fraudulent claims for payment from the government will be held accountable.[2] Under the False

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[1] Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863); U.S. v. Bornstein, 423 U.S. 303, 309 (1976).

[2] 31 U.S.C. §3729(a) (2018).

Claims Act the United States recovered more than $4.7 billion from fraudulent or false claim violations in the 2016 fiscal year.[3] Since 2009, the United States has recovered more than $31 billion in settlements or judgments from civil cases through the False Claims Act litigation.[4]

The False Claims Act contains additional provisions permitting what is known as "qui tam" suits to allow private citizens to sue defrauding entities and individuals on behalf of the government in exchange for a percentage of the awarded damages.[5] During the 2016 fiscal year, 702 qui tam suits were filed. The relator received approximately thirty percent of the awarded damages – totaling more than a half a billion dollars.[6] The prescribed damages under the original enactment of the False Claims Act were double damages, forfeiture, and up to five years of imprisonment.[7] The current landscape leaves violators subject to far more punitive damages, amounting to treble damages plus additional civil penalties of more than $10,000 per false claim submitted.[8]

Pursuant to the False Claims Act, any party who (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval, (2) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim, or (3) conspires to commit a violation of either of the prior may be held civilly liable under the False Claims Act.[9] In other words liability may exists where, an individual makes a false claim for payment that the individual knew to be false and the falsity was material to whether or not the claim were to be paid or reimbursed. A claim includes "direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under [a variety of] federal benefits programs."[10] The required scienter under the False Claims Act defines "knowing" and "knowingly" to mean that an individual has "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information."[11] Lastly, but arguably the most critical is materiality. Materiality is defined by the False Claims Act as "having a

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[3] *Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016*, U.S. DEP'T JUSTICE (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.

[4] *Id.*

[5] A qui tam action is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui Tam Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[6] *Supra* note 3.

[7] Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863);

[8] 31 U.S.C. §3729(a)(1)(G) (2012); 28 C.F.R. §85.3(a)(9) (2018).

[9] 31 U.S.C. § 3729(a)(1)(A)–(C).

[10] Universal Health Servs. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 1996 (2016).

[11] 31 U.S.C. §3729(b)(1)(A).

natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[12]

It is without question that making express false statements in order to receive payment for a claim to the United States Government would garner liability under the False Claims Act.[13] This is the 'express false certification theory.' Contrary to this express false certification theory is that which split the circuits for many years: implied false certification. The implied false certification theory considers a payment request from the government as a claimant's implied certification of compliance with the relevant statute, regulations, or contract requirements that are material conditions of payment and renders the claim as false or fraudulent when the claimant knowing fails to disclose the violation.[14] The circuit courts were split on whether to accept this implied certification theory in whole, partially, or reject the theory altogether.

The *Escobar* case resolved this split among the circuit courts on whether or not implied false certification is an acceptable theory of liability. The Supreme Court rendered their unanimous opinion in *Escobar*, authored by Justice Thomas, on June 16, 2016, and upheld the theory of implied false certification as a valid basis of liability under the False Claims Act.[15] In addition to resolving the circuit split, Justice Thomas included a discussion on the materiality requirement and how such a rigorous requirement should be enforced.[16] Justice Thomas was clear to cite to the text of the statute and the definition provided by the legislature. However, Justice Thomas continued and provided in dicta a litany of factors to consider when determining materiality.[17]

How the courts will apply the now hallowed doctrine of implied false certification is yet to be determined, but the recent writings on the matter have generally focused on the materiality dicta supplemented in Justice Thomas's opinion in *Escobar*. This Comment aims to address the blatant disregard by the legal profession of the forthright interpretation provided by Justice Thomas that has been supplanted by the factors listed in dicta in the *Escobar* decision. A careful reading of Justice Thomas' opinion cites to the unambiguous language of the False Claims Act and how such language has been a staple in fraud statutes throughout our nation's jurisprudence. Part II will provide a historical framework for the origins and alterations of the False Claims Act during the course of its more than 150-year lifespan and will delve into the prior circuit split on the theory of implied false certification and why

[12] *Id.* at § 3729(b)(4).
[13] *Id.* at § 3729(a)(1)(A).
[14] *Escobar*, 136 S. Ct. at 1993.
[15] *Id.* at 1995.
[16] *Id.* at 2002.
[17] *Id.* at 2003–04.

the decision rendered by Justice Thomas reigned supreme. Part III will analyze the current discussions surrounding materiality under the False Claims Act in the wake of the *Escobar* decision and how another circuit split may be on the horizon, paying particular attention to decisions from new and remanded cases, post-*Escobar* decision. Part IV will provide an attempt at a definitive answer to materiality under the *Escobar* decision and why legal professionals and scholars have missed the mark to date on interpreting Justice Thomas' opinion. This Comment will conclude that the Justice Thomas decision does not depart from his traditional notions of textualism or originalism, and that the standard for materiality under the False Claims Act has, in fact, not changed and should not be interpreted any differently than defined by Section b(4) of the statute.

II. BACKGROUND

A. Statutory History

As concisely as it can be said, Justice Thomas' opening line in the *Escobar* decision provides the overarching premise of the False Claims Act: "The False Claims Act imposes significant penalties on those who defraud the Government."[18]

More than 150 years ago, at the height of the American Civil War, the United States Government was tasked with creating a solution to curb the plight of fraud that had run rampant with dishonest vendors providing defective supplies to the Union Army.[19] These unscrupulous contractors would use the lack of government oversight that was present during the first century of our nation's history to profit from the sale of defective products and supplies. On more than one occasion, the United States Government purchased several hundred to a thousand horses that were so sickly and riddled with a litany of equine diseases that they were essentially rendered useless.[20] During one such instance, the Government purchased more than 400 horses for the Union Army, only 76 of which were fit for service. The remaining 324 horses were either undersized, ringboned, blind, or dead upon arrival.[21] In addition to the purchase of unserviceable horses, the Government was repeatedly defrauded by the purchase of flimsy shoes for the servicemen that would last for only twenty days or so before falling apart,[22] blankets and

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[18] *Id.* at 1995.

[19] Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, OKLA. BAR J. (Apr. 9, 2005), http://okbar.org/members/barjournal/archive2005/aprarchive05/obj7612fal.aspx.

[20] Brief for Nat'l Whistleblowers Ctr. as Amici Curiae Supporting Respondents at 11, Universal Health Servs. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989 (2016) (No. 15–7) (citing CONG. GLOBE, 37th Cong., 2d Sess. 298 (1862) (Statement of Sen. Dawes)).

[21] *Id.* at 10–11 (citing H.R. REP. No. 2–37, at 98–99 (1861)).

[22] *Id.* at 10 (citing REGIS DE TORBRIAND, FOUR YEARS WITH THE ARMY OF POTOMAC 136 (Trans., George K. Dauchy, Ticknor & Co. (1889) (1886)).

overcoats that were rotten and useless,[23] artillery shells that were filled with sawdust rather than gunpowder,[24] and muskets that were so poorly manufactured they were "not worth shooting."[25] To curtail the occurrence of these egregious acts to defraud the Government, Congress appointed a special committee, the Select Committee on Government Contracts, to inquire on the breadth and the extent in which fraudulent contracting had occurred.[26] After the Select Committee returned their findings, it was evident something must be done if the Union had any hope of continuing the fight against the Confederates of the South. The Government delivered its solution in the form of the False Claims Act, also known as "Lincoln's Law," in March of 1863.[27] Those found liable under the new statute were subject to double the actual damages, plus a penalty of $2,000 for each false claim.[28]

The original enactment of the False Claims Act permitted not only the government from bringing a cause of action for expected fraud in government contracting, but also created an avenue for private citizens to bring suit on the government's behalf in what is known as a "qui tam" action.[29] A private citizen who brings a qui tam action is also referred to as a "relator"[30] or, more commonly, a "whistleblower". If, in the early days of the statute, the qui tam action was successful in rooting out fraud under the False Claims Act the relator was entitled to half of the awarded damages.[31]

The False Claims Act remained unchanged until 1943 when Congress amended the statute due to fears that the amount being awarded in qui tam actions was too enticing and thus leading to unnecessary litigation.[32] These amendments consisted of two primary, major changes to limit the frequency of frivolous qui tam suits. First, if the government had any information on the alleged statutory violation, the relator no longer had any right to any portion of the potential recovery, regardless of whether the government had taken any action to confront the defrauding contractor.[33] Second, if the relator was still entitled to a share of the recovery, the share was severely

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[23] *Id.* (citing H.R. REP. No 49–37, at 136–40 (1863) (Test. of Wm. T. Duvall)).

[24] *Id.* at 11–12 (citing CONG. GLOBE, 37th Cong., 3d Sess. 966 (1863) (Statement of Sen. Howard)).

[25] *Id.* (citing CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS, Vol. I, 305 (1939)).

[26] CONG. GLOBE, 37th Cong., 1st Sess. 23 (1861) (resolution of Rep. Van Wyck) ("[A] committee of five members [shall] be appointed by the Speaker [of the House of Representatives] to ascertain and report what contracts have been made by any of the departments for provisions, supplies, and transportation; for materials, and services, or for any articles furnished for the use of government[.]")

[27] Lahman, *supra* note 19.

[28] *The False Claims Act: A Primer*, U.S. DEP'T OF JUST., *available at* https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (last visited Dec. 21, 2018).

[29] 31 U.S.C. §3730 (2012).

[30] Lahman, *supra* note 19.

[31] *Id.*

[32] Samuel Long, *Controlling Contracting Fraud: The False Claims Act Pleading Standard and Its Implications for Fraud in the New Health Care System*, 44 PUB. CONT. L. J. 777, 780 (2015); Lahman, *supra* note 19.

[33] Long, *supra* note 32, at 780.

diminished.[34] Nearly all qui tam actions stopped as a result of these amendments, and the contractors' ability to defraud the government increased and went largely unpunished.

Congress once more amended the False Claims Act, but not until more than forty years later. The False Claims Amendments Act of 1986 significantly increased the amount in which the relator was entitled to in recovery, but, more critically, the amendments increased the damages from double damages to treble damages and raised the statutory penalty from $2,000 to a range between $5,000 and $10,000 per false claim.[35]

Since 1986, the statute has seen only minor amendments. The most prominent amendment being the Fraud Enforcement and Recovery Act of 2009 and then, a year later, in the Patient Protection and Affordable Care Act of 2010.[36]

B. Liability Under the False Claims Act

The current iteration of the False Claims Act recognizes seven instances in which any person can be held liable for a false claim submitted to the government:[37] when an individual "(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit a violation of [the FCA]; (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property; (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government . . . ."[38]

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[34] *Id. See also* Lahman, *supra* note 19.

[35] Todd B. Caslteton, *Compounding Fraud: The Cost of Acquiring Relator Information Under the False Claims Act and the 1993 Amendments to Federal Rules of Civil Procedure*, 4 GEO. MASON L. REV. 327 (1996). *See also supra* note 28.

[36] *History of the False Claims Act: The Whistleblower Act*, BERNSTEIN LIEBHARD LLP, http://www.bernlieb.com/whistleblowers/History-Of-The-False-Claims-Act/index.html (last visited Dec. 21, 2018).

[37] 31 U.S.C. § 3729(a) (2012).

[38] *Id.*

Pursuant to any of these seven instances, there are four primary elements that are required to prove culpability of an individual or a company that has submitted a false claim for payment to the government: (1) a false statement or fraudulent course of conduct; (2) made with the requisite scienter; (3) that is material; and (4) that results in a claim to the government.[39] The statute defines certain key terms in relation to these elements. First, a claim includes any direct requests to the government for payment or for reimbursement requests of federal find recipients.[40] Next, the scienter requirement is fulfilled by "knowing" or "knowingly" and are defined under the statute as: (1) has actual knowledge of the information; (2) acts in deliberate ignorance if the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.[41] The statute makes clear, however, that specific intent to defraud the government is not required.[42] As this Comment asserts, arguably the most crucial term that is defined under the statute is that of materiality. The statute defines material as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[43]

The theories courts have established in determining liability for a violation under the False Claims Act have evolved along with the statute. Courts have determined that false statements can be either "factually false" or "legally false."[44] "Factually false" statements are routinely associated with incorrect descriptions of goods or services provided, or a request for reimbursement for goods or services that were never provided.[45] "Legally false" statements are false representations or false certifications of compliance with a governing law, statute or regulation, or contractual term.[46] Premised upon the understanding of the differences inherent in these differing avenues of legal falsity, the courts have developed two theories of liability for such claims: express false certification and implied false certification.[47] Express false certification is when an individual or company contractor "falsely certified compliance with a particular statute, regulation, or contractual term, where compliance is a prerequisite to payment."[48] It is irrelevant how the statement is made, as long as the statement relates to a

[39] U.S. v. Triple Canopy, Inc., 775 F.3d 628, 634 (4th Cir. 2015) (citing U.S. *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913 (4th Cir. 2003)).

[40] Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 1996 (2016) (citing 31 U.S.C. § 3729 (b)(2)(A)).

[41] *Id.* (citing 31 U.S.C. § 3729 (b)(1)(A)).

[42] 31 U.S.C. § 3729 (b)(1)(B).

[43] 31 U.S.C. § 3729 (b)(4).

[44] U.S. *ex rel.* Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).

[45] 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, 230 (2013). *See, e.g.*, U.S. v. Krizek, 7 F. Supp. 2d 56 (D.D.C. 1998).

[46] *See, e.g.*, U.S. *ex rel.* Thompson v Columbia/HCA Healthcare Corp., 938 F. Supp. 399 (S.D. Tex. 1996).

[47] Martin, *supra* note 45, at 247.

[48] U.S. *ex rel.* Connor v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008).

claim for payment from the government.[49] Implied false certification, on the other hand, prostrates that the mere act of submitting a claim for payment or reimbursement implies that the claim complies with all contractual terms and all relevant statutes or regulations.[50] More simply, one who relies on the implied false certification theory does not need to allege that the accused made any express statement or certification that was either legally or factually false.[51]

C. The Circuit Split

As more theories on the distribution of liability emerged, courts became inconsistent with their respective applications of the implied false certification theory. Courts found no issue in the application of the express false certification theory, but struggled in determining how the implied false certification theory should be applied, if at all. From this dispute, three primary camps arose amongst the circuit courts: (i) courts holding that the implied false certification theory should be recognized only when there is an express condition-of-payment requirement; (ii) courts holding that the implied false certification theory should be applied broadly; and (iii) courts holding that the implied false certification theory should not be recognized in any capacity.[52]

i. Express Condition of Payment Requirement

Five circuit courts have adopted the view that the implied false certification should be applied only in circumstances where an express condition of payment existed. Furthermore, the Second Circuit utilized *Mikes v. Straus*, decided in 2001, to illustrate this point.[53] The Second Circuit articulated that the False Claims Act "was not designed for use as a blunt instrument to enforce compliance with all medical regulations, but rather only those regulations that are a precondition to payment."[54] The Court was concerned that, due to its punitive nature, utilizing the False Claims Act to punish regulator violations that are not preconditions of payment would be a gross misuse, and thus an improper application of the statute.[55]

Adopting this approach, the Sixth Circuit held in *Hobbs v. MedQuest* the False Claims Act is "not a vehicle to police technical compliance with complex federal regulations, [and should not trigger liability in] the absence

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[49] *Id.*

[50] Martin, *supra* note 45, at 239.

[51] Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 1996 (2016).

[52] Doan Phan, Comment, *Redefining Lincoln's Law: How to Shape the Theory of Implied Certifications Post-Escobar*, 13 J. L. ECON. & POL'Y 113, 120 (2017).

[53] *See generally* U.S. *ex rel.* Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001).

[54] *Id.* at 699.

[55] *Id.*

of conditions of payment."[56] The Third, Ninth, Tenth, and Eleventh Circuits have all since adopted the approach articulated by the Second Circuit in *Mikes*.[57]

ii. Implied False Certification Applied Broadly

The approach adopted by the First, D.C., and Federal Circuits is a more comprehensive approach than that which have adopted the 'express condition of payment' approach. The approach adopted there is: when a contractor submits a claim for payment and fails to disclose any knowing breach of the provisions of their contract, then the theory of implied false certification will apply.[58] The First Circuit in *United States ex rel. Hutcheson v. Blackstone Med., Inc.* overturned the trial court's finding that express conditions of payment must be present for a False Claims Act violation to occur, similar to the Second Circuit decision in *Mikes*.[59] Instead the First Circuit determined that the finding of the lower court "that only express statements in statutes and regulations can establish preconditions of payments is not set forth in the text of the [False Claims Act]."[60] The First Circuit believed that the knowledge requirement and the requirement that the claim be material were enough to reign in breadth of the statute, effectively dismissing the Second Circuits concerns in the *Mikes* decision.[61]

iii. Rejection of the Implied False Certification Theory

The final court to rule on the applicability of the implied false certification theory before the Supreme Court granted *certiorari* on the issue was the Seventh Circuit, which expressly denied adopting the theory in its *Sanford-Brown* decision.[62] The Seventh Circuit cautioned against such a broad application of liability as the implied false certification theory allowed for the termination due to any deficiency, no matter how minute.[63] Further, the Court held that it "would be equally unreasonable for [the court] to hold than an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by references into the [statute in question] are conditions of payment for purposes of liability under the [False Claims Act]" theory of implied false certification.[64] Finally, the Seventh Circuit stated that violations of a regulation that occurred after good-faith

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[56] U.S. *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 717 (6th Cir. 2013).

[57] *See, e.g.*, U.S. ex rel. Keeler v. Eisai, Inc., 568 F. App'x. 783 (11th Cir. 2014); U.S. *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295 (3d Cir. 2011); Ebeid *ex rel.* U.S. v. Lungwitz, 616 F.3d 993 (9th Cir. 2010); U.S. *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010).

[58] *See, e.g.*, U.S. *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377 (1st Cir. 2011).

[59] *Id.* at 388.

[60] *Id.*

[61] *Id.*

[62] U.S. v. Sanford-Brown, Inc., 788 F.3d 696, 711–712 (7th Cir. 2015).

[63] *Id.* at 711.

[64] *Id.*

entry into the auspice of the regulation at hand should be left to the agencies to evaluate and adjudicate, rather than the judicial system.[65]

Remaining neutral – or as some would consider, indifferent – the Fifth and Eighth Circuit Courts had not yet addressed whether adoption of any iteration of the implied false certification theory was appropriate, or to reject the implied false certification theory outright by the time the Supreme Court heard *Escobar*.[66] These circuit courts' lack of approach mirrors premises of the interpretive cannons of avoidance that are often used by the justices of the Supreme Court to effectively 'punt' a decision down the line with the intention of avoiding the need to address a particular issue.[67]

D. Escobar

The ever-growing issue of forum shopping for the most favorable court, bred by the diverse methods being applied to the application of the implied false certification theory around the country, predicated the need for the Supreme Court to step in and to provide a solution. Thus, came *Escobar*.[68]

In a unanimous decision authored by Justice Clarence Thomas, the Supreme Court upheld the theory of implied false certification as a basis for liability when two conditions are met: (1) the claim requesting payment makes specific representations regarding the goods or services provided; and (2) the violating individual knowingly fails to disclose their noncompliance with a statutory, regulatory, or contractual requirement.[69] True to his traditional interpretation methods, Justice Thomas made clear to start "with the language of the statute."[70] "The False Claims Act imposes civil liability on any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[71] Justice Thomas concludes that, though Congress did not define either fraud or fraudulent under the statute, it intended to incorporate the well-settled meaning of the common-law terms that [the False Claims Act] relies upon.[72] The Supreme Court illuminated through Justice Thomas' opinion that it was unwilling to accept the First Circuit's version of implied false certification and, instead, applied the above-mentioned two conditions as a means to limit application of the

[65] *Id.* at 714.

[66] U.S. *ex rel.* Steury v. Cardinal Health, Inc., 735 F.3d 202, 205 (5th Cir. 2013) ("[T]he Fifth Circuit has not yet adopted the implied false certification theory of [False Claims Act] liability[.]").

[67] Abbe R. Gluck & Lisa Shultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 90 passim (2013) (a general focus on the staff drafters' awareness and use of the judicial rules of statutory construction and interpretation).

[68] Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989 (2016).

[69] *Id.* at 1995–96.

[70] *Id.* at 1999.

[71] *Id.* (citing 31 U.S.C. § 3727(a)(1)(A) (2012)).

[72] *Id.* at 1999.

theory.[73] Further, Justice Thomas rejected the interpretation of the Second Circuit in its *Mikes* decision, which required an express condition of payment present.[74] Justice Thomas later addressed, however, that the determining factor in the opinion is whether the misrepresentation was material to the payment decision.[75] Essentially, courts should be concerned with whether the defendant knowingly violated a requirement known to be material.[76] Justice Thomas made sure to illustrate the "rigorous" and "demanding" nature of the False Claims Act's materiality requirement in rejecting Universal Health's position that the materiality issue is so fact intensive that summary judgment or dismissal motions are improper at any stage.[77] Therefore, if a condition is material to the government, whether it is a condition of participation or a condition of payment, it is considered a distinction without any overarching difference; both are considered material.[78]

However, after making clear that the Court would uphold the theory of implied false certification, Justice Thomas proceeded to engage in a discussion of the materiality requirement and how it should be enforced.[79] Justice Thomas predicated his entire discussion with his 'bread and butter' approach of jurisprudence: the text of the statute, or more specifically, the statutory definition of materiality under the False Claims Act. The False Claims Act defines "material" as "having a natural tendency to influence, or be capable off influencing, the payment or receipt of money or property."[80] In his discussion, Justice Thomas provides vague examples of prima facie claims for materiality, or lack thereof.81 He makes it clear, however, that such circumstances are not dispositive of proof of materiality, and that they should be weighed against the definition provided by the statute.[82] First, he states that evidence 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" is likely to show materiality under the statute.[83] Second, if the "[g]overnment pays a particular claim in full despite its actual knowledge that certain requirements were violated, [it] is very strong evidence that those requirements are not material."[84] Essentially, Justice Thomas believes that a consideration of the

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[73] *Id.* at 2001.
[74] *Id.*
[75] *Id.* at 1994.
[76] *Id.*
[77] *Id.* at 2003 n.6 (2016) ("The standard for materiality . . . is a familiar and rigorous one. And False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, [including] facts to support allegations of materiality.").
[78] *Id.* at 1996.
[79] *Id.* at 2002.
[80] 31 U.S.C. § 3729(b)(4) (2012).
[81] *Escobar,* 136 S. Ct. at 2003–04.
[82] *Id.*
[83] *Id.* at 2003.
[84] *Id.* at 2003–04.

"tendency to influence" requirement, as the statute includes in the definition of materiality, should carry the day when determining materiality.

III. ANALYSIS: FALSE CLAIMS ACT: POST *ESCOBAR*

With the *Escobar* decision final, circuit courts are tasked with applying the Supreme Court's version of the implied false certification theory of liability in False Claims Act matters. Even with Justice Thomas' discussion on materiality published, not all circuits are applying the rules surrounding the factors for weighing materiality in a manner equivalent to the rule articulated in *Escobar*.[85] Remanded and new cases alike must utilize a uniform application of the rule for materiality in order to prevent future circuit splits. The concept of materiality is fact-intensive and case-specific, leaving no single factor weighed as dispositive in making the materiality determination.[86] Unfortunately, under the current framework, divergence seems to be the norm rather than the exception.

At the time the Supreme Court rendered its decision in *Escobar*, judgments in three cases were vacated and remanded back to their respective circuit courts for reconsideration.[87] First, the Supreme Court vacated the Fourth Circuit's decision in *Triple Canopy, Inc. v. United States ex rel. Badr*.[88] The Fourth Circuit's ruling found Triple Canopy liable under the False Claims Act for knowingly providing unqualified guards at a United States military base in Iraq.[89] The facts alleged that Triple Canopy falsified the marksmanship scores of several guards that were hired to serve at the Al Asad Air Base in Iraq in accord with a government contract that reimbursed Triple Canopy for costs associated with the training and hiring of these "guards."[90]

On remand, the Fourth Circuit applied *Escobar* and determined, as it had in their prior decision, that Triple Canopy should be held liable under the False Claims Act.[91] In applying the two-prong test of falsity and materiality from *Escobar*, the Fourth Circuit concluded that the "half-truths" from Triple Canopy in failing to disclose the inability of the guards to pass marksmanship training with the required scores in their invoices for reimbursement amounted to actionable misrepresentations.[92] In addition, the Fourth Circuit

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[85] *See supra* Section II.C.

[86] U.S. *ex rel.* Johnson v. Golden Gate Nat'l Senior Care, L.L.C., 223 F. Supp. 3d 882, 894 (D. Minn. 2016)

[87] Cynthia A. Howell, *Rough Road Ahead for Businesses? – The Impact of the Supreme Court's Ruling in Universal Health Services, Inc. v. United States ex rel. Escobar*. 19 DUQ. BUS. L.J. 97, 115 (2017).

[88] Triple Canopy, Inc. v. U.S. ex rel. Badr, 136 S. Ct. 2504 (2016).

[89] *See generally* U.S. v. Triple Canopy, Inc., 775 F.3d 638 (4th Cir. 2015).

[90] *Id.*

[91] U.S. v. Triple Canopy, Inc., 857 F.3d 174, 179 (4th Cir. 2017).

[92] *Id.* at 178.

looked to the analogous hypothetical provided by the Supreme Court in *Escobar* for the materiality prong.

> A defendant can have "actual knowledge" that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has "actual knowledge." Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.[93]

The Fourth Circuit illuminated this analogy by stating: "guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight."[94] Furthermore, the Government made an affirmative decision to not renew the base security contract with Triple Canopy and immediately intervened in the qui tam litigation.[95] Essentially, the Fourth Circuit sidestepped affirmatively applying materiality, as defined, in favor of comparison to a dicta hypothetical illustrated in Justice Thomas' opinion. It is, however, important to note that the straightforward application of the dicta hypothetical afforded a similar outcome to the determination the Court would have held as if it had applied the strict two-prong test in accordance with the statutory definition. Essentially, it was a case of no harm, no foul.

Next, the Supreme Court vacated the Eighth Circuit's decision in *Weston Educ., Inc. v. United States ex rel. Miller*.[96] Here, former employees of a for-profit college alleged that the institution inflated grades and attendance records in order to avoid the repayment of federal loans.[97] The inflated and false records for student attendance and grades were purported to violate the institution's Program Participation Agreement and thus fall within the parameters for liability under the False Claims Act.[98] The Eighth Circuit initially dismissed the action after finding that false record keeping was not material to the claims for the receipt of federal subsidies.[99] On remand, in one of the first post-*Escobar* decisions, the Eighth Circuit found that the antitheses

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[93] *Id.* at 179 (citing Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 2001-02 (2016)).

[94] *Id.*

[95] *Id.*

[96] Weston Educ., Inc. v. U.S. *ex rel.* Miller, 136 S. Ct. 2505 (2016).

[97] *See generally* U.S. *ex rel.* Miller v. Weston Educ., Inc., 784 F.3d 1198 (8th Cir. 2015).

[98] *Weston Educ.*, 784 F.3d at 1204.

[99] *Id.*

of its prior holdings were warranted.[100] This time the Court found that the institution's record-keeping was material to the case due to of the express establishment of record-keeping as a condition of payment and evidence that indicated that the government relied on the records in evaluating payment eligibility.[101] The record keeping requirement in *Weston* was established as a condition of payment by multiple instruments, including regulation, statute, and an agreement between the parties.[102] The Eighth Circuit applied the two prongs articulated in *Escobar* in reaching the opposite conclusion of its initial decision, and pressed forward without a preemptive dismissal of the claim.

The Seventh Circuit decision in *United States ex rel. Nelson v. Sanford-Brown* was next on the chopping block for vacation and remand.[103] Here, the Seventh Circuit affirmed the District Court's grant of Sanford-Brown's motion for summary judgment against allegations that the for-profit college was in violation of its Program Participation Agreement and the Higher Education Act, therefore, the receipt of federal subsidies qualified them for liability under the False Claims Act.[104] The Supreme Court granted *certiorari* to vacate the Seventh Circuit's initial ruling and remand the matter for reconsideration consistent with *Escobar*.[105] On remand, the Seventh Circuit affirmed its prior decision to uphold the grant of summary judgment for the school.106 The Court indicated that the mere "option to decline to pay" claims was insufficient to establish materiality and thus insufficient to establish False Claims Act liability.[107] This approach utilized the definition of "material" as written in the False Claims Act.[108] By correctly applying the strict definition of "material," the Seventh Circuit highlighted a particular issue for potential future circuit splits: the discrepancies between the common law definition of "material" vs. statutory definition for "material."

Additional cases have prevailed through the district courts applying the rules set forth in *Escobar* that have not differed substantially from the initial cases above. These cases, however, are split among the claims that can withstand the muster of a summary judgment motion and those that cannot. This tends to be the defining factor between this litany of court opinions.

The Northern District of California in *Rose v. Stephens Institute* denied summary judgment for the defendant on the grounds that both prongs of the *Escobar* test need not be fulfilled to find liability under the False Claims

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[100] U.S. *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494, 504 (8th Cir. 2016).
[101] *Id.* at 504.
[102] *Id.*
[103] *See generally* U.S. *ex rel.* Nelson v. Sanford-Brown, Ltd., 788 F.3d 696 (7th Cir. 2016).
[104] *See generally* U.S. *ex rel.* Nelson v. Sanford-Brown, Ltd., 840 F.3d 445 (7th Cir. 2016).
[105] U.S. *ex rel.* Nelson v. Sanford-Brown, 136 S. Ct. 2506 (2016).
[106] *Nelson*, 840 F.3d at 447.
[107] *Id.*
[108] *Id.* (citing Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016)).

Act when utilizing the implied false certification theory.[109] Furthermore, the District Court found that the materiality prong was established by disproving the mitigating factors alleged by the defendant.[110] In disproving the factors set forth by the defendant, the District Court looked to the government's decisions to not take action against the defendant for the alleged infractions: "the [Department of Education's] decision to not take action against [the defendant] despite its awareness of the allegations in this case is not terribly relevant to materiality."[111] Instead, the District Court looked to the government's past pattern of enforcement for violations, including corrective actions, fines, and settlement agreements, to determine whether the violations were in fact material to the government.[112] This blatant disregard for the appropriate application of the rule to determine liability and materiality, as ordered by the Supreme Court, creates yet another inconsistent application of the law. Nowhere, in the *Escobar* decision does it suggest or allude to the optional nature of either prong of the applicability test.[113]

The Eastern District of New York in *United State ex rel. Lee v. Northern Adult Daily Health Care Center*, assuming a similar rational of the variability of reliance as the Court in *Rose*, dismissed the case against the defendant for failure to demonstrate materiality.[114] The Court stated that the relator, Lee, failed to allege how the "noncompliance with Title VI and the [Department of Housing] regulations . . . would have influenced the government's decision to reimburse Northern Adult."[115] However, the Court did not apply the statutory definition of materiality in making its assessment of the alleged facts.[116] Instead, it deferred to the common law definition of materiality provided in the *Escobar* opinion's dicta.[117] The court did, however, grant additional leave for the relators to amend the complaint in order to bring the claims asserted into compliance with *Escobar*.[118] As mentioned above, by applying the common law definition in lieu of the statutory definition as required under the *Escobar* two-prong test, the Court has created an inconsistency in application, which fosters nothing more than an appropriate grounds for appeal.

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[109] Rose v. Stephens Inst., No. 09-cv-05966-PJH, 2016 U.S. Dist. LEXIS 128269, at *15 (N.D. Cal. Sept. 20, 2016). This is squarely at odds with the Escobar ruling, requiring that both prongs of the test be met: "We hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied." *Escobar*, 136 S. Ct. at 2001.

[110] *Rose*, 2016 U.S. Dist. LEXIS 128269, at *17.

[111] *Id.*

[112] *Id.* at *19.

[113] *See generally Escobar*, 136 S. Ct. 1989.

[114] U.S. *ex rel.* Lee v. N. Adult Daily Health Care Ctr., 205 F. Supp. 3d 276, 296 (E.D.N.Y. 2016).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* ("When the Amended Complaint was drafted, Relators did not have the benefit of the Supreme Court's recent guidance on materiality. To the extent that Relators wish to pursue this theory, the pleading is inadequate, and Relators are granted leave to amend the Amended Complaint[.]").

In the Northern District of Georgia case, *United States et al., ex rel. v. The Public Warehousing Company, et al.*, the Court provided a litany of situations to illustrate when and where the decision to stop payments after notice of a violation would, or would not, render the violations as material to the government.[119] The Court first appealed to the knowledge requirement and held that "just because one agency within the vast bureaucracy of the federal government has knowledge of a contractor's wrongdoing does not mean that the Defendants have a 'government knowledge' defense."[120] More importantly, the Court made sure to highlight that in certain circumstances, the government may continue to pay even though it is aware of potentially fraudulent claims.

> The more essential the continued execution of a contract is to an important government interest, the less the government's continued payment weighs in favor of the government knowledge defense. 'To find otherwise could lead to perverse outcomes; the more dependent the government became on a fraudulent contractor, the less likely it would be to terminate the contract (and the less likely the contractor would be held liable).'[121]

Essentially, a decision to continue to make payments on a potentially fraudulent contract will not tarnish the viability of a potential False Claims Act materiality argument, so long as the performance of the contract is deemed critical to a government interest. The District Court in *Public Warehousing Co.* appropriately weighed the circumstantial factors in determining materiality as articulated in the *Escobar* opinion. The careful application of the *Escobar* rule allows Courts to make succinct, subjective decisions rather than an overly broad or improper objective determination.

Contrary to the viewpoint taken by the Court in *Public Warehousing Co.*, the First Circuit in *United States ex rel. D'Agostino v. EV3, Inc., et al.* determined that the governments continued reimbursements "in the wake of D'Agostino's allegations [cast] serious doubt on the materiality of the fraudulent representations that D'Agostino alleges."[122] Thus, the Circuit Court determined that because the government did not take immediate action to stop payments and terminate the relationship with the provider, per the relator's allegation, the violations were not material.[123] By doing so, the Court failed to weigh the circumstances surrounding the decision of a timely

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[119] *See generally* U.S. v. The Pub. Warehousing Co. K.S.C., No. 1:05-CV-2968-TWT, 2017 WL 1021745 (N.D. Ga. Mar. 16, 2017).

[120] *Id.* at *6.

[121] *Id.*

[122] D'Agostino v. ev3, Inc., 845 F.3d 1, 7 (1st Cir. 2016)

[123] *Id.* at 7–9.

injunction by the government; a step the Supreme Court found to be essential in determining materiality via the two-prong test.

More recently in July of 2016, the Seventh Circuit declined to apply the implied certification theory articulated by the Supreme Court, holding that the knowledge requirement for the falsity of the claim was not met.[124] Here, a local workers union brought an action against a roofing subcontractor who was hired for a federal construction project at the Veterans Affairs Medical Center in Dayton, Ohio.[125] Pursuant to the Davis-Bacon Act, contractors who conduct work on federal government projects are required to pay their workers a "prevailing wage."[126] The workers union here alleged that the subcontractor failed to pay the union member workers the prevailing wage.[127] To bolster its argument, the workers union presented evidence that the subcontractor had presented and submitted false payroll reports to the federal government for reimbursement.[128] Instead of applying the implied false certification theory the Supreme Court has articulated in *Escobar*, the Seventh Circuit focused on determining whether the subcontractor had submitted the false reports with the requisite knowledge that the reports were fraudulent.[129] Affirming the District Court's summary judgment dismissal, the Seventh Circuit found that there was insufficient evidence to show that the subcontractor possessed the requisite knowledge of the falsity of the reports before submitting them for government reimbursement.[130]

Despite the Seventh Circuit foregoing the Supreme Court's crucial *Escobar* rule, it is important to note that the ever-cognizable Judge Posner's dissenting opinion noted that a claim submitted with omissions of a violation of contractual requirements, as seen in this case, can be a viable basis for liability when utilizing the implied false certification theory under the False Claims Act.[131] Judge Posner believed that his colleagues did not appropriately apply the facts of the case to the rule of law.

Another example of a court evaluating a motion to dismiss is *United States v. Crumb*.[132] The defendant argued that the express certification theory should be utilized to determine his liability rather than an implied false certification theory.[133] The Court disagreed with the defendant, finding that the complaint satisfied both prongs of the implied false certification rule in *Escobar*; the submitted claims represented the provided services rendered by

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[124] U.S. *ex rel.* Sheet Metal Workers Int'l Ass'n., Local Union 20 v. Horning Invs., LLC, 828 F.3d 587, 591 (7th Cir. 2016).
[125] *Id.* at 589.
[126] *Id.* at 590.
[127] *Id.* at 589.
[128] *Id.* at 591.
[129] *Id.* at 593.
[130] *Id.* at 595.
[131] *Id.* at 596.
[132] *See generally* U.S. v. Crumb, No. 15-0655-WS-N, 2016 WL 4480690 (S.D. Ala. Aug. 23, 2016).
[133] *Id.* at *23.

the defendant and were far more than the baseline requests for payments required under the theory.[134] The Court held that the complaint provided for and established persuasive inferences that the alleged misrepresentations should be considered material to the decision to pay process.[135] Further, the Court found it improper, not to mention impossible, to determine materiality at the Rule 12(b)(6) stage in the proceedings.[136]

It is important to note that several cases have resulted in granting a defendant's motion to dismiss for failing to establish the requisite materiality in the months succeeding *Escobar*. One such case is *United States ex rel. Dresser v. Qualium*.[137] The District Court here believed that the mere allegation of impropriety in the submission of a claim was insufficient to establish materiality because the federal government had failed to explain why the noncompliance with regulation requirements were material to it decision regarding payment.[138] The Court determined that even if compliance with the regulation could be viewed as a condition for payment, compliance alone did not establish the requisite materiality to satisfy the *Escobar* rule.[139] Therefore, the District Court dismissed the case for failure to state all the required elements of a False Claims Act violation.[140] This dismissal directly contradicted the Court in *Crumb*, which held that is was improper and impossible to make a determination regarding materiality at such an early stage in the proceedings. The Court here made a determination of a question of fact, rather than submit the evidence to the trier of fact.

A bird's eye view of the legal landscape post-*Escobar* shows that while the courts are routinely applying the rule articulated in *Escobar*, the strict statutory definition of materiality has been repeatedly manipulated due to misapplication of the dicta set forth by Justice Thomas. By relying on the fictitious examples provided in Justice Thomas' dicta, lower courts are issuing judgments and/or dismissals with reckless abandon and inconsistent application. Cohesive application is necessary in order to avoid making further mistakes, and lower courts ought to pay heed to the dangers of meandering from the Supreme Court's jurisprudence.

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[134] *Id.*
[135] *Id.* at *22.
[136] *Id.* at *24.
[137] *See generally* U.S. *ex rel.* Dresser v. Qualium Corp., No. 5:12-cv-01745-BLF, 2016 WL 3880763 (N.D. Cal. July 18, 2016).
[138] *Id.* at *6.
[139] *Id.*
[140] *Id.* at *18–20.

IV. CONCLUSION: CURRENT MATERIALITY STANDARD

Legal scholars and professionals alike view the *Escobar* decision as a definitive endorsement of implied false certification.[141] These same individuals, however, have expressed concerns that the Supreme Court has left the materiality standard at least as clouded as it was before the landmark decision.[142] While several approaches have been tested and applied, courts have yet to determine a definitive solution or approach in which the federal judicial system can uniformly rely on. These capricious approaches universally fail to address the actual standard of materiality expressed by the Supreme Court in *Escobar* because the standard didn't change.[143]

In Section B of the *Escobar* decision, Justice Thomas addressed materiality and the fundamental legal underpinnings that create the foundations of the two-prong rule.[144] Instead of relying upon his rather clever hypotheticals, courts should rely upon the clear and upfront textualist approach that Justice Thomas has become known for during his tenure on the Supreme Court. Relying on the text presented in the False Claims Act, Justice Thomas articulates the definition and standard of materiality in the closing section of the *Escobar* opinion.[145] Legal scholars too often look to the dicta of the opinion to determine the scope of materiality, when Justice Thomas did not 'hide the ball' and placed the clear and definitive definition up front before any additional discussions on materiality.

Unfortunately, the approaches that rely upon Justices Thomas' dicta are prevalent in the current landscape.[146] One of the more common approaches courts have taken has been to skew materiality in favor of the common law definitions, particularly of that pertaining to fraud.[147] It is important to note, however, that courts concede that the roots of materiality grow from "common-law antecedents" and, in fact, "the common law could not have conceived of 'fraud' without proof of materiality".[148] Taking these

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[141] *See generally* Jerad Whitt, Comment and Note, *I'm Not Calling You a Liar . . . : Implied Certification Theory Under the False Claims Act*, 85 U. CIN. L. REV. 451 (June 2017); Phan, *supra* note 52; Robert W. Miller, *BRIEF INSIGHT: Escobar Appears to Open the Door to More "Materially" False Claims*, 10 J. HEALTH & LIFE SCI. L. 1 (Oct. 2016).

[142] *Id.*

[143] Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016).

[144] *Id.*

[145] *Id.*

[146] *Supra* Section III.

[147] RESTATEMENT (SECOND) OF TORTS § 538(1) (AM. LAW INST. 1977) ("Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material"); *id.* at § 538(2) (defining materiality as whether a reasonable person would consider it important in the decision-making process or the person who made the misrepresentation had reason to know the particular recipient is likely to consider the matter important in the decision-making process). *See also* RESTATEMENT (SECOND) OF CONTRACTS §162(2) cmt. c. ("[A] misrepresentation is material" only if it would "likely . . . induce a reasonable person to manifest his assent[,]" or the defendant "knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent[]" to the transaction.).

[148] Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016) (citing Nedar v. U.S., 527 U.S. 1, 22 (1999); Kungys v. U.S., 485 U.S. 759, 769 (1988)).

beginnings into consideration, there is no need to differentiate whether the materiality requirement of fraud, as perpetrated by the False Claims Act, should be governed by the common law definition of materiality or the statutorily provided definition in §3729(b)(4); the concept of materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[149] This understanding is consistently articulated in renowned treatises and followed by courts alike.[150]

Despite this mutual understanding, the demanding and rigorous nature of the materiality requirement articulated by Justice Thomas, is balanced against subjective factual circumstances, with none to be taken as singularly or absolutely dispositive.[151] Courts should be strict in the application of materiality when examining the circumstances of each case and weighing the substantive facts for a final materiality determination. The False Claims Act is, and has always been, structured and intended "to reach all types of fraud, without qualification, that might result in financial loss to the Government."[152] There is no evidence of a specific intent requirement under the False Claims Act, which supports the idea that the Act was intended to provide the Government with broader protections than that provided to the average citizen in prevailing against actions of fraud.[153]

By applying the common law definition of materiality, the district and circuit courts have improperly restricted the scope of coverage under the False Claims Act. Though common law fraud is the required source to understand how to apply materiality to the defendant's conduct, the common law should not be used for materiality when the statute provides a clear and concise definition. In complete accordance with the common law understanding of materiality, the statute applies the conditions of actual influence or capable influence, which is not unlike the common law characterization of importance or likelihood of importance considerations.[154] Even without the statutory definition of fraud, a clearly defined definition for materiality can supply

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[149] *Id.* at 2002 (citing 26 R. LORD, WILLISTON ON CONTRACTS § 69:12, p. 549 (4th ed. 2003)).

[150] *Id.* at 1989 n.5 (2016) (citing 26 R. LORD, WILLISTON ON CONTRACTS § 69:12, p. 549-550 (4th ed. 2003) ("most popular" understanding is "that a misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her choice of action with respect to the transaction involved: which will induce action by a complaining party[,] knowledge of which would have induced the recipient to act differently". . . "[a] misrepresentation is material if, had it not been made, the party complaining of fraud would not have taken the action alleged to have been induced by the misrepresentation."); Junius Constr. Co. v. Cohen, 257 N.Y. 393, 400 (1931) (a misrepresentation is material if it "went to the very essence of the bargain"); *cf.* Neder v. U.S., 527 U.S. 1, 16, 22, n. 5 (1999) (relying on the "natural tendency to influence" standard and citing to the RESTATEMENT (SECOND) OF TORTS § 538 definition of materiality).

[151] *Id.* at 2003 (Justice Thomas, as keen to importance of the facts of each case, presented noting that "garden-variety breaches of contract[s] or regulatory violations" are not prima facie examples for materiality under the False Claims Act. Further, Justice Thomas was clear that the "condition of payment" or knowledge by the government of the falsity did not effectively squash the claim.)

[152] U.S. v. Neifert-White Co., 390 U.S. 228, 232 (1968).

[153] *Id. See also* 32 U.S.C. § 3728(b)(1)(B) (2012) (there is not specific intent requirement found in the False Claims Act).

[154] 31 U.S.C. §3729(b)(4); RESTATEMENT (SECOND) OF TORTS § 538(1).

enough understanding for courts to appropriately assert liability using the implied false certification theory.

Interpreting materiality as anything other than the strict definition of the statute should be viewed as an egregious disregard for the law. The legislature carefully drafts, debates, and passes legislation. Each statute is carefully crafted to make sure that the premise and reason for passage is going to be applied appropriately by the courts. As such, the judiciary should apply staunch textualist principles, as Justice Thomas has, to prevent the intrusion of improper application of the law. This strict constructionism requires that judges interpret a statute according to the precisely chosen terms, without adulterating the true meaning with improper outside sources.[155] By taking the prudent approach illustrated by Justice Thomas, judges can prevent unconscionable outcomes and effectuate the intended purpose of the False Claims Act.

[155] *Strict Constructionism*, BLACK'S LAW DICTIONARY (8th ed. 1999).