Materiality: A Needed Return To Basics In False Claims Act Liability

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MATERIALITY: A NEEDED RETURN TO BASICS IN FALSE CLAIMS ACT LIABILITY

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I. INTRODUCTION

The False Claims Act (the “FCA” or “Act”)[1] is credited for returning well over $3 billion to the federal fisc in 2010 alone. On account of such success, the FCA has been rightly hailed as the premiere statute for protecting government programs from fraud and abuse by government contractors.[2] Remarkably, however, there is a significant lack of uniformity among federal courts regarding what makes a claim[3] “false” under the Act. This article discusses the legal constructs that federal courts have developed to interpret the concept of “falsity” under the FCA and concludes that these legal constructs have obfuscated, rather than advanced, uniform and sound legal analysis of the FCA. This article advocates for the abandonment of such legal constructs in favor of a unified approach to falsity which hinges exclusively on materiality.

II. A BASIC OVERVIEW OF THE FCA

The basic framework created by the FCA for the prosecution of false claims is not difficult to understand. The FCA makes it unlawful for individuals to knowingly use or cause

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[2] The number of private contractors performing government functions has increased significantly in the last century. Thus, the number of people in the private sector potentially subject to liability under the FCA has also significantly increased. See generally Martha Minow, Partners Not Rivals: Privatization and the Public good 3 (2002); Minow, Outsourcing Power: How privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy, 46 B.C. L. Rev. 989, 990-95 (2005).

[3] The Act defines the term “claim” as “any request or demand, whether under a contract or otherwise, for money or property…if the U.S. Government provides any portion of the money or property which is requested or demanded. § 3729 (c).
someone to use false information to obtain, retain, or cause the government to spend government funds.\textsuperscript{4} The FCA does not require specific intent to defraud.\textsuperscript{5} Instead, “knowingly” under the FCA means that the defendant “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.”\textsuperscript{6} The Act specifically holds a person liable who (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; or (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.\textsuperscript{7}

Violators of the False Claims Act can face civil penalties between $5,000 and $10,000 in addition to triple the damages that the violations caused the government.\textsuperscript{8} A notable feature of the False Claims Act—and the feature to which most of the Act’s success is attributed—is that any private person with knowledge of government fraud, known as a “relator” under the FCA, may bring a civil action on behalf of the government for a violation of the Act.\textsuperscript{9}

And that is where simplicity ends.

\textsuperscript{4} § 3729.
\textsuperscript{5} § 3729 (b)(1)(B).
\textsuperscript{6} § 3729 (b)(1)(A).
\textsuperscript{7} § 3729 (a)(1)(A)–(B) (the most frequently used provisions under the FCA, which are commonly known as the false claim and false statement provisions, respectively). The FCA also holds a person liable who: (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G); (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. § 3729(a)(1)(C)-(G).
\textsuperscript{8} § 3729(a)(1)(G); see H.R. REP. No. 99-345, at 11 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5276 (Congress unambiguously expressed its view that treble damages were remedial); see also Cook Cnty. v. U.S. ex rel. Chandler, 538 U.S. 119, 131–32 (2003) (stating that the False Claims Act provided “make-whole recovery beyond mere recoupment of the fraud” and that treble damages “do[] not equate with classic punitive damages”).
\textsuperscript{9} § 3729(a)–(b). The genesis and importance of this private-enforcement mechanism in American jurisprudence dates back to the Civil War. See Evan Caminker, The Constitutionality of Qui Tam Actions, 99 YALE L.J. 341, 351 (1989).
III. FACTUAL FALSITIES VERSUS LEGAL FALSITIES

At the core of FCA liability is the submission of a claim for payment that is “false,” a concept which has proven remarkably elusive for the courts.\(^\text{10}\) At its most basic formulation, a claim for payment is “false” when something renders the claim not payable, although the party requesting the payment passes off the claim as though it is.\(^\text{11}\)

The reasons that render a claim not payable fall under two broad categories. The first category involves factual falsities.\(^\text{12}\) A factually false claim is one that is not payable because it rests on inaccurate factual information about the product or service being billed.\(^\text{13}\) For example, a claim for 100 units of an injectable drug, when only 10 units were provided, is factually false and would be a basis for liability under the FCA.

The second category that renders a claim not payable involves legal falsities.\(^\text{14}\) This category refers to situations in which a factually accurate claim (i.e., one that bills for 100 units where 100 units were actually provided) violates a legal condition of payment for the product being billed.\(^\text{15}\) For example, a claim to the government for 100 units of an injectable drug that is administered by a non-licensed health care professional despite government regulations to the

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\(^{10}\) The Act does not define what it means for a claim to be “false” or “fraudulent.” Therefore, courts have looked to common definitions of those terms in defining the boundaries of what constitutes a false or fraudulent claim. See, e.g., U.S. ex rel. Mikes v. Straus, 274 F.3d 687, 696 (2nd Cir. 2001): Regarding the third element, the term “false or fraudulent” is not defined in the Act. A common definition of “fraud” is an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.” Webster’s Third New International Dictionary 904 (1981). “False” can mean “not true,” “deceitful,” or “tending to mislead.” Id. At 81. The juxtaposition of the word “false” with the word “fraudulent,” plus the meanings of the words comprising the phrase “false claim,” suggest an improper claim is aimed at extracting money the government otherwise would not have paid.

\(^{11}\) Mikes v. Straus, 274 F.3d 687.

\(^{12}\) See, e.g., U.S. ex rel. Wilkins v. United Health Group, Inc., 2010 WL 1931134, * (May 13, 2010), D. N.J.) (“FCA violations are generally of two types: 1) factually false claims and 2) legally false claims. The former is of the variety where a person misrepresents what if any goods and services were provided to the Government. The latter arises where the person certifies compliance with a statute or regulation that is a condition of Government payment, while knowing that no such compliance exists.”)

\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) Id.
contrary is factually accurate, but nevertheless violates a condition of payment. Submission of such a claim would constitute a legally false claim.16

Importantly, not all factual or legal falsities render a claim to the government not payable or “false” under the False Claims Act. In order for a factual or legal falsity to render a claim not payable or “false” within the meaning of the Act, the factual or legal falsity must pertain to something that is important or goes to the essence of that for which the government agreed to pay.17 In other words, the factual or legal falsity must be “material” to the government’s willingness to enter into a contract or pay for the goods or services in question.18

Drawing the line between what is important or unimportant to the government’s contracting and/or payment decision has proven remarkably difficult for the courts to articulate. A big reason for such a difficulty is that there is no comprehensive source of information that

16 Id. Litigants have not always found it easy to fit inaccuracies in the correct category. See, e.g., U.S. of America v. Kellogg Brown & Root Services, Inc., 2011 WL 3303486, *9 (D.D.C. August 3, 2011) (“the government argues … claims at issue here fall in the first category of “factually false claims” … [because] KBR is liable … for submitting claims for costs that… were not allowed under or within the scope of the contract at issue… The government cites no case providing direct support for this interpretation of factual falsity… [D]etermining the scope of a contract is a quintessentially legal, not factual question.”) (emphasis added).

17 A claim is materially false if it has “a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property” from the government. See, e.g., Longhi v. Lithium Power Techs, Inc., 575 F.3d 458, 470 (5th Cir. 2009).

18 Despite differences in articulation, all courts recognize some type of materiality requirement or limitation for liability under the False Claims Act. For Pre-FERA actions, see, e.g., U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019-20 (7th Cir. 1999) (explaining that the “FCA is not an appropriate vehicle for policing technical compliance with administrative regulations”); U.S. ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) (holding that “[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA”). For Post-FERA actions, see, e.g., U.S. ex rel. Nowak v. Medtronic, Inc., 2011 WL 3208007, *27 (D. Mass. 2011) (“The FCA cabins the fraud that is actionable under the FCA not by limiting the scope of misrepresentation or fraud that is actionable but rather by requiring a showing of … knowledge under 3729(a)(1)(B) … and materiality.”); U.S. ex rel. Loughren v. Unum Grp., 613 F.3d 3000, 306-07 (1st Cir. 2010) (“[T]he FCA is subject to a judicially-imposed requirement that the allegedly false claim or statement be material.”; ). See also Loughren, 613 F.3d at 307-08 in 8 (holding that the Supreme Court had recently found a materiality requirement applicable to 31 USC 3729(a)(2) & (a)(3), but that such holding does not disturb the court’s “previous reading of a materiality requirement into the statute more generally,” and, further, that the FERA amendment that incorporated an explicit materiality requirement into the former 3729(a)(2) does not alter this conclusion). There are not many examples of cases in which a factual misrepresentation was considered not material to the decision to pay possibly because it would be rare for someone to make a knowing misrepresentation of a fact in connection with a claim for money unless that fact mattered to the right to or amount of payment. But see U.S. ex rel. Berge v. Bd of Trustees, 104 F.3d 1453 (4th Cir. 1997) (where a factually false statement pertaining to the identity of research contributors was deemed not material to the government’s decision to award the university funding).
lists all the rules which, if broken, render the claims affected by those broken rules not payable by the government. Rather, the rules that affect the government’s decision to pay for goods and services are not only scattered, but can be unwritten. Sometimes the rule is laid out in a contract between the government and the contractor; sometimes the rule is laid out in a statute; sometimes the rule is laid out in a penal code; and sometimes the rule is not laid out anywhere, but is so basic to the integrity of the government program in question that the government expects the rule to be known and observed by its contractors. As an example of the latter, there is no need to write a rule that provides that an injectable drug is not payable if it is administered on a deceased person, for everyone would agree that dispensing the injectable drug on a live person is inherently material to the right to payment. Unfortunately, the materiality of many conditions of payment—both written and unwritten—is sometimes less obvious than the last example.

As an example of the latter, there is no need to write a rule that provides that an injectable drug is not payable if it is administered on a deceased person, for everyone would agree that dispensing the injectable drug on a live person is inherently material to the right to payment. Unfortunately, the materiality of many conditions of payment—both written and unwritten—is sometimes less obvious than the last example.

Needing to separate the material from the immaterial insofar as FCA falsity was concerned, federal courts developed legal constructs to assist in the materiality inquiry. These constructs were built around the question of “certification,” a concept that has taken a life of its own over time.

IV. Express Certification

In deciding whether the rule violated in an FCA case was important, courts have focused on whether compliance with that rule had been “certified” by the defendant in connection with its request for payment. Courts reasoned that an express certification of compliance with the

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19 There has been significant litigation and difference of opinion as to where a rule must “reside” in order to be an appropriate basis for FCA liability. See discussion infra note 87.

20 The reasoning was that it is not the underlying violation of a rule that causes liability under the FCA, but rather the false certification of compliance with that rule for the purpose of fraudulently obtaining payment that triggers liability under the FCA. See, e.g., U.S. ex rel. Rost v. Pfizer, Inc., 736 F. Supp.2d 367, 376 (D. Mass. 2010) (“A claim cannot be false merely because the activity underlying the claims was illegal, [i]t is the false certification of compliance which creates liability.”); U.S. ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39, 54 (D. Mass 2001) (“While Defendant’s payments of kickbacks may well be illegal, a claim under the FCA will fail unless Relator

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rule was evidence that the parties considered the rule in question important to the claim for
payment, such that falsely certifying compliance with that rule constituted a false claim under the
Act.\textsuperscript{21} This theory of legal falsity became known as the “express false certification” theory of
liability under the FCA.\textsuperscript{22}

Over time, the express certification theory gained traction as the premiere judicial
construct for legal falsity in FCA cases.\textsuperscript{23} However, the theory also acquired talismanic effect in
connection with FCA liability. Specifically, the legal community, both courts and litigants,
began to treat the existence of an express certification as the sine qua non of liability,\textsuperscript{24} while
conversely treating the absence of an express certification as an automatic shield from liability
under the Act.\textsuperscript{25}

\textit{U.S. ex rel. Conner v. Salina Reg’l Health Center, Inc.}, 543 F.3d 1211 (10th Cir. 2008),
is a clear example of the excessive reliance that litigants placed on the express certification
theory. Likewise, \textit{Conner} also made it evident that the courts needed to reign in the certification
construct.\textsuperscript{26} There, a hospital had expressly certified compliance with “all applicable laws and
alleges that [the defendant] caused or induced a doctor and/or pharmacist to file a false or fraudulent certification
regarding compliance with the anti-kickback statute.”).
have recognized false certification of compliance with a regulation that is a condition of payment as a basis of
liability under the False Claims Act.); see also U.S. ex rel. Hutcheson v. Blackstone, 647 F.3d 377, 388 (1st Cir.
2011), \textit{cert. denied}, (2011) (“The district court appeared to employ the concept of certification such that a claim can
be false or fraudulent only if the submitting entity knew or should have known of the underlying falsehood or
fraudulence.”).
\textsuperscript{22} See Wilkins, 2010 WL 1931134, * 3 (“A legally false claim is known as the “false certification” theory of
liability.”) See Sylvia, Claire, The False Claims Act: Fraud Against the Government, Section 4:33 (“The term ‘false
certification,’ generally refers to a case in which a defendant who makes a claim for payment from the United
States submits a form or document expressly certifying compliance with a law, contract term, or regulation, when
the defendant did not in fact comply with the requirement, rendering the certification, and therefore the claim for
payment, false”).
Eng’g Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776,
786-87, 793 (4th Cir. 1999); U.S. ex rel. Thompson v. Columbia/HCA healthcare Corp., 125 F.3d 899, 902 (5th
Cir. 1997); U.S. ex rel. Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996).
\textsuperscript{24} See Mikes v. Straus, 274 F.3d 687, 697 (2nd Cir. 2001).
\textsuperscript{25} Id.
\textsuperscript{26} U.S. ex rel. Conner v. Salina Reg’l Health Center, Inc., 543 F.3d 1211 (10th Cir. 2008).
regulations” in its cost reports (a means of claiming government funds), although it had violated many of those laws and regulations.\textsuperscript{27} A physician sued the hospital under the FCA, claiming that the hospital’s “false” express certification rendered the hospital’s claims false and actionable under the FCA.\textsuperscript{28} The district court rejected the relator’s position and dismissed his complaint, which dismissal was affirmed by the Tenth Circuit.

Recognizing that the hospital had expressly certified compliance with all applicable laws and regulations in its cost report, as alleged by the physician relator, the Tenth Circuit held that such an express certification of compliance was nevertheless \textit{too broad} to form the basis for liability under the FCA because there was no evidence that payment by the government was contingent upon (i.e., material to) compliance with all certified laws and regulations.\textsuperscript{29} In other words, the Court recognized that having an express certification, without more, could not be the \textit{sine qua non} of materiality or liability under the FCA.\textsuperscript{30} The Court reasoned that such an approach to an express certification theory would over-expand liability under the FCA beyond that which the Act intended.\textsuperscript{31}

\textsuperscript{27} Id.
\textsuperscript{28} Relator was represented by a well-known national law firm specializing in health care law and, remarkably, the defense of FCA cases, which goes to show the widespread reach of the express certification fallacy.\textsuperscript{29} Conner, 543 F.3d at 1218. Note that some courts still did not recognize that the problem with the “broad certification” was not that the certification was somehow not express, but simply that the rule with which compliance was certified was not material to the government’s decision to pay. \textit{See also} U.S. ex rel. Westmoreland v. Amgen, Inc., 707 F. Supp. 2d 123 (D. Mass. 2010) (broad language in state Medicare Enrollment Application requiring compliance with “all applicable state and federal laws” was insufficient to constitute express certification of compliance with state and federal anti-kickback statutes); cf. U.S. ex rel. Schmidt, M.D. v Zimmer, Inc., 386 F.3d 235, (3d Cir. 2004) (“A certificate of compliance with federal health care law is a prerequisite to eligibility under the Medicare program. It follows that Schmidt alleged a violation of the FCA when he alleged that Mercy certified its compliance with federal health care law knowing that certification to be false.”) (internal citations omitted).
\textsuperscript{30} Unfortunately, many courts failed to recognize and flesh out the need for a material nexus between the wrongful conduct and the government’s decision to expend funds and continued to view express certification, without more, as the yardstick of liability. This led to tortured reasoning in some cases in which an “express certification” of compliance was clearly present, but where nevertheless the courts chose to negate such a fact for the apparent purpose of limiting FCA liability. \textit{See e.g.}, U.S. ex. Rel. Westmoreland v. Amgen, Inc., 707 F. Supp. 2d 123 (D. Mass. 2010) (broad language in state Medicare Enrollment Application requiring compliance with “all applicable state and federal laws” was insufficient to constitute express certification of compliance with state and federal anti-kickback statutes).
\textsuperscript{31} Conner, 543 F.3d. at 1218.
As cases similar to Conner transpired in the FCA arena, the need to continue to define and circumscribe the purview of the express certification theory became apparent to the courts, which then began to impose additional requirements for liability under the theory. Specifically, courts began to enumerate the types of rules with which a false express certification of compliance had to be made in order to form a basis for liability under the FCA, holding that liability would attach only if an express false certification was made with a statute, regulation, or contract term, as long as they were a condition to payment. Different iterations of the foregoing list ensued in subsequent cases, however, suggesting that express certification claims could exist when compliance with other conditions was expressly stated in authoritative sources other than statutes, regulations, and contracts, such as programs and other specifications.

These necessary adjustments to the express certification theory, however, did not resolve the remaining questions that the theory raised and did not correct the analytical problems that the theory’s talismanic approach engendered. For example, what made a rule a “condition to payment” for FCA liability, as required by the theory, was left undefined. Further, whether this condition to payment requirement was the same as the old materiality requirement under the Act became a murky proposition. Indeed, although some courts interpreted the “condition to payment” requirement as an expression of materiality to payment, other courts held that this “condition to payment” requirement was something unrelated to the concept of materiality that

33 See, e.g., Mikes v. Straus, 274 F.3d 687, 697 (2nd Cir. 2001) (“We join the Fourth, Fifth, Ninth, and District of Columbia Circuits in ruling that a claim under the Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment.”).
34 See U.S. ex rel. Carter v. Halliburton Co., et al., 2009 WL 2240331 (E.D. Va. 2009) (“An express certification claim exists ‘when a government contract or program required compliance with certain conditions as a prerequisite to a government benefit, payment or program.’”). The constituent parts of a “program” such as Medicare often consist of documents, which are not statutes, regulations, or contracts in the traditional sense. They include Manuals, National and Local Coverage Decisions, etc. Further, the legislative history of the FCA includes violations of “specifications” as an additional source of liability under the FCA. See S. Rep. No. 99-345, at 9, reprinted in 1986 U.S.C.C.A.N. 5266, 5274 (“A false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation.”).
appeared in the Act. Additionally, the decisions regarding express certification did not clarify whether a rule must declare itself to be a condition to payment in order to be a basis for FCA liability or whether the courts could surmise that the rule was a condition to payment based on other circumstances.

The bottom line with the express certification theory, even as modified by Conner and subsequent cases, is that while the theory sought to simplify the materiality inquiry, as well as prevent potential over-reaching under the FCA, the theory did not create a reliable paradigm that properly or consistently could guide courts or litigants in FCA cases. To the contrary, the constant tweaking required by the theory made it an unreliable predictor of liability under the FCA and created division among the courts.

V. IMPLIED CERTIFICATION

Another problem with the express certification theory that revealed itself over time was that, in its attempt to prevent over-reaching under the FCA, the theory excessively limited the

35 *Mikes*, 274 F.3d at 697 (“We add that although materiality is a related concept, our holding is distinct from a requirement imposed by some courts that a false statement or claim must be material to the government’s funding decision … We need not and do not address whether the Act contains a separate materiality requirement.”).

36 See, e.g., U.S. v. Albinson et al., 2010 WL 3258266, *13 (Aug. 16, 2010, D. N.J.) (“The overwhelming majority of courts have extended FCA liability to a party’s knowing false certification of compliance with applicable regulations, statutes, or contracts, when compliance with the applicable requirement is a condition of payment. The Court is persuaded that the false express certification theory should apply in this matter…[T]he Statement of Work required Albinson to certify acceptance of the work performed by the contractors…giv[ing] rise to an inference that payment was conditioned on the Albinson’s acceptance of the work.”)

37 U.S. ex rel. Westmoreland v. Amgen, Inc., 707 F. Supp.2d 123 (D. Mass. 2010), is an example of the theory of express certification becoming a moving target as a means of predicting liability under the FCA. There, the district court faced an express certification of the CMS-855A enrollment form by a provider that had engaged in kickbacks. In that form, the provider had agreed to “abide by the Medicare laws, regulations and program instructions…” and certified that “I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transactions complying with …the Federal anti-kickback statute…”). *Id.* at 134. Unable to deny the existence of the express certification, as well as an express certification with a “contract term, specification, statute, or regulation,” the court managed to avoid finding liability by concluding that the certification of compliance was “forward looking” and, as such, felt it could not be a basis for liability under the FCA unless it could be shown that “when the provider signed the enrollment forms, they knew that they would be accepting kickbacks from the Defendants in violation of the anti-kickback statute. Without such pleading, there can be no “false claim” … under the express certification theory.” *Id.* at 136.
FCA’s reach. Specifically, while the theory imposed all sorts of extra requirements for liability to prevent over-reaching in cases like Conner, the theory shielded from liability other cases in which rules material to payment had been violated, simply because compliance with those rules had not been expressly certified. Courts sought to correct this problem through the creation of the implied certification theory of liability.

By way of example, in Ab-Tech Constr., Inc. v. U.S., the Court of Federal Claims faced a situation where the defendants had submitted payment vouchers containing no express representations regarding their compliance with the eligibility requirement of the federal small business program in question there. The lack of certification clearly would have placed fraudulent conduct in the submission of those vouchers outside of the reach of the FCA under the express certification theory. However, without an express certification to rely on, the Court concluded that the defendants’ submissions of payment vouchers implicitly certified adherence with the eligibility requirements of the program, making their conduct actionable under the FCA. Many courts thereafter adopted the Ab-Tech framework and, thus, the theory of implied certification was born.

An implied false certification claim is “based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a

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38 The express certification theory failed to capture cases of fraud that should be actionable under the FCA, something that was later alleviated with the advent of the implied certification theory, discussed later in this article. See Mikes v. Straus, 274 F.3d 687, 697 (2nd Cir. 2001). See also U.S. ex rel. Conner v. Salina Regional Health Center, Inc., 543 F.3d 1211 (10th Cir. 2008) (denying FCA liability based on a lack of express certification).
40 Id. at 433.
41 Id. at 434.
42 Id. at 435.
precondition to payment.” The idea behind the theory is that important rules which are conditions to payment should not be ignored by contractors simply because they did not make it into some form that required express certification by the contractor. In reality, most cases that call for application of the implied certification theory for liability under the FCA involve situations where the rule did make it into some condition of participation certified by the contractor at a different time from the time of payment, such as when a party expressly certified compliance with certain conditions of participation in a government program, but ceased to be in compliance with its prior express certifications at a later time when it sought payment.

Having corrected some of the unintended effects of the express certification theory, the implied certification construct was a needed addition to the materiality paradigms available to the courts. However, the implied certification theory raised some problems of its own. Namely, in its attempt to cure the under-inclusion problem created by express certification, implied certification once again raised the specter of over-reaching FCA liability—the very thing that the express certification theory sought to correct. Accordingly, as with the express certification theory, the theory of implied certification required and received significant modifications from the courts, almost from its inception.

44 *Mikes*, 274 F.3d at 699, (“Foundational support for the implied false certification theory may be found in Congress’s expressly stated purpose that the Act include at least some kinds of legally false claims and in the Supreme Court’s admonition that the Act intends to reach all forms of fraud that might cause financial loss to the government.”) (internal citations omitted).

45 The rationale behind implied certification liability can be seen in U.S. ex rel. Main v. Oakland city Univ., 426 F.3d 914 (7th Cir. 2005), although the theory was not addressed by name. There, a university obtained a certification of eligibility for government subsidies in phase one of a multi-phase program by expressly certifying that it would “refrain from paying recruiters contingent fees for enrolling students.” Id. At 916. In phase two, the university applied for grants even though it was in violation then of the contingent fee rule with which it had certified adherence in phase one. Finding liability under the FCA, Judge Easterbrook held that the phase two disbursements were contingent upon the certificate of eligibility in phase one and that liability attached to each claim submitted thereafter given the violation. In other words, the university had implicitly certified that it was in compliance with the contingent fee rule when it submitted requests for grants in phase II. The court explained that “[i]f a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.” *Id.* Cf. U.S. ex rel. Westmoreland v. Amgen, Inc., 707 F. Supp.2d 123 (D. Mass. 2010) (same scenario, but liability rejected under the express certification theory).
For example, in the healthcare context, where the great majority of FCA cases arise, the Second Circuit considered the application of implied certification and cautioned that the construct could not be used expansively because it could improperly become a “blunt instrument to enforce compliance with all medical regulations… [as opposed to] those regulations that are a precondition to payment…”46 Instead, citing concern with the federalization of medical malpractice under the guise of implied certification theories of liability, the Second Circuit added that implied certification could only be used when the “underlying statute or regulation upon which the plaintiff relies expressly states[47] that the provider must comply in order to be paid.”48

So, to be clear, in contrast with the express certification theory which required a false express certification with a statute, rule, or contract (arguably among other sources) that was a condition of payment (however determined),49 the implied certification theory, according to the Second Circuit at least, required a violation with a condition of payment expressly stated as such in a statute or a regulation.50

Not surprisingly, and just as was the case with express certification theory, the implied certification construct did not unify the FCA jurisprudence. Some courts followed the Second

46 Mikes, 274 F.3d at 699.
47 Although the Second Circuit’s “precondition to payment” statement seem to call for a materiality analysis as a means to cabining FCA liability, the Second Circuit never coached its opinion in such terms.
48 In a different context – one involving the question of whether a person may be liable under the implied certification theory for causing a legally false claim to be submitted where the party submitting the claim is an innocent third party – a U.S. District Court in Massachusetts imposed yet another limitation on the use of the implied certification theory of liability when it answered that question in the negative. See U.S. ex rel. Rost v. Pfizer, Inc., 736 F. Supp.2d 367, 375 (D. Mass. 2010). Cf In re Pharmaceutical Industry Average Wholesale Price Litigation, 491 F.Supp.2d 12 (D. Mass. 2007) (where the same court held the opposite in connection with an implied certification case involving factual falsities, as opposed to legal falsities). See also U.S. ex rel. Hutcheson v. Blackstone, 647 F.3d 377, 379 (1st Cir. 2011), cert. denied, (2011) (rejecting the Rost limitation on implied certification and holding that, in fact, a person could have liability under the implied certification theory for causing legally false claims to be submitted by an innocent third party).
49 See discussion supra page 8.
50 For a compilation of implied certification cases through 2008, see Susan Levy, et al., The Implied Certification Theory: When Should the False Claims Act Reach Statements Never Spoken or Communicated, But Only Implied? 38 Public Contract Law Journal 131 (Fall 2008) (arguing that the implied certification theory of liability should be narrowly applied).
Circuit’s implied certification construct, which allowed liability only if a statute or regulation expressly stated that compliance was a pre-condition to payment. Those courts reasoned (misguidedly) that only by requiring such an express announcement in the regulation could the defendant receive sufficient notice to justify liability under the FCA. Some courts, however, rejected the implied certification theory altogether as a basis for FCA liability, while others deferred ruling on the validity of implied certification. Further, over time, and just as was the case with express certification, some courts which did subscribe to the implied certification construct eventually came to redefine it. Though modification of the theory was necessary, the evolution of the construct made the theory as much of a moving target and source of division among the courts as was its express certification predecessor.

For example, in SAICS II, the DC Circuit Court of Appeals considered and rejected the Second Circuit’s implied certification pronouncement that the underlying statute or regulation must explicitly state that payment was conditioned upon compliance with the statute or

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52 In that the FCA already contains a scienter requirement which imposes liability only upon knowing submissions of false claims, injecting “notice” into what is essentially a materiality inquiry unnecessarily obfuscates the analysis.

53 U.S. ex rel. Westmoreland v. Amgen, Inc., 707 F. Supp.2d 123, 137 (D. Mass. 2010) (“[L]iability based on an implied certification theory requires that the relevant statute or regulation expressly state that compliance with a particular requirement is a precondition of payment…adequate notice should be given that compliance is a precondition to payment by an express statement in the relevant statute or regulation.”) (internal citations omitted).

54 See, e.g., U.S. ex rel. Carter v. Halliburton Co., et al, 2009 WL 2240331, *12-13 (E.D. Va. July 23, 2009) (”Under this implied false certification theory…the FCA…attaches liability to the submission of a claim by a contractor that knows that it has not complied with a contract term, statute, or regulation…constitute[ing] an ‘implicit certification’ that the contractor has fully performed the relevant portion of the contract. This theory…has not been recognized in the Fourth Circuit, which has, in fact, expressed doubt as to whether implied certification liability can exist.”) (internal citations omitted).


56 See discussion supra note 54.
regulation in question. Instead, the DC Circuit Court of Appeals identified contracts as an equally valid place where conditions for pre-payment could be found for purposes of the implied certification theory. The DC Circuit’s pronouncement was then followed by the First Circuit, which also held that a claim could be legally false under the FCA due to an implied certification of compliance with a precondition of payment that was not expressly stated in a statute of regulation.

In sum, some circuits required that, in order for FCA liability to attach under the implied certification theory, the violated rule must be in a statute or regulation that expressly declared such rule a pre-condition of payment. In contrast, other courts required neither a statute nor a regulation, finding that a contract would suffice, nor an express declaration that the rule was a pre-condition to payment.

VI. THE RETURN TO MATERIALITY

Against this backdrop of a divided jurisprudence insofar as FCA falsity was concerned, it is not surprising that the concept of materiality finally re-surfaced in the 2011 case U.S. ex rel.

57 Finding themselves unfettered by precedent, Chief Judge Sentelle, Judge Tatel, and Judge Griffith unanimously rejected the “express conditioning” requirement set out in the Second Circuit cases and explained that “nothing in the statute’s language specifically requires such a rule, and we fear that adopting one would foreclose FCA liability in situations that Congress intended to fall within the Act’s scope.” SAIC, 626 F.3d at 1267-68. Most importantly, in rejecting the modified implied certification construct, the Court circled back to the concept of materiality, further holding that, although the “existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality…it is not a necessary condition. The plaintiff may establish materiality in other ways, such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue. Id. At 1269. SAICS II was reaffirmed and followed in U.S. v. Kellogg Brown & Root Services, Inc., 2011 WL 3303486 (D. D.C. 2011).

58 SAIC, 626 F.3d at 1269.

59 See U.S. ex rel. Hutcheson v. Blackstone Medical, Inc., 647 F.3d 377, 379 (1st Cir. 2011), cert. denied (2011) (First, we reject the argument that, in the absence of an express legal representation or factual misstatement, a claim can only be false or fraudulent if it fails to comply with a precondition of payment expressly stated in a statute or regulation. Second, we reject the argument that a submitting entity’s representations about its own legal compliance cannot incorporate an implied representation concerning the behavior of non-submitting entities. These purported limitations do not appear in the text of the FCA and are inconsistent with our case law.”).

60 See Mikes v. Straus, 274 F.3d 687 (2nd Cir. 2001).


62 The Supreme Court has never endorsed nor clarified these judicial constructs.
There, a medical device manufacturer was charged with causing the submission of false claims when recipients of the manufacturer’s kickbacks, namely, a hospital and physicians, submitted claims for reimbursement to the government. The relator reasoned that the claims were legally false under the FCA because they were in violation of the anti-kickback statute, which was a material pre-condition to payment. The relator’s complaint contained no allegations regarding express or implied certifications. Instead, it alleged that the hospital and the physicians signed a provider agreement and a cost report, both of which expressly conditioned payment on compliance with the anti-kickback statute, among other laws.

Relying on the then-prevailing framework for liability under the FCA, which centered heavily on certification theories discussed in this article, the defendant moved to dismiss the relator’s complaint. Specifically, the defendant argued that there were only three ways for a claim to be false under the FCA: if it (1) misstated facts, (2) incorrectly certified compliance with a statute or regulation, or (3) failed to meet an express condition of payment stated in a statute or regulation. Since the complaint had not alleged factual falsities or certifications (express or implied), the district court, accepting the Defendant’s argument, found that the relator had failed to plead actionable false claims under the FCA and dismissed the case.

64 Id. at 379.
65 Id.
66 Id. at 379-81.
67 A claim that misstates a fact would fall under the factual falsity claim category explained earlier in this article.
68 Such a claim would fall under a version of the express certification theory.
69 Such a claim would fall under a version of the implied certification theory. See Hutcheson at 379.
70 Though not alleged, the district court did consider whether the provider agreement and hospital cost reports were express certifications. As to the cost report, the district court found that it was too general to constitute an express certification basis for liability, a la Conner. As to the provider agreement, the district court found that the certification was specific to the physicians, not the device manufacturer. Id. at 66.
In deciding that the relator had not stated a legally cognizable claim, the district court enumerated the elements of liability under the FCA as consisting of (1) knowingly presenting or causing to be presented, (2) a false claim, (3) to the United States Government, (4) knowing its falsity, (5) which was material, (6) seeking payment from the federal treasury. The district court then defined the “false claim” requirement (element 2 in the district court’s analysis) as one arising exclusively under the three-fold construct of falsity advanced by the defendant; to wit, a claim that is factually false, that fits in the express certification theory, and/or that fits in the implied certification theory. Finally, the district court treated “materiality” (element 5 in the court’s analysis) as an element separate from “falsity,” defining the former as “the natural tendency to influence, or be capable of influencing, the payment of receipt of money or property” from the government. In doing so, the district court clearly adopted the Second Circuit’s conclusion that “falsity” and “materiality” were separate and distinct requirements under the FCA.

On appeal, the First Circuit Court of Appeals rejected the district court’s decision, holding that the three-fold construct advanced by the defendant and adopted by the district court was merely a “judicially created conceptual framework” with imposed limitations that appeared nowhere in the text of the FCA. With respect to the express and implied certification theories, the First Circuit pointed out that “[c]ourts have created these categories in an effort to clarify

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72 Id. at 61. It should be noted that the case was adjudicated under the pre-FERA version of the FCA. FERA amended the FCA to eliminate the presentment requirement to the U.S. Government listed by the District Court as the third element of liability. In all other respects pertinent to this article, the content of the FCA pre and post FERA is identical in content, except for some renumbering.

73 Id. at 64 (internal citation omitted).

74 Id. at 63 (“analysis of whether the claim is false vel non ought not be based on the materiality of the false statement”).

75 Hutcheson at 379-80 (“[W]e reject the argument that, in the absence of an express legal representation or factual misstatement, a claim can only be false or fraudulent if it fails to comply with a precondition of payment expressly stated in a statute or regulation . . . These purported limitations do not appear in the text of the FCA . . . In reaching this conclusion, we do not adopt the judicially created conceptual framework employed by the district court, nor do we adopt any categorical rules as to what counts as a materially false or fraudulent claim under the FCA.”) (emphasis added).
how different behaviors can give rise to a false or fraudulent claim.” However, the Court recognized that “[j]udicially-created categories sometimes can [. . .]create artificial barriers that obscure and distort those requirements.” The text of the FCA does not refer to ‘factually false’ or ‘legally false’ claims, nor does it refer to ‘express certification’ or ‘implied certification’ claims.”

Declining to rely on the three-fold construct in question, the First Circuit addressed what constitutes a “false or fraudulent” claim under the Act and concluded, simply, that “liability cannot arise under the FCA unless a defendant acted knowingly and the claim’s defect is material” to the government’s payment decision. In doing so, the Court, concluding that dismissal was inappropriate because it could not be decided as a matter of law that compliance with the anti-kickback statute was not material to the government’s decision to pay, directed the district court on remand to engage on a straightforward analysis of falsity based on the text of the statute.

VII. THE MATERIALITY REGIME

Hutcheson’s approach provided a much needed reconsideration of the falsity analysis under the FCA apart from certification constructs. The Act simply requires that a claim in question (1) be materially false and (2) be knowingly submitted or caused to be submitted by the defendant. It is materiality, therefore, that is at the crux of falsehood. However, Hutcheson

76 Id. at 385.
77 Id.
78 Id. at 386 (internal citations omitted).
79 Id. at 388.
80 Id. at 395 (“[W]e reverse the district court’s dismissal…for failing to identify a materially false or fraudulent claim within the meaning of the FCA…”).
81 Id. at 388, fn 12 (“The parties contest the proper place of this materiality requirement in the analysis under the FCA. Hutcheson argues that a claim can only be legally false or fraudulent if the legal defect is material. Blackstone argues…that these are two separate inquiries, such that a claim can be false or fraudulent without being materially so. We decline to resolve this semantic dispute, which has no bearing on the outcome of this case. It is uncontested that only false or fraudulent claims that are materially false or fraudulent can give rise to liability under
did not entirely discard the certification constructs; it merely advised against relying on certification constructs as the sole basis for falsity under the FCA. In that sense, *Hutcheson* did not go far enough.

As correctly identified by the First Circuit and for the reasons outlined throughout this article, the judicially created constructs of certification have created artificial barriers that have obscured and distorted the remedial goals of the FCA, without providing anything of value in return. First, these judicial constructs have failed to protect the integrity of the FCA regime by circumscribing liability to the right scope of cases, without being under-inclusive or over-inclusive. Secondly, these judicial constructs have failed to simplify analysis or unify the governing jurisprudence so as to create predictability in the application of the Act. Thirdly, by usurping the materiality requirement of the Act, these judicial constructs have failed to follow the very text of the statute that they were supposed to advance. In every material respect, therefore, these judicial constructs have failed and should be abandoned in favor of a pure application of the text of the FCA.

Liability under the FCA requires exclusively (1) that the violated rule be material to the government’s decision to contract or pay and (2) that the defendant act with the requisite scienter

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82 *Hutcheson* at 392 (“We first address whether the claims at issue here misrepresented compliance with a precondition of payment so as to be false…and then address whether those misrepresentations were material.”).

83 As the Supreme Court has amply recognized, in writing the FCA, “Congress wrote expansively, meaning to ‘reach all types of fraud, without qualification, that might result in financial loss to the Government,’” *Cook Cnty. v. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quoting *U.S. v. Neifer-White Co.*, 390 U.S. 228, 232 (1968)). Congress did not write the FCA only to reach frauds “expressly” or “implicitly” “certified” which appear in one document or source to the exclusion of some others, as these certification theories would require.

84 No pun intended.
The meaning of both elements is well-developed in FCA law, which contains ample guidance to safeguard the proper scope of the Act. If both elements are proven in any given case, FCA liability is appropriate.

Generally, a false claim is submitted “knowingly” when the defendant acts with actual knowledge of the falsity of the claim or deliberate ignorance of the truth or falsity of the claim. Because the certification theories never affected the scienter requirement for FCA liability, this article does not canvass the law dealing with what constitutes a “knowing” submission of a false claim under the FCA. Instead, the remainder of this article is dedicated to fleshing out the concepts of materiality that this author believes should exclusively govern “falsity” under the FCA.

Unlike the certification theories discussed in this article, the framework for evaluating the materiality of a rule is not complex. Materiality has been defined as any statement, express or implied, “which has a natural tendency to influence, or [is] capable of influencing, the decision

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85 See Hendow, 461 F.3d at 1172 (“So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.”).
86 Two Circuits agree with this author. See U.S. v. Scu, Applications Int’l Corp. (SAIC), 626 F.3d 1257, 1270 (D.C. Cir. 2010) (rejecting the defendant’s argument that legal preconditions of payment must be expressly designated as such to give rise to false claims, stating that “nothing in the statute’s language specifically requires such a rule” and that adopting one could “foreclose FCA liability in situations that congress intended to fall within the Act’s scope.” Instead, it calls for “strict enforcement of the Act’s materiality and scienter requirements.”) See also Hutchinson, 657 F.3d at 388 (1st Cir. 2011) (“we are not persuaded …by the concerns that prompted the Second Circuit to adopt such a [certification] rule in Mikes…The court reasoned that to find [standard of care] claims false or fraudulent would allow the government and relators to supplant private plaintiffs in medical malpractice suits…[o]ther means exist to cabin the breadth of the…FCA…The text of the FCA and our case law make clear that liability cannot arise under the FCA unless a defendant acted knowingly and the claim’s defect is material.”).
87 “Knowing” behavior includes “ostrich-like” behavior of burying one’s head in the sand and refusing to learn information that an individual exercising reasonable judgment would have reason to know. See, e.g., Bombardier, 2009 WL at *12. Reckless disregard is a linear extension of “gross negligence” and lies on a spectrum between gross negligence and intentional harm. Id.
88 The scienter requirement requires that a plaintiff show that the defendant “knows” (as defined by the Act), see supra note 4-6 that (1) it violated a term and (2) that the term was material to the government’s decision to pay. See, e.g., SAIC II, 626 F.3d at 1271; see also U.S. ex rel. Laymon v. Bombardier Transportation (Holdings) USA, Inc., 2009 WL 793627, *12 (W.D. Pa. March 23, 2009) (Laying out in extensive detail the standards for “knowing” and “knowingly” under the Act and holding that “a defendant’s state of mind typically should not be decided on summary judgment.”)
of the decision-making body to which it was addressed.”

In other words, when a representation of compliance with a rule, however and wherever expressed, would have a tendency of influencing the government to pay, then the rule is material to payment.

The burden of proving the materiality of a rule is on the government (and/or the qui tam relator prosecuting a case on behalf of the government), which must prove by a preponderance of the evidence that compliance with the rule is material to the government’s decision to pay. At the pleading phase, the government’s burden is merely to show the plausibility that the rule is material to the payment decision.

Contrary to the capricious formalities advanced by certification theories (that a condition to payment be found in one place or another or be declared in one way or another), a rule can be material regardless of whether it appears in a legislatively enacted source, contract, or some other formal place. Indeed, while “[e]xpress contractual language may ‘constitute dispositive evidence of materiality,’ materiality may be established in other ways, ‘such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue.’” To the extent the rule in question does appear in a written source, special focus must be placed on the importance to payment that the text places on compliance with the rule. The inquiry requires “analysis focus[ing] on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite of

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89 E.g., U.S. ex rel. Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010).
90 See, e.g., U.S. v. Kellogg Brown & Root Services, Inc. (KBR), 2011 WL 3303486, *12 (D. DC August 3, 2011) (“The materiality prong requires the government to prove ‘by a preponderance of the evidence that compliance with the legal requirement in question is material to the government’s decision to pay.’”).
91 KBR, 2011 WL 3303486 at *12 (“At this stage of the proceedings, the government has stated enough to draw the inference that the provisions in question are material to the government’s decision to pay. ‘So long as the pleadings suggest a plausible scenario to show that the pleader is entitled to relief, a court may not dismiss.’”) (quoting Atherton v. District of Columbia, 567 F.3d 672, 681 (D.C. Cir. 2009)).
92 Hutcheson, 647 F.3d at 394 (citing SAIC, 626 F.3d at 1269).

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the government’s payment.” In other words, where a text provides that the government expects compliance with a rule as a condition to payment, that text should not be lightly overcome, if at all, through extraneous evidence that contradicts the meaning of the text. However, the rule need not appear in a particular text or state that it is a condition of payment in order for it to be material to payment.

It is important to emphasize that, in having to prove that compliance with a rule is material to payment, the government and the relator need not prove that the government would not have actually paid the claim had it known of the non-compliance, but rather that it may not have paid. The reason is simple. Judging a priori the materiality of the rule with which compliance is required is appropriate because it incentivizes defendants to observe compliance with all material rules of a government program in a prescriptive fashion; i.e., at the time the claim is made. The opposite approach would create a perverse incentive for defendants to ignore compliance with material rules of a program in the hopes of arguing after claim submission that the government would have paid the claim anyway.

In sum, the meaning of materiality is well-developed in FCA jurisprudence and, coupled with the scienter requirement of the FCA, should provide the exclusive framework for deciding “falsity” in FCA cases.

VIII. CONCLUSION

94 See, e.g., Lemon, 614 F.3d at 1169 (holding that the government must only show that had it “known of the falsity [of the claims submitted], it may not have paid.”).
95 See, e.g., U.S. ex rel. Laymon v. Bombardier Transportation (Holdings) USA, Inc., 2009 WL 793627, *11 (W.D. Pa. March 23, 2009) (“[d]espite Bombardier’s position to the contrary, the actual effect of the falsity of the reports upon Bombardier’s decision to pay is not controlling on the materiality issue. Rather, the focus is on the ‘potential effect of the false statement when it is made.’ That is, a party will be held liable for a false statement or course of conduct ‘if it has a natural tendency to influence agency action or is capable of influencing the government’s funding decision, not whether it actually influenced the government.”) (internal citations omitted).
It is uniformly accepted that “violations of laws, rules or regulations alone do not create a cause of action under the FCA.”\textsuperscript{96} The same can be said for violations of contractual or other terms that govern the relationship between the government and its contractors. Liability under the FCA requires that the violated rule or term be a condition to payment and that the defendant knowingly submit a demand for payment notwithstanding the violation. In other words, liability under the FCA does not exist without both scienter and materiality of the violated rule or term.\textsuperscript{97}

To assist in the analysis of the materiality requirement, courts developed the judicial constructs of express and implied certification. Despite good intentions, those judicial constructs have failed and should be abandoned.

The initial construct was express certification. This construct failed because it became overly-mechanized and led to decisions inconsistent with the remedial purpose of capturing all government fraud, rather than fraud packaged or pled in the “express certification” way.\textsuperscript{98} Although mechanization initially may have resulted in efficiencies and a certain level of predictability, it became problematic in the long run because it rendered the construct too rigid to address evolving modalities of fraud that should have been actionable given the remedial purposes of the FCA, but which fell outside of the construct’s parameters. The foregoing problem led the courts to modify the express certification theory, to create the new construct of

\textsuperscript{96} Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996).

\textsuperscript{97} The requirement of materiality rests on the longstanding and broadly accepted principle that a “plaintiff making a tort claim based on a statutory violation must have suffered an injury of the type the statute was designed to prevent.” U.S. v. Kellogg Brown & Root Services, Inc., 2011 WL 3303486 (D. D.C. 2011). Fraud under the FCA is just such a tort and the injury that the FCA seeks to prevent is the knowing submission of claims for goods or services which are tainted by violations of terms important to the government’s decision to contract or pay for such goods or services.

\textsuperscript{98} The FCA has always been considered remedial. See, e.g., U.S. ex rel. Colucci v. Beth Israel Med. Ctr., 603 F. Supp. 2d 677 (S.D.N.Y. 2009) (finding that False Claims Act actions survive death of relator because they are primarily remedial); U.S. v. Vill. of Island Park No. 90 CV992 (ILG), 2008 WL 4790724, at *6 (E.D.N.Y. Nov. 3, 2008) (stating that the Excessive Fines Clause did not apply because the False Claims Act is remedial). Further, Congress referred to FERA as “one of the most potent civil tools” to stop fraud. S. Rep. No. 111-10, at 4 (2009); see also S. Rep. No. 99-345, at 11 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5276 (“The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side . . . .” (citation omitted).
implied certification, and to continuously “improve” on these judicial constructs in order to both capture the frauds that were escaping from enforcement, while simultaneously shielding contractors from inappropriate over-reaching liability. Unfortunately, that led to the development of bells and whistles in the constructs which took on a life of their own away from the text of the Act and which varied from jurisdiction to jurisdiction. The end result has been confusion; a lack of unified jurisprudence for the FCA; and a lack of predictable enforcement under the FCA.

In sum, the judicial constructs of express and implied certification have not created a workable framework that could reliably strike a balance between the dangers of over-reaching and under-reaching under the Act. They should, therefore, be retired in favor of a straightforward application of the text of the FCA. Under the text of the Act, what constitutes “falsity” or a “false claim” hinges exclusively on scienter (not an issue under certification theory) and materiality, rather than certification. To borrow Judge Easterbrook’s words, “[i]f a false statement is integral to a causal chain leading to [government] payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.” This concept of materiality is sufficiently developed in the FCA jurisprudence to allow for the thoughtful, reliable, and un-mechanized analysis of “falsity” under the Act. Thus, courts should rely exclusively on materiality, rather than certification, as the cornerstone of falsity under the FCA.