Living in a “Material” World: the False Claims Act’s Materiality Requirement in Light of Its Heightened Status in the Law

Stephanie Ann Martin
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Requirement in Light of Its Heightened Status in the Law

by Stephanie A. Martin

The economic crisis has brought with it a renewed sense of belt-tightening among federal and state legislators. All levels of government in the federal system are experiencing a renewed sensitivity to budget concerns. Along with measures to increase revenue and cut expenditures from a budgetary perspective, Congress has recently sought to reinforce another avenue of budget control: the False Claims Act.

The False Claims Act (FCA) has effectively aided the government in reclaiming funds lost because of false or fraudulent activity for decades. In recent years, its use has become even more lucrative. It gives the federal government a substantial weapon with which to combat fraud from contractors and others, through investigation, enforcement, and litigation. Additionally, the FCA is distinctive in its ability to deputize lay citizens. Congress passed the Fraud Enforcement and Recovery Act in 2009 to enhance the False Claims Act and provide a more robust set of guidelines with which to prosecute
activities that drain funds from "the federal fisc."9 States, in a similar fiscal crisis, have begun to follow suit.10

Courts have generally agreed that the materiality of a false statement, or its connection to the claim for payment, is indispensable to an action under the False Claims Act. However, this requirement has been defined inconsistently.11 Some courts define materiality in terms of "outcome materiality,"12 in which materiality is measured in terms of the government’s reliance on the claim in making payment.13 One court has relied on "claim materiality," where the emphasis is placed on the claimant’s use of false information in the claim itself.14 Still other courts employ a "natural tendency" test that focuses on the potential, rather than the actual, effects of a false statement.15

Faced with these conflicting standards, Congress attempted to provide a remedy by legislatively inserting a materiality definition put forth by the Supreme Court: "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."16 Congress also made materiality the threshold of liability: a claimant is liable for a false claim if he or she "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false
or fraudulent claim."  Through these actions, codified in the Fraud Enforcement and Recovery Act (FERA), Congress sought to overturn Supreme Court precedent that had placed more onerous requirements on those seeking to prosecute fraudulent claims. Court decisions effectively blocked government prosecutions that failed to include a direct causal link between the actions of the claimant and the payment made by the government. Congress sought to reverse this trend through FERA by expressly loosening the requirements of intent and materiality, made more onerous by courts, and making it more desirable for citizens to join the effort with new whistleblower incentives.

Congress’s putative solution has not yet solved the problem, as this legislatively mandated definition is still vague enough to allow courts to come to different conclusions regarding its meaning. However, a shift is beginning to take place. Courts are beginning to accept Congress’s mandate and coalesce around the natural tendency test, reflecting recognition of the test’s merits.

This Note will discuss the evolution of the materiality requirement of the False Claims Act, as well as the law’s future. The Note begins by laying out the history of
“materiality” within the Act. The Note then discusses the current state of judicial confusion over the definition of materiality as it existed before the enactment of the Fraud Enforcement and Recovery Act of 2009, comparing the different approaches taken by courts. The Note explores the changes to the materiality standard made in FERA, in part designed to overrule the more rigid requirements designed by the Supreme Court. The Note then examines the shifting terrain of materiality jurisprudence, specifically highlighting the shift by some courts toward the natural tendency test. The Note discusses some of the benefits and detriments of each approach, and concludes by recommending that the remaining courts adopt the natural tendency test for determining whether a false statement is material to a payment made by the federal government.

I. The Materiality Requirement of the False Claims Act: A Struggle for a Definition

The False Claims Act has experienced a long and continuous evolution since its inception. Enacted to counter fraudulent claims against the government during the Civil War, the Act has undergone several facelifts over the years. Subsequent
legislative amendments have attempted to strengthen the Act’s “remedial” power,\textsuperscript{29} while courts, including the Supreme Court, seem disposed to weakening the Act by placing procedural barriers to False Claims suits.\textsuperscript{30} The Fraud Enforcement and Recovery Act of 2009\textsuperscript{31} is but the latest in a series of attempts to further define the statute,\textsuperscript{32} responding to the changing nature and importance of fraud enforcement.\textsuperscript{33}

A. The Evolution of Materiality

Before FERA was enacted in 2009, “materiality” was not addressed explicitly in the statute.\textsuperscript{34} Instead, the pertinent section of the False Claims Act merely required that a claimant had to create or use a false statement “to get a false or fraudulent claim paid or approved by the Government.”\textsuperscript{35} Legislative history of the pre-FERA False Claims Act, however, suggests that Congress desired an emphasis on materiality.\textsuperscript{36} Courts have since generally considered materiality to be an element of a False Claims action.\textsuperscript{37} Their interpretations of this materiality requirement, however, have varied.\textsuperscript{38}

Though most courts seem to accept materiality as an element of a False Claims offense,\textsuperscript{39} they differ as to how to define the term.\textsuperscript{40} Several courts cite a definition that was adopted by the
Supreme Court in *Kungys v. United States* 41: “a natural tendency to influence, or capable of influencing, the decision of the decisionmaking body.” 42 The Court cited the natural tendency definition as one that was already generally accepted among federal courts. 43 This definition, however, remains sufficiently vague, generating divergent interpretations of materiality. 44

1. Outcome Materiality

On the spectrum of materiality standards, the strictest is outcome materiality. 45 Circuits that fall on this side of the spectrum place emphasis on the degree to which the false statement affects the government’s “decision to” pay the claim. 46 For example, the Fourth Circuit measured materiality, in *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 47 in terms of its impact on the agency’s “decision to” pay the claim. 48 The Third Circuit, likewise, seemed to lean toward the outcome materiality test prior to FERA’s enactment. 49 In *Hutchins v. Wilentz, Goldman & Spitzer*, the court heard a qui tam action filed by a former paralegal that alleged his former employer had submitted false legal bills to the government, 50 by artificially inflating the costs for representation. 51 The court held that false claims or statements would not be considered for
adjudication under the False Claims Act “unless these claims would result in economic loss to the United States government.”

As evidenced by these and other decisions, the distinction between “would,” the requirement for outcome materiality, and “could,” the standard for the natural tendency test, represents a wide gap in interpretations of what is sufficient.

The Eighth Circuit has adopted this standard explicitly. The court heard a qui tam action in which it was alleged that contractors supporting an environmental remediation of a Superfund site had knowingly submitted false claims for payment. In adopting this standard, the court used the term “claim” as it was defined in the FCA to provide a narrow lens through which to view materiality. Because a claim is a “demand for money” that “induces” the United States to suffer “a detriment,” the extent to which a claim is material should be directly linked to that detriment. The Eighth Circuit reasoned that any more tenuous link would result in liability for many documents that are not a direct demand for money.

2. Natural tendency Test for Materiality

Most circuits have adopted the test that stands at the other side of the spectrum. The natural tendency test mirrors
the Kungys language, and allows for a more contingent causality in the relationship between a false statement and a claim. The Ninth Circuit, for example, used the test to measure the materiality of a psychiatric hospital’s false statements for the purpose of Medicare reimbursement. The court cited findings of its sister circuits and found that the natural tendency test was “more consistent with the plain meaning of the FCA.” The court found that even though the Medicaid reports in question were never audited for errors, the defendants’ false statements on those reports had sufficient potential for payment to be wrongfully tendered. The court also found that the government need not have sought reimbursement for costs resulting from the fraudulent activity. Other courts applying the natural tendency test have gone further, allowing for claims to go forward without damages suffered by the government.

The Fourth Circuit also eventually adopted the capable of influencing test in United States ex rel. Wilson v. Kellogg, Brown & Root. In this case, a falsely-created form was executed months after the government made the decision to award a task order to a contractor. The court found that the Department of Defense was neither actually influenced by the
form, because the form was not submitted until after the contract task order was awarded; nor was the form capable of influencing the Department’s decision, because the form was a “boilerplate acceptance” with little importance to the contract, and the Department had “ample basis by which to judge [the contractor] and its ability to comply with the task order independent of the [ ] Form.” The Wilson decision shows both the breadth of and the limits to the natural tendency test: though more attenuated links between the false statement and the payment will be sufficient to show liability, the extent to which these are sufficient is not unlimited.

B. Allison Engine: the Supreme Court imputes a stricter definition

In Allison Engine Co., Inc. v. United States ex rel. Sanders, the case to which the FERA amendments are a direct response, the Supreme Court held that a close causal link between false statement and payment was necessary for a successful False Claims suit to go forward. It viewed the language in then-section 3729(a)(2), “to get,” to “[denote] purpose,” and said that “thus a person must have the purpose of getting a false or fraudulent claim “paid or approved by the
Government” in order to be liable.” Other courts had agreed: the Eighth Circuit had held that “only those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due” would be allowed to proceed. Materiality of the false statement was relevant to the Court’s analysis when the false statement in question was intended to be an influential factor in the government’s decision to pay the claim. Stated another way, the government’s payment must be directly based on the false statement.

C. Congress responds: The Fraud Enforcement and Recovery Act

Congress attempted to re-strengthen the False Claims Act in 2009 to remove procedural barriers and make it easier for funds to be recovered. The recent amendments to the False Claims Act can arguably be seen as much as a testament to its effectiveness in fighting fraud as Congress’s attempt to remedy problems seen in the statute’s effect. Its success stems from many factors, including the law’s provision enhancing incentives for individuals to play a role in combating fraud. The False Claims Act incorporates a novel approach to prosecuting
violations by allowing individuals to report transgressions to
the Department of Justice\textsuperscript{80} or to bring a qui tam action,\textsuperscript{81}
esentially adjudicating the case on behalf of the government.\textsuperscript{82}
This method has increased the number of eyes and ears available
to report questionable behavior, because it allows the
individual to keep a portion of the proceeds of the suit,\textsuperscript{83} while
protecting the relator\textsuperscript{84} from retaliation.\textsuperscript{85}

The Fraud Enforcement and Recovery Act amendments were also
enacted with an eye toward fixing discrete problems Congress
perceived in courts’ analyses of the statute.\textsuperscript{86} Its primary
target was the Supreme Court’s analysis in \textit{Allison Engine Co., Inc. v. United States ex rel. Sanders}.\textsuperscript{87} Congress enacted
reforms essentially to negate the findings of \textit{Allison Engine} in
the areas of presentment,\textsuperscript{88} intent,\textsuperscript{89} and materiality. Finding
these holdings too strict, Congress declared that the Supreme
Court had acted in a way that was at odds with “the original
intent of the statute.”\textsuperscript{90} Where the Supreme Court had stated
that a payment must have come from the federal government,\textsuperscript{91}
Congress stated that the payment trail need not be so direct,
thus including payments using federal funding and used in a
contractor-subcontractor relationship.\textsuperscript{92} Where the Supreme Court
had emphasized the importance of the claimant’s intent in the False Claims statute and held it to be an important part of its inquiry. Congress changed the statute to remove the intent requirement. Where there existed ambiguity as to whether the claim must be paid, Congress also amended the law to rescind language that could be interpreted as requiring payment.

In passing the Fraud Enforcement and Recovery Act, Congress responded to the judicial uncertainty surrounding the materiality requirement by codifying the “natural tendency” language from Kungys and Neder. This legislative resolution likely stemmed from the newfound importance of the term. Previously, a relator had to prove not only that a claim was material, but that the perpetrator acted with the intent to defraud the government. FERA made the materiality of the claim the end of the inquiry. In so doing, Congress seemingly removed the causation requirement.

Congress’s codification of the definition of “material” within the False Claims statute signaled its preference for making the definition used previously by the Supreme Court—that the claim has “a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property”—the
threshold of liability for a false claim. As the Supreme Court stated in Kungys, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." In so doing, Congress indicated its desire to "incorporate the established meaning" of materiality.

By eliminating the intent requirement and making materiality the end of the inquiry for liability, however, Congress gave materiality an even more vaunted place than it had as an element of a claim, and made the term the only standard of liability. In its words, Congress did so to "reflect the original intent of the statute." Thus, it is more important than ever to determine the exact definition of materiality as applied in the courts, so that the courts can begin to correctly apply this new language.

II. Courts Begin to Deal With the New Requirement

The recent prominence of this new requirement in False Claims Act liability dictates a closer examination of the present state of the law, and its likely trajectory. Congress’s amendments to the False Claims Act have greatly enhanced the
role of materiality beyond federal courts’ current treatment.\textsuperscript{107} The 2009 amendments to the False Claims Act incorporate materiality as more than an element—as it currently stands, the government can satisfy the major part of a False Claims case by simply proving that the claim was “material.”\textsuperscript{108} Because materiality will serve as the tipping point for a False Claims case to go forward, the definition of “material” will become even more important in coming years.\textsuperscript{109}

Though the materiality definition adopted by Congress in FERA has often been cited by courts, many also attempted to further define the standard. Instead of responding with increased unanimity, circuits sowed further discord with their interpretations.\textsuperscript{110} A few courts remain committed to a stricter test, while others have begun to join the march toward the natural tendency test. Some have failed to address the new language altogether.\textsuperscript{111}

A. The Eighth Circuit stands its ground

The Eighth Circuit has remained faithful to its outcome materiality-based definition, even after the FERA amendments were enacted. In \textit{United States ex rel. Vigil v. Nelnet, Inc.},\textsuperscript{112} the court acknowledged that the requirement had been modified by
a “new statute.” Despite this, the court held that the relator must have proof that certifications made by a claimant were necessary for payment; that without these certifications, payment would not be rendered by the government. The Eighth Circuit reaffirmed its preference for the outcome materiality test, saying that certifications made by a loan servicing company were insufficient to show that they “would have affected decisions by [government agencies]” without submission.

B. Other courts begin the shift

Some courts have begun to move closer to the more lenient definition. Cases in the Third Circuit, for example, signal the Circuit’s move away from outcome materiality. Citing decisions in other circuits, the Eastern District of Pennsylvania decided a case in which a medical device supplier allegedly gave discounts to customers other than the government, and hid those discounts on a government form. The court applied the natural tendency test and held that the materiality of the statements regarding discounts on the government form was a question of fact that should be fleshed out. However, it noted that the fact that the government continued to do business
with the claimant was not dispositive of the materiality of the
original false statement.\textsuperscript{120}

The Second and Fifth Circuits, in particular, have shifted
away from the outcome materiality standard and closer to the
natural tendency test.\textsuperscript{121} Rejecting the other tests that
"unnecessarily narrow[ed]" the definition of materiality, the
Fifth Circuit adopted the natural tendency test, calling for
statements that merely "'could have' influenced the government's
payment decision or had the 'potential' to influence the
government's decision, not that the false statements actually
did so."\textsuperscript{122} The Fifth Circuit held that this test was more in
keeping with legislative intent as well as the plain meaning of
the statute.\textsuperscript{123} In the end, the Fifth Circuit defined the test
for materiality as two-pronged: the statement should "either (1)
make the government prone to a particular impression, thereby
producing some sort of effect, or (2) have the ability to effect
the government's actions, even if this is a result of indirect
or intangible actions on the part of the Defendants."\textsuperscript{124} In
short form, whether a false statement is material, under the
Fifth Circuit's standard, depends on whether it has the
“potential to” have an impact on the government’s decision to pay.\textsuperscript{125} This approach has been adopted by other circuits.\textsuperscript{126}

C. The First Circuit embraced early the natural tendency test

Other Circuits seem to have endorsed the natural tendency test both before\textsuperscript{127} and after FERA.\textsuperscript{128} The First Circuit used the natural tendency test to deny a motion to dismiss and allow a False Claims suit to go forward, in \textit{United States ex rel. Hutcheson v. Blackstone Medical, Inc.}\textsuperscript{129} The court found that “as a matter of law,” it “could not say” that the statements at issue “were not capable of influencing” a payment by Medicare.\textsuperscript{130} Though the court stated unequivocally that it was not adopting “categorical rules” to measure the degree to which a material statement was capable of or in fact influenced a payment decision,\textsuperscript{131} the natural tendency standard allowed the case to survive a motion to dismiss.\textsuperscript{132}

D. Continuing confusion

Despite the move by some circuits to the less stringent standard, true consensus has not emerged in the cases decided after FERA’s enactment. Many cases deal with potentially fraudulent claims for payment submitted prior to the effective
date of the Act, and courts find that the FERA amendments are not applicable. Instead, these courts apply former section 31 U.S.C. 3729(a)(2), which required an extra intent element as well as materiality. These courts have not removed the intent requirement because their cases have not forced their hand. Congress attempted to do exactly that by creating a retroactivity provision of the Fraud Enforcement and Recovery Act. The law included a provision that made it effective “as if enacted on June 7, 2008” to claims pending on or after that date. However, shortly after FERA was enacted, the United States District Court for the Southern District of Ohio found that the retroactivity provision ran afoul of the Ex Post Facto Clause of the Constitution, and several courts followed this reasoning. Even if the retroactivity requirement was applicable, some courts were finding that cases failed to fall even within the covered time frame. Courts have been taking advantage of FERA’s limited applicability to sidestep one attempted controlling measure placed by Congress.

III. A Former Circuit Split Begins to Give Way to One Test

Due to the changed liability requirement for false statements, courts must begin to deal with the new definition
Cases will soon be docketed that arose after FERA’s effective date, rendering moot the uncertainty surrounding both the retroactivity provision and whether the effective date applies to cases or claims for payment. As stated by the First Circuit, “judicially-created categories sometimes can help carry out a statute's requirements, but they can also create artificial barriers that obscure and distort those requirements.”

In the case of the False Claims Act’s materiality requirement, the latter has been the result. In recent years, courts have begun to resolve the uncertainty in their rulings by slowly coalescing around the natural tendency test. The time has come for the last few courts, namely the Eighth Circuit, to come on board with their fellow circuits.

A. Some Confusion Remains

The continuing discrepancy in definitions of materiality may be due to one or all of several factors. While Congress has attempted to clarify the term’s definition, some courts have been reluctant to interpret materiality in light of this clarification. In some cases, they may be attempting to avoid making the choice between approaches. Some courts conclude that
the purported false claims before them will pass or fail no
matter which test is used. In United States ex rel. Raynor v.
National Rural Utilities Co-op Finance Corp., the District of
Nebraska found that there was so little evidence of a false
statement that its materiality would be nonexistent in either
case. Similarly, courts have come to fact-based results
without adopting doctrinal rules. The First Circuit, for
example, held that the false claims before it were in fact
capable of influencing Medicare payments, but the court was
careful to disclaim the notion that it was espousing
“categorical rules” to define materiality. The Second
Circuit, likewise, found that the materiality requirement had
been satisfied even though it did not “define the precise
contours” of the term.

The language courts use to describe the tests may also be
responsible for inconsistent application of definitions. Before FERA’s enactment, courts created confusion by
categorizing the test in different ways, and that confusion has
persisted post-FERA. While some courts differentiate between
the natural tendency test and the outcome materiality test,
others say that the natural tendency test and the outcome
materiality test are essentially two interpretations of the definition, “natural tendency to influence, or capable of influencing.” This discrepancy has likely prolonged the unduly negative perception of a circuit split between definitions. Where courts and commentators cite a hopeless circuit split, the reality reflects a much narrower divide in the circuits’ interpretations than it seems.

B. Congress Endorses the Natural Tendency Test

Congress chose the “natural tendency to influence” standard in an attempt to provide a clear legislative definition to a concept long the subject of judicial uncertainty, and simultaneously communicating its intent to make that legislative definition broad. Congress’s choice of this definition is an express endorsement of the Supreme Court’s position on materiality. This position reflects a flexibility to allow courts to engage in an inquiry that makes use of the case’s idiosyncrasies, rather than a “mechanical resolution” of every case. In addition, the test used by the court rejects the notion that the false claim must “more likely than not” be the basis of the payment. The choice of this definition could be especially meaningful for Congress in fulfilling its goal of
recouping costs: it allows for more false claims prosecutions to go forward, including those that lack the evidence that would tip the more stringent tests.¹⁶⁵

C. Outcome Materiality

The outcome materiality test envisions materiality as providing the ultimate standard for a False Claims suit. Without a government payment that was disbursed from the federal treasury based in whole or in part on a false statement, an action under the False Claims Act should not proceed under the outcome materiality standard.¹⁶⁶ Outcome materiality purports to be consistent with the larger policy goal of the False Claims Act,¹⁶⁷ and thereby imposes de facto limits on the number and types of claims that are eligible for False Claims liability.¹⁶⁸ It is more in line with the Supreme Court’s pronouncement in United States v. McNinch: “it is . . . clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government.”¹⁶⁹

While it is argued that the broad purpose of the False Claims Act is “protecting the federal fisc” by concentrating on claims which “cause the government to pay money,”¹⁷⁰ other courts are beginning to see that this goal is better accomplished by
targeting “all fraudulent attempts to cause the Government to pay out sums of money” than by insisting on a detrimental outcome. Congress intended to punish fraud at the point where it occurs, through the imposition of punitive damage measures and multiple amendments designed to increase enforcement. The outcome materiality test targets fraudulent conduct only after its effects have been realized. In United States ex rel. Vigil v. Nelnet, Inc., the Eighth Circuit affirmed dismissal of a suit alleging that Nelnet, Inc., a loan service company, had falsely certified that it was in compliance with a relevant condition of participation in a federal program. The court found that materiality had not been satisfied, under its outcome materiality definition. Because the claims had never been submitted, the Eighth Circuit held, they did not have an effect on the potential government payment. Instead of disincentivizing the attempt at fraud, this standard may result in a risk that the chance that the fraud will go undetected. Were the case decided in a jurisdiction that supported the natural tendency standard of materiality, however, it almost certainly would have come to a different result. Jurisdictions that employ the natural tendency test would be much more likely
to find the certifications material because they spoke to
Nelnet’s intent to possibly submit those certifications and
receive payment.\textsuperscript{179} It is unlikely that Nelnet made the
certifications for a reason wholly unrelated to its
participation in the loan program; and therefore the potential
was there that they could have influenced the government’s
decision to repay a defaulted loan in the future.\textsuperscript{180}

D. Courts that Have not yet Done So Should Join the Trend

Toward the Natural Tendency Test

Congress’s goal in creating and amending the False Claims
Act over the years has consistently been to ferret out fraud and
protect the federal coffers.\textsuperscript{181} Courts seem to be following the
spirit of that goal and slowly adopting the natural tendency
test as the standard for materiality. These courts are on the
right track, and others should follow, for the natural tendency
test more tightly fits Congress’s intent and provides for a more
well-rounded inquiry.

The natural tendency test comports with another feature of
the False Claims Act, in that it assesses blame where it is
properly placed: with the person making the false statement.
The test allows for liability even without proof of damages.\textsuperscript{182}
Because the False Claims statute imposes a civil penalty for violation, the government need not show that damages were suffered. The outcome materiality test, in its requirement for the government to actually pay the claim, implicitly overrides this statutory intent by requiring proof that the government suffered damages. The outcome materiality test is therefore inconsistent with the intent of the statute.

Because the False Claims Act assesses a civil penalty on fraudsters independent of any damages incurred, proof of damages is not necessary.

In addition, courts no longer must rely on the accuracy of the government employees processing the claim. The court in United States ex rel. Antidiscrimination Center of Metro New York, Inc. v. Westchester Cty., N.Y. explored this possibility. The court found that a test that requires substantial inquiry into the actions of the government agency, rather than that of the claimant, was an inaccurate basis for imputing liability. Where a certification was required by the agency, the court found, the extent to which a false certification was material should not depend on whether the claim was actually paid or not. Rather, it should be
dependent on “the integrity of the claims submitted,” “tested as of the time of submission to the government.”

The natural tendency test eschews the harsh rigidity of the outcome materiality test, in favor of a more open, fact-driven inquiry. It is by no means a boundless, open ended invitation to liability. The natural tendency test, while more liberal than its counterparts, has limits that safeguard actors from liability. Contractors and others should not fear that all attenuated connections could be fodder for a False Claims action, because the doctrine is bounded by past jurisprudence and general civil procedure principles.

While the natural tendency test indicates a broadening of the standard, it is by no means limitless. As explored by the Fourth Circuit in United States ex rel. Wilson v. Kellogg, Brown & Root, broadening the standard by which materiality is judged does not ensure that liability will attach. The court found that the false statement in question could not have had any effect on the contract to which the false statement was tied. Not only was the statement executed months after the contract was awarded, but the agency was able to make an independent determination of the contractor’s merits. Courts, like the
Fourth Circuit in Wilson, will recognize when a false statement likely could have no bearing on the government’s process in paying a claim, and will not allow the case to move forward.\textsuperscript{194} The natural tendency test remains sufficient protection against baseless allegations being litigated.

The natural tendency test allows for a more fact-based inquiry because it allows for putative claims to survive the pleadings stage and move to discovery. The degree to which a potential claim has merit will be borne out by the facts. Illustrative of this principle is the case of United States ex rel. Hutcheson v. Blackstone Medical, Inc.\textsuperscript{195} The case reached the First Circuit on appeal from the District of Massachusetts, which had granted a motion to dismiss from the defendant company.\textsuperscript{196} The District Court had found that the government relator had not stated a claim sufficient to survive the 12(b)(6) motion because it found that the relationship between false certifications made, and the mechanism by which claims are paid, was too attenuated.\textsuperscript{197} The relator had alleged that doctors, beneficiaries of kickbacks from the medical device company, submitted claims for payment for surgeries in which the company’s equipment had been used, while falsely certifying that
they were not receiving kickbacks. The First Circuit reversed the finding of the District Court, saying that as long as claims on which the government had to make a decision whether to pay were “affected” by a false statement, the materiality requirement was satisfied such that the case would survive a motion to dismiss. Adopting this test makes it more likely that False Claims allegations will survive the pleading stage.

Under the natural tendency test, the court may have more discretion to consider other factors, without the additional requirement that the payment was actually made. Under the outcome materiality test, conversely, the fact that the government did or did not make a payment is crucial to the inquiry and is grounds for summary judgment. Precluding a flexible standard merely removes from the factfinder the discretion to consider the extent to which damage, if any, results, the effect on the agency’s activity, and other factors.

Critically, the natural tendency test is more consistent with legislative intent and the purpose of the statute. The False Claims Act was enacted with the intent to be broad in reach, and Courts have interpreted it as such. The purpose is
to discourage any false or fraudulent activity that could cause the federal government to lose money. This is most effectively served with a definition of materiality that discourages this activity at its source: the person who “sends bills” to the government.

IV. Conclusion

The current economic crisis and the effect it has had on budgets at both the federal and state level has encouraged governments to take drastic steps to ensure that needless waste of government dollars does not occur. The keystone statute in this area, the False Claims Act, has weathered over 150 years of use, interpretation, and amendments. The most recent amendments, codified in the Fraud Enforcement and Recovery Act, will undoubtedly have a lasting effect on false claims in the coming years. Important among those is the materiality requirement. Congress changed the language of the statute to make the test for liability whether a false statement was “material to” the government’s decision to pay a claim, thus loosening the requirement. Courts have struggled with defining this term, but must come to an agreement as the stakes have become much higher. Those courts that have not yet adopted the
natural tendency test should: this definition allows for more flexibility and is in keeping with Congress’s goals for the statute. With this more flexible test, the federal government will be better equipped to use the False Claims Act for its original purpose: to stop fraudulent claimants from raiding the government’s coffers.

*Stephanie Martin is a third year law student at The Catholic University of America, Columbus School of Law.


See 132 Cong. Rec. S15036-02 (Oct. 3, 1986) (statement of Sen. Chuck Grassley) (confirming that the qui tam provisions were necessary to “establish a solid partnership between public law enforcers and private taxpayers in the fight against fraud.”).


To date, 27 states and the District of Columbia have passed their own False Claims Acts. See State False Claims Acts, TAF Education Fund, The False Claims Act Legal Center, http://www.taf.org/statefca.htm (last visited Nov. 20, 2011) The state acts had varied widely in the past, but have become much more uniform in their language, often tracking the language of the federal False Claims Act. See, e.g., N.Y. State Fin. Law § 188 (McKinney 2010) (“‘Material’ means having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property”). This is in part due to the
states’ desire to make their own False Claims Acts effective, and in part to a federal initiative to bring states in line. In 2005, Congress passed the Deficit Reduction Act, which in part incentivized states to bring the language of their statutes in line with the federal False Claims Act. 42 U.S.C. § 1396h (2007). In return for doing so, Congress offered to provide states with a ten percent larger share of the suit’s award in cases where the state had joined with the federal government as a party. 42 U.S.C. § 1396h(a) (2007). After the Fraud Enforcement and Recovery Act amendments were adopted at the federal level in 2009, several states changed their language to reflect these changes. See, e.g., Cal. Gov't Code § 12651 (West 2010) (adopting “material to”); see also N.Y. Spons. Memo., 2010 A.B. 11568 (legislative history of New York False Claims Act, stating state’s desire to model its statute after the federal statute). Many also have begun offices within their respective Attorneys General offices or other state offices that investigate and begin suits based on false claims. See, e.g., About the Medicaid Fraud Control Unit, Office of the Attorney General, New York State,
Many concentrate on the Medicaid area, as it seems to be the largest opportunity for fraud. Id. (citing the office as “the largest unit within the Attorney General’s Criminal Division” and announcing the addition of “dozens” of new staff). Some states are branching out into other contracts they have with private contractors. See State False Claims Acts, TAF Education Fund, The False Claims Act Legal Center, http://www.taf.org/statefca.htm (last visited Feb. 20, 2011) (showing 20 states as not having “Medicaid-only” False Claims Acts). However, the novelty of these state-level false claims statutes means that many of the states have a dearth of case law on the subject, and so have none of their own authority to which to look. See City of Pomona v. Superior Court, 89 Cal. App. 4th 793, 802 (Cal. Ct. App. 2001). Many look to the federal circuits to provide rules. See United States ex rel. Lisitza v. Johnson & Johnson, 765 F.Supp.2d 112, 132 (D. Mass. 2011), (summarizing cases in different states in which the courts have looked to federal law to provide guidance on rulings) reconsideration denied, CIV.A. 07-10288-RGS, 2011 WL 1827357 (D. Mass. May 12, 2011). More and more, states are signing on as parties to existing federal suits, alleging that
in addition to violating the federal False Claims Act, defendants are violating state False Claims Acts as well. See, e.g., United States ex rel. Nowak v. Medtronic, Inc., 1:08-CV-10368, 2011 WL 3208007 at *11 (D. Mass. July 27, 2011) (relators brought suit under the false claims statutes of 22 states, and the District of Columbia); see also Virginia Joins Suit Alleging that Johnson & Johnson Paid Kickbacks to Steer Nursing Home Prescriptions for Anti-Psychotics, available at PRWeb.com, http://www.prweb.com/releases/2010/03/prweb3726794.htm (last visited Mar. 11, 2011). Some criticism has been leveled at this practice: "most of the significant recoveries in the states have resulted from states' ability to join federal law enforcement efforts and global settlements. This raises the question whether the state statutes bring anything new to law enforcement, or whether the states are simply using their statutes to maximize "piling on" or piggy-backing opportunities." James F. Barger, Jr. et. al., States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts, 80 Tul. L. Rev. 465, 485 (2005). The reality is, however, that the closer the language in the states' statutes tracks that of the False Claims Act, the more sense it makes for states to join suits begun by the
federal government. As this practice continues, and as states continue to look at federal case law to provide them guidance, a uniform definition of materiality seems to be even more sorely needed.

11 See infra Section I.A.

12 See Bourseau, 531 F.3d at 1171 (citing United States ex rel. A+ Homecare Inc. v. Medshares Mgmt. Grp., Inc. 400 F.3d 428, 445 (6th Cir. 2005)).

13 See infra Section I.A.1.

14 See infra note 60.

15 U.S. ex rel. Loughren v. Unum Group, 613 F.3d 300, 309 (1st Cir. 2010) ("all that the test requires is that the false or fraudulent statement is capable of influencing the Agency's decision").


17 31 U.S.C. § 3729 (a)(1)(B) (2009). The materiality of a false statement increased in importance because Congress removed the existing liability standard. Before this change, plaintiffs had to prove that the material, false claim had been created "to get" a payment from the government. 31 U.S.C. § 3729 (a)(2) (2006). Now, if the statement is at all "capable of


19 Allison Engine, 553 U.S. at 665. This also includes requirements that the claim actually be presented to a government official. Id. at 671.

20 S. Rep. No. 111-10, at *4 (2009). See also Brockmeier, supra note 18, at 301 (“According to Senator Grassley, the sponsor of the Bill, the goal of the legislation is to override these misinterpretations of the FCA.”).

21 See infra part I.B. and I.C.


23 See, e.g. United States v. Southland Mgmt. Corp., 288 F.3d 665, 677 (5th Cir. 2002) (discussion of circuit split), on reh'g en banc, 326 F.3d 669 (5th Cir. 2003). See also Megan L. Hoffman, The Substantial Weight Test: A Proposal to Resolve the
Circuits' Disparate Interpretations of Materiality Under the False Claims Act, 58 U. Kan. L. Rev. 181 (2009). Though these and other sources describe the different interpretations as a circuit split, they characterize the split in different ways. This more readily indicates confusion in applying the definition rather than a circuit split. Compare United States ex rel. Longhi v. United States, 575 F.3d 458, 468 (5th Cir. 2009), cert. denied, 130 S. Ct. 2092 (2010) (characterizing different definitions as “two different interpretations of the ‘natural tendency to influence or capable of influencing’ standard”) with United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008) (defining different courts’ standards as different measurements of materiality). Further, the movement of some circuits away from the stricter test essentially leaves the Eighth Circuit as essentially the holdout in applying outcome materiality. See infra Section I.D.

24 See, e.g. United States v. Bourseau, 531 F.3d 1159, 1170 (9th Cir. 2008) (citing circuit split).


26 For a more comprehensive history of the False Claims Act, see Brockmeier, supra note 18, at 282.
(stating that the law had been passed in response to the United States government being “billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war”).


The Act has undergone several significant amendments, the most recent pre-FERA being in 1986. See Pamela H. Bucy, Federalism and False Claims, 28 Cardozo L. Rev. 1599, 1602 (2007).


See Brockmeier, supra note 18, at 284-5 (discussing amendments in 1943 and 1985). The last set of comprehensive amendments to the law, enacted in 1986, were a substantial recalibration of the duties and rewards for the government and individuals involved in suits. Among other changes, the 1986 amendments...
lessened procedural barriers for bringing forth information, increased the award amount for individuals bringing qui tam actions, and lowered the burden of proof needed to a preponderance of the evidence. See id. at 285; see also generally Rhoad & Fornataro, supra note 9, at 15 (describing the evolution of the False Claims Act through its legislative amendments).

33 See S. Rep. No. 111-10 at *2 (“To make sure this kind of [financial] collapse cannot happen again, we must reinvigorate our anti-fraud measures and give law enforcement agencies the tools and resources they need to root out fraud so that it can never again place our financial system at risk.”). In the most recent amendments through FERA, Congress was motivated by government initiatives that immediately preceded the adoption of the law: the American Recovery and Reinvestment Act and the Troubled Asset Relief Program, both of which authorized hundreds of millions of dollars to be used to bring about economic recovery. See infra note 110. The emphasis on fraudulent payouts is apparent: the Recovery.gov website devotes an entire section to reporting waste of funds and fraudulent activity.


35 31 U.S.C. § 3729 (2006) (emphasis added). In Allison Engine, the Supreme Court placed particular emphasis on this part of the statute. The phrase “denote[d] purpose,” and was seen as an essential intent requirement—the mere fact that a payment resulted from this claim was not enough. The claimant had to intend to have the claim paid by the government. 553 U.S. at 668-9. As the Eighth Circuit explained, “Essentially, then, only those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due, are properly considered “claims” within the meaning of the FCA.” Costner v. URS Consultants, Inc., 153 F.3d 667, 677 (8th Cir. 1998).

36 S. Rep. No. 99-345 at *5285 (1986). Congress suggested that liability should be placed on a claimant if the federal government decided to commit funds to a claim in which it might
not have without the false statement. Id. If the false statement had an effect such as this on the federal government’s decision, it is “material” to that decision within the definition of material. United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008). The Ninth Circuit also found legislative intent in another section of the statute, § 3729 (a)(7), saying that Congress intended for materiality to be a requirement where a contractor or other claimant was attempting to avoid paying claims made by the government. Id.

37 See, e.g., United States v. Southland Mgmt. Corp., 326 F.3d 669, 679 (5th Cir. 2003) (“There should no longer be any doubt that materiality is an element of a civil False Claims Act case. Our past precedent and every circuit that has addressed the issue have so concluded.”). But see United States ex rel. Landers v. Baptist Memorial Health Care Corp., 525 F.Supp.2d 972, 977 (W.D.Tenn 2007) (distinguishing between the “statutory elements” and the requirement of materiality which is only imposed “[i]n addition”); United States ex rel. Bahrani v. ConAgra, Inc., 624 F.3d 1275, 1295 (10th Cir. 2010) (“To date, we have never directly addressed whether civil claims under the FCA incorporate a materiality element and, if so, what the
proper test is for materiality.”). The Sixth Circuit engaged in a comprehensive analysis of the FCA, under a three-step statutory interpretation framework adopted in United States v. Wells, 519 U.S. 482, 490-92 (1997), which considers “a natural reading of the full text; . . . the common-law meaning of the statutory terms; . . . and . . . the statutory and legislative history,” and concluded that the statute included a materiality requirement. United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 442-44 (6th Cir. 2005). While it seems that the Second Circuit has not found materiality to be an element, rulings have suggested that views the False Claims Act as “‘not encompass[ing] those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions.’” United States ex rel. Hutcheson v. Blackstone Medical, Inc., 694 F. Supp.2d 48, 63 (D. Mass. 2010) (quoting Mikes v. Strauss, 274 F.3d 687, 697 (2d Cir. 2001)), rev’d, 647 F.3d 377 (1st Cir. 2011).

38 The importance of materiality, by contrast, seems to be self-explanatory. Drawing the line at statements and contract terms that are material helps to stave off the “onerous and unforeseen” liability for contractors and others that could stem
from expanding liability to every minor term of the contract.

See United States v. Science Applications Intern. Corp., 626 F.3d 1257, 1271 (D.C. Cir. 2010). Opening up liability for every contract term, combined with zealous qui tamrelators—or, as one commentator called them, a “posse of ad hoc deputies”—could have disastrous consequences for the federal government’s contracting ability. Jeremy E. Gersh, Saying What They Mean: The False Claims Act Amendments in the Wake of Allison Engine, 5 J. Bus. & Tech. L. 125, 128 (2010).

39 See A+ Homecare, Inc., 400 F.3d at 441-42 (digesting the findings in several circuits of “implicit support” for a materiality requirement, in “the statutory language, the legislative history, and the underlying purpose of the law”).

40 The sufficiency of evidence surrounding the materiality of a claim also varies. Some courts require express contractual language, which is considered dispositive of this issue, while others allow testimony that shows completion of the contract was dependent on the fulfillment of certain conditions. United States ex rel. Hutcheson v. Blackstone Medical, Inc., 647 F.3d 377, 394 (1st Cir. 2011) (citing United States v. Science
Applications Intern. Corp. (SAIC), 626 F.3d 1257, 1267-70 (D.C. Cir. 2010)).

41 Kungys v. United States, 485 U.S. 759 (1988); Neder v. United States, 527 U.S. 1, 16 (1999). Courts cite the language as coming from either of these cases. See Southland Mgmt., 326 F.3d at 679; United States ex rel. Longhi v. United States, 575 F.3d 458, 468 (5th Cir. 2009), cert. denied, 130 S. Ct. 2092 (2010); United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008); A+ Homecare, Inc., 400 F.3d at 442.

42 Kungys, 485 U.S. at 770. The First, Fifth, Sixth Circuits have all adopted this definition at one time or another. See, e.g., Hutcheson, 647 F.3d at 394; Longhi, 575 F.3d at 468.

43 485 U.S. at 770 (citing Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)). The “natural tendency” definition is also used by federal courts in defining materiality in the context of mail fraud. See United States v. Tarallo, 380 F.3d 1174, 1182 (9th Cir. 2004) (citing United States v. LeVeque, 283 F.3d 1098, 1103-04 (9th Cir.2002)), amended by 413 F.3d 928 (9th Cir. 2005).

44 In United States ex rel. Longhi v. United States, the Fifth Circuit explained that it had found the outcome materiality test
and the natural tendency test to both be interpretations of the definition, “natural tendency to influence or capable of influencing.” 575 F.3d at 468 (citing United States v. Southland Mgmt. Corp. 288 F.3d 665, 676 (5th Cir. 2002)). But see A+ Homecare, Inc., 400 F.3d at 428 (2005).

45 Costner v. URS Consultants, Inc., 153 F.3d 667 (8th Cir. 1998); Cf. Bourseau, 531 F.3d at 1171 (“The Eighth Circuit has adopted a more restrictive “outcome materiality test.”).


47 104 F.3d 1453 (4th Cir. 1997).

48 104 F.3d at 1461. See also Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001) (“[the FCA] statute reaches only those claims with the potential wrongfully to cause the government to disburse money”)

49 Hutchins v. Wilentz, Goldman and Spitzer, 253 F.3d 176 (3d Cir. 2001).

50 Id. at 181.

51 Id. at 179-180. The relator also alleged that his investigation of the false billing statements resulted in the firm’s action of retaliatory firing. Id. at 181.
See United States ex rel. Bahrani v. ConAgra, Inc., 624 F.3d 1275, 1295 (10th Cir. 2010). The Tenth Circuit considered a case where the relator appealed on the basis of a jury instruction that assigned liability if the jury found that the changes to certificates submitted to the government “would” have been influential. The relator thought that the instruction should have instead included the word “could” where “would” appeared. Id. at 1294. The court disagreed, saying that inserting the word “could” would allow many more, if not all, false statements to impute liability under the False Claims Act. The word “would,” in the court’s eyes, draws the distinction between claims that are material—those that involve a “significant” change, and those that are not. Id. at 1295. Based on this reading, the logical implication is that the word “would” as used by the Third Circuit implies a more significant statement.

Costner v. URS Consultants, Inc., 153 F.3d 667 (8th Cir. 1998).

Id. at 673.

Id. at 677.
See also United States ex rel. Jones v. Collegiate Funding Services, Inc., No. 3:07CV290-HEH, 2011 WL 129842 (E.D. Va. Jan. 12, 2011) (“It is illogical that Congress could have intended to impose FCA liability on persons who possess—but never in fact use—a form which could be considered false if submitted under certain circumstances.”).

Another view of materiality, claim materiality, is cited by courts but not adopted with any regularity. United States ex rel. Longhi v. United States, 575 F.3d 458, 469 (5th Cir. 2009), cert. denied, 130 S. Ct. 2092 (2010). Claim materiality measures the extent to which a claim is material by measuring the extent to which the statement affects the claimant’s right to submit a claim or statement to the government. This has been defined in terms of being “made by a person not rightfully entitled to that money or property,” and materiality as necessary to determining that entitlement. United States ex rel. Wilkins v. North American Const. Corp., 173 F.Supp.2d 601 (S.D. Texas 2001). The Fifth Circuit later moved away from this more restrictive reading of the materiality requirement. Longhi, 575 F.3d at 470.

United States v. Bourseau, 531 F.3d 1159, 1161 (9th Cir. 2008).

Id. at 1171.

Id.

Id. at 1172.


See supra notes 48-49 and accompanying text.

525 F.3d 370 (4th Cir. 2008).


Id.

Id.

Id. at 379. See also infra notes 198-199 and accompanying text.

S. Rep. No. 111-10, at *9 (2009) ("This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008) . . . .").

553 U.S. at 668-9.


Id.


See S. Rep. No. 111-10, at *4 (2009) (calling the False Claims Act “one of the most potent civil tools for rooting out waste and fraud in Government”) Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009, More than $24 Billion Since 1986,” Department of Justice,


Brockmeier, supra note 18, at 278.
Qui tam actions have been popular since before the Revolutionary War, and allow for a win-win situation for the government and individuals. Id. at 279. Government agencies can delegate watchdog authority to individuals, thereby reducing demands on their resources, and individuals can benefit from their work, usually by sharing in the proceeds. See id. at 279.

Short for the Latin phrase, “qui tam pro domino rege quam pro se ipso in hac parte sequitur,” or “who pursues this action on our Lord the King’s behalf as well as his own.” Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 765 n. 1 (2000)(citing 2 William Blackstone, Commentaries *160). The procedure for initiating and carrying out a qui tam action is laid out in Rhoad & Fornataro, supra note 9, at 15.

Over sixty-three percent of the funds recovered by the federal government were acquired through a qui tam action. Id. at 279.

The awards are greater in a qui tam suit. 31 U.S.C. § 3729 (2009). See also Bucy, supra note 30, at 1601. Successful suits also result in a recuperation of attorneys’ fees. Rhoad & Fornataro, supra note 9, at 15.
The term given to individual plaintiffs in a False Claims action. Bucy, supra note 29, at 1600.

These so-called “whistleblower protections” provide legislative and judicial relief for employees and others who experience retaliation for their involvement in a False Claims suit. Rhoad & Fornataro, supra note 9, at 19. The FERA Amendments also expand these protections by broadening the scope of protected activities for which whistleblowers are retaliated against, and allowing contractors to benefit from these protections. Id. The Fraud Enforcement and Recovery Act increased these incentives. Now, an individual bringing an action that was taken up by the government can receive between fifteen and twenty-five percent of the proceeds of the action. 31 U.S.C. § 3730(d)(1). Individuals who bring qui tam actions can receive between twenty-five and thirty percent of the damages. 31 U.S.C. §3730(d)(2).


The court in *United States v. Edelstein* notes that the Supreme Court had interpreted the statute to allow for false records given to an intermediate party, like a contractor, to be subject to False Claims liability. Civ. A. 3:07-52, 2011 WL 4565860, at *3 (E.D. Ky. Sept. 29, 2011). However, the court required that the claim be “ultimately submitted to the Government for payment or approval.” *Id.*

Compare 31 U.S.C. § 3729 (a)(2) (2006) (“knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved by the government”) (emphasis added) with 31 U.S.C. § 3729 (a)(1)(B) (2009) (“knowingly makes . . . a false record or statement material to a false or fraudulent claim”).


*Allison Engine*, 553 U.S. at 669.


See supra Section I.B.


[89x831]31 U.S.C. § 3729 (a)(2) (2006) ("knowingly makes...a false record or statement to get a false or fraudulent claim paid or approved by the government").

[72x712]31 U.S.C. § 3729 (a)(1)(B) (2009) ("knowingly makes...a false record or statement material to a false or fraudulent claim").

This change is part of what some commentators are calling an "exponential expansion" of both liability for potential false claimants, and incentives for individuals bringing forth actions. Rhoad & Fornataro, supra note 9, at 14.

Neder v. United States, 527 U.S. 1, 16 (1999); see supra notes 43-46 and accompanying text.


See supra Section I.C.
This loosened requirement, and the Fraud Enforcement and Recovery Act generally, were clearly enacted as a reactionary measure to fraudulent activities, perhaps undetected, that contributed to the country’s economic crisis. Its biggest contribution, however, is yet to be realized. As President Obama stated in his remarks on signing the bill, the False Claims Act will likely be heavily used to combat fraud in disbursements of American Recovery and Reinvestment funding and Troubled Asset Relief Program funding. See Remarks on Signing the Fraud Enforcement and Recovery Act of 2009 and Legislation to Prevent Mortgage Foreclosures and Enhance Mortgage Credit Availability, 2009 Daily Comp. Pres. Doc. 390 (May 20, 2009).

The insertion of the materiality requirement may mean the difference between funding that is and is not recovered.

One possible cause of this view is the fact that FERA included a retroactivity provision that was later attacked as violating the Ex Post Facto Clause. United States ex rel. Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009). See infra Section II.D. 639 F.3d 791, 799 (8th Cir. 2011).

In Vigil, the government relator had alleged that Nelnet, Inc. had created claims for reimbursement from the federal government for loans that it had guaranteed that subsequently defaulted. However, there was no evidence that the claims had in fact been submitted for payment. Vigil, 693 F.3d at 796. The court found that without this submission, the decision to pay reimbursement claims for defaulted loans was not affected. Id. at 799-800. Arguably, were this case heard by a circuit that has adopted the natural tendency standard, the court might not have affirmed a dismissed the complaint as the Eighth Circuit did. Id. at 802.

Thomas, 708 F.Supp. 2d at 505.

The District Court noted that materiality seemed to be evident: “Why would the government ask for this information if it was not material to its decision?” Id. at 513.

Compare Mikes v. Strauss, 274 F.3d 687, 696-97 (2d Cir. 2001); Hoffman, supra note 16, at 181 (discussing cases in these circuits, and placing their analyses alongside that of the Eighth Circuit, as those that conform with the outcome materiality test), with United States ex rel. Longhi v. United States, 575 F.3d 458 (5th Cir. 2009), cert. denied, 130 S. Ct.
2092 (2010); United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94, 116-17 (2d Cir. 2010) (refraining from adopting the natural tendency test but deciding the case under the FERA language and finding that materiality was satisfied), rev’d on other grounds, Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S.Ct. 1885 (2011).

122 Longhi, 575 F.3d at 469. See also United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008).

123 Longhi, 575 F.3d at 469-70. It looked to the Oxford English Dictionary and the Merriam-Webster dictionary and found that the definitions of “tendency,” “capable,” and “influence” support a reading of the test that most closely conforms to Congress’s intent for this section of the statute. Id.

124 Id. at 470.

125 Id.


127 United States v. Rogan, 517 F.3d 449, 452 (7th Cir.2008). See also supra Section I.A.2.
United States v. Omnicare, Inc., No. 07 C 5777, 2011 WL 1059148 at *3 (N.D. Ill. Mar. 21, 2011). The court cited Seventh Circuit precedent that had found materiality satisfied when there was “a good probability” that information could affect a payment decision. \textit{id.} (citing United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008)).


\textit{id.} at 394.

\textit{id.} at 380.

\textit{id.} at 394.

Courts have generally discussed and found that the retroactivity requirement applied to “claims” as defined by the False Claims Act itself: as claims for payment, rather than a legal claim. United States v. Hawley, 619 F.3d 886, 894 (8th Cir. 2010). \textit{See also Handwerker et. al., supra note 89, at 316.}

(cataloguing the decisions of several courts that the post-FERA False Claims Act did not apply).

135 See Handwerker et al., supra note 89, at 305-6.

136 See, e.g., Hopper v. Solvay Pharmaceuticals, Inc., 588 F.3d 1318, 1329 n. 3 (11th Cir. 2009) (stating that the new FERA requirements do not apply, as the claims on which the suit was brought was not pending within even the timeframe covered by the retroactivity provision).


138 Pub. L. 111-21, § 4(f)(1), 123 Stat. 1617. There is some debate as to what Congress meant to include within the retroactivity provision. The selection of the date after which pending claims would be subject to the requirement, June 7, 2008, seems to answer the Supreme Court, which decided Allison Engine on June 9, 2008. Id.; Allison Engine Co., Inc. v. United States ex rel. Sanders, 553 U.S. 662 (2008). However, the statute defines “claims” as “any request or demand . . . for money or property,” which signifies the claims on which cases would focus. 31 U.S.C. § 3729 (b)(2)(A). See also Hopper v. Solvay Pharmaceuticals, Inc., 588 U.S. 1318, 1327 n.3 (2009).
The FCA statute was punitive enough in its purpose and effect that it triggered the ex post facto inquiry. The statute provides for "civil penalt[ies] of not less than $5,000 and not more than $10,000" with an allowance for treble damages based on the amount lost by the federal government. 31 U.S.C.A. § 3729(a)(1)(G)


See discussion supra Section I.C.

See supra notes 103-105 and accompanying text.

See discussion supra Section II.D.


See supra Section II.

See supra Section II.C.

See supra Section I.C.


Id. at *11. See also United States ex rel. Hendren v. Mayo, 2:09-CV-00210, 2012 WL 405665, at *3 (N.D. Miss. 2012) (dismissing a False Claims complaint based on lack of particularity in allegations).
153 United States ex rel. Hutcheson v. Blackstone Medical, Inc.,
647 F.3d 377, 380 (1st Cir. 2011).

154 United States ex rel. Kirk v. Schindler Elevator Corp., 601
F.3d 94, 116-17 (2d Cir. 2010), rev’d sub nom., on other
grounds, Schindler Elevator Corp. v. United States ex rel. Kirk,

155 Many courts vacillate in their language defining materiality,
only incorporating language from both texts. The Third Circuit
engaged in this practice in Hutchins v. Wilentz, Goldman &
Spitzer, saying at once that the statute was enacted to
“attempt[] or actually cause[] economic loss,” while emphasizing
that claims that “do not or would not” cause a loss to the
government will not survive. 253 F.3d 176, 182 (3d Cir. 2001).

156 See United States ex rel. Loughren v. Unum Group, 613 F.3d
300, 309 (1st Cir. 2010); United States ex rel. A+ Homecare,
Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428, 445 (6th Cir.
2005).

157 See United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir.
2008).

158 United States ex rel. Longhi v. United States, 575 F.3d 458,
470 (5th Cir. 2009), cert. denied, 130 S. Ct. 2092 (2010).
See supra Section I.C.


See Neder v. United States, 527 U.S. 1, 16 (1999).


The court calls the test “the natural tendency test” reflecting the original language of the definition.

Kungys, 485 U.S. at 771. Contra United States ex rel. Hutcheson v. Blackstone Medical, Inc., 694 F. Supp.2d 48, 64 (D. Mass. 2010)(stating that the natural tendency test takes into account the likelihood that the government would have refused to pay a claim that it knew was based on a false statement).

See infra section III.D.

See supra section I.A.1.

Meador & Warren, supra note 29, at 461.


See United States v. Southland Mgmt. Corp., 288 F.3d 665, 678 (5th Cir. 2002) on reh'g en banc, 326 F.3d 669 (5th Cir. 2003), in which the court found liability for a false claim because HUD housing program participants had in fact falsely certified compliance with the program requirements and were paid. Because the false statement had in fact resulted in a payment that would not have otherwise been tendered, the court found that the claim was material under the outcome materiality standard. Id.

Vigil, 639 F.3d 796 (8th Cir. 2011); see discussion supra in section II.A.

Id.

Id.

Id. at 799–800.

See United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94, 117 (2d Cir. 2010), rev'd and remanded on different grounds, 131 S. Ct. 1885 (2011) (stating that the fact that defendant “submitted [] reports that gave the impression that it was complying with [federal] requirements while in fact it was entirely disregarding them” met the natural tendency test, even without payment).

See United States ex rel. Longhi v. United States, 575 F.3d 458, 469 (5th Cir. 2009), cert. denied, 130 S. Ct. 2092 (2010).


31 U.S.C. §3729 (a)(1) (2009) (“is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil
Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.”).

184 Varljen v. Cleveland Gear Co., Inc., 250 F.3d 426, 430 (6th Cir. 2001) (“the failure to comply with government contract specifications can result in an FCA ‘injury’ to the government, even if the supplied product is as good as the specified product”). See also Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 183 (3d Cir. 2001).


186 See supra notes 171-173.

187 See supra note 66 and accompanying text. The Third Circuit noted that there could be liability in cases where “the government discovers that a claim is false before it makes payment,” or “where the government in essence passes on the cost of the false claim to a third party.” United States ex rel. Sanders v. Am.-Amicable Life Ins. Co. of Texas, 545 F.3d 256, 259 (3d Cir. 2008) (citing Rex Trailer Co. v. United States, 350

In Hayes, the court found liability where a defendant overcharged the government for a military part, despite the fact that the government suffered no injury in reselling the part for the same price. 297 F.Supp.2d at 739.

Anti-Discrimination Ctr. 668 F.Supp. 2d at 570. According to the court, “there is no requirement that the plaintiff show that any grant official actually relied on the false certification in making the decision to send HUD fair housing and community development funds to the County. Conversely, an individual government employee's decision to approve or continue such funding, even with full access to all relevant information or knowledge of the falsity of the applicants certification does not demonstrate that the falsity was not material.” Id.

(arguing that the financial motivation in pursuing a False
Claims Act suit allows for more unsupportable claims to come
forward).

193 525 F. 3d 370, 379 (4th Cir. 2008); see supra notes 67-72 and
accompanying text.

194  Id.

195 647 F.3d 377 (1st Cir. 2011).

196 United States ex rel. Hutcheson v. Blackstone Medical, Inc.,
694 F. Supp.2d 48, 67 (D. Mass. 2010), rev'd, United States ex
(1st Cir. 2011). The case, as well as the District Court
decision, is also known for addressing “false certification”
theory, which imposes liability for False Claims Act violations
against organizations or individuals that put forward that they
are in compliance with a statute or other condition placed on
their performance. For an in-depth discussion of false
certification theory, see United States ex rel. Kirk v.
Schindler Elevator Corp., 601 F.3d 94, 113-115 (2d Cir.
2001)), rev'd on other grounds, Schindler Elevator Corp. v.
Circuit also discusses two competing theories of false certification theory in United States v. Science Applications Intern. Corp. (SAIC), 626 F.3d 1257, 1267-70 (D.C. Cir. 2010).

197 Id. at 66.


199 The District Court found that because the claims were for normal and necessary surgeries, not ones that were wholly "medically unnecessary," the underlying certifications were not material to the government’s decision to pay. Hutcheson, 694 F. Supp.2d at 66-7.

200 Hutcheson, 647 F.3d at 395.


202 Among these factors are the extent to which the false statement was linked to the government activity, the contract or program to which it was tied, the degree to which the false statement was made in response to a program requirement; and weigh these factors to consider whether, in this framework, a false statement had the potential to affect a government payment decision. See Wilson, 525 F.3d at 378.


See United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) (characterizing legislative intent at the time of the False Claims Act’s 1863 enactment as being “intended to reach all types of fraud, without qualification, that might result in financial loss to the Government,” and stating that “the Court has consistently refused to accept a rigid, restrictive reading” of the Act). See also Rainwater v. United States, 356 U.S. 590, 592 (1958) (interpreting Congress’s intent as being broadly protective of government funds).


United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008).

The Seventh Circuit cites Justice Holmes in support: “[m]en must
turn square corners when they deal with the government.” Id. (quoting Rock Island, Arkansas & Louisiana R.R. v. United States, 254 U.S. 141, 143 (1920)) (omission in original).