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Noah Matthew Rich

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The principles of natural justice and sound morals . . . require the most scrupulous good faith, candor, and truth, in all dealings whatsoever. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction . . . and, with reference to the concerns of human life, they endeavor to aim at mere practical good and general convenience.

-Joseph Story[1]

I. INTRODUCTION

Yarushka Rivera suffered her first seizure on May 13, 2009.[2] A week earlier, she had been prescribed Trileptal, an anti-epileptic drug that is sometimes used to treat bipolar disorder. Almost immediately after taking Trileptal for the first time, Rivera began to experience side effects so severe that she decided to stop taking the medication. According to her parents, nobody told Rivera or her family that suddenly stopping taking Trileptal could significantly increase the risk of seizures.

Rivera's diagnosis of bipolar disorder came after several years of treatment at a mental-health clinic in Massachusetts. Rivera had begun to exhibit behavioral problems in middle school, after which she received treatment from a spate of healthcare professionals including social workers, a psychologist, and a psychiatrist. In her short life, Rivera underwent numerous counseling sessions, was temporarily involuntarily committed to the hospital, and was diagnosed with bipolar disorder.

Rivera suffered her second seizure on September 2, 2009. Her mother and stepfather, Carmen Correa and Julio Escobar, tried to obtain a new medication to prevent further episodes, but their insurer—the Massachusetts Medicaid program—refused to pay for it.

Rivera suffered her third seizure on October 29, 2009 when she was alone in her bedroom. This time, the seizure was fatal. Rivera died at the age of nineteen.

Rivera's parents deeply distrusted the clinic that had treated their

[*] Attorney, Baron & Budd, P.C.; J.D., *cum laude*, Georgetown University Law Center, 2014. The views expressed in this Article are my own.

1. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 219 (4th ed. 1846).

2. This statement of facts is drawn from the Fifth Amended Complaint in *United States ex rel. Escobar v. Universal Health Services, Inc.*, No. 11-cv-11170 (D. Mass Feb. 8, 2017), as well as the summary judgment record as summarized in *Correa v. Schoeck*, No. 12-cv-4164, 2016 WL 7635755, at *1-2 (Mass. Super. Dec. 27, 2016).

daughter and began to investigate. According to Correa and Escobar, they discovered that some of the social workers who treated Rivera were not actually social workers, the psychologist who diagnosed her with bipolar disorder was not licensed to practice, the doctor who requested that she be involuntarily committed had never examined her, and the psychiatrist who prescribed her Trileptal was actually an inexperienced nurse. Digging deeper, Correa and Escobar concluded that many of the clinic's employees had fraudulently obtained credentials that they used to falsely certify they were qualified to provide care to numerous additional patients.

Correa and Escobar filed a lawsuit under the federal False Claims Act ("FCA"), which allows a private individual—known as a relator—to sue on behalf of the government to recover funds that have been obtained by fraud. Correa and Escobar alleged that the clinic had fraudulently obtained payment from Medicaid because it had falsely certified compliance with various "health regulations regarding patient care, supervision, and core staffing requirements."[3] In essence, Correa and Escobar contended that if the government had known it was being billed for care provided by unlicensed and unqualified individuals, it would have refused to pay for not only Rivera's treatment, but the treatment of numerous other patients.

What began as a whistleblower lawsuit brought by two grieving parents ultimately resulted in perhaps the single most influential Supreme Court decision interpreting the FCA. Most FCA cases involve an allegation that the government has been misled such that the defendant wrongfully obtained money or avoided an obligation to pay what it owed. But until 2016, courts often disagreed on fundamental questions. For a falsehood to be actionable, how central must it be to the contract at issue? Could the government recover for noncompliance with a minor, technical portion of an agreement, or is the FCA limited to more important breaches? Must the falsehood actually have caused the government to pay money, or is it sufficient that the falsehood was one factor that could have influenced the government's decision?

Seven years after Yarushka Rivera died, the Supreme Court attempted to resolve at least some of these questions. In the case now known simply as *Escobar*, the Court identified various guideposts to consider in determining whether a falsehood is sufficiently material to be actionable under the FCA.[4] The Court did not write upon a blank slate; its decision was merely the latest pronouncement in a centuries-long tradition of common-law precedent interpreting the requirement of materiality in deceit cases. In early American jurisprudence, the concept of materiality was muddled

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

4. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176 (2016).

and inconsistent. However, a remarkable consensus emerged in the twentieth century: a misstatement is material if it has a natural tendency to affect, or is capable of affecting, the hearer's actions—irrespective of the actual effect of the misstatement. In *Escobar*, the Supreme Court fundamentally agreed with this definition and identified several factors that may be relevant to the materiality inquiry under the FCA.

Unfortunately, jurists and litigants alike have often misinterpreted *Escobar*. The decision frequently is read to displace, rather than complement, the precedent on which it relied—as well as the statutory definition of materiality added to the FCA in 2009, which incorporated the common-law definition of materiality. Because *Escobar* has wrongly been read to eclipse all other authority on the issue, the lower courts often fail to apply the straightforward analysis that is uniformly employed in other contexts where materiality is at issue. Instead, their materiality analysis frequently begins and ends with the few factors enumerated in *Escobar*, ignoring that materiality is defined by statute, that the Supreme Court applied a well-known test in interpreting the FCA, and that the factors enumerated in *Escobar* are not exhaustive. Making matters worse, a recent line of decisions has relied on a misquotation of *Escobar* to impose an onerous "outcome-materiality" standard, foreclosing an FCA suit unless a litigant can prove that the falsehood actually affected the government's payment decision—rather than merely being capable of affecting that decision, as the statute requires.

The FCA was intended to proscribe a broader set of misconduct than has generally been understood in the wake of *Escobar*. A robust body of case law interpreting the identical materiality standard in other contexts has provided ample guidance for courts interpreting the FCA to follow, and these decisions demonstrate that, under most circumstances, the materiality analysis is straightforward and uncontroversial. Only by faithfully applying this precedent can Escobar be understood in its proper context and can the FCA be fairly applied.

II. MATERIALITY UNDER THE FALSE CLAIMS ACT

The government has numerous tools to combat fraud in the public sphere, with severe consequences for wrongdoers. One who lies to federal investigators, for instance, could spend up to five years in prison.[5] The penalty for tax fraud is up to three years in prison, as well as a $100,000 fine.[6] Attempting to obstruct a grand jury could land a defendant in prison for ten years or more.[7] Perhaps the most potent of the government's anti-

5. 18 U.S.C. § 1001(a).
6. 26 U.S.C. § 7206.
7. 18 U.S.C. § 1503(b).

fraud tools is the FCA, which subjects a defendant to treble damages and tens of thousands of dollars in civil penalties per false claim,[8] as well as up to five years in prison and a criminal fine of $250,000 or more.[9] Together, these statutes provide strong incentives to "turn square corners when . . . deal[ing] with the government."[10]

Because these tools are so potent, courts have long been wary of extending their reach beyond their intended purpose.[11] Therefore, in all of these contexts, the government has been permitted to punish a wrongdoer only if the false statement is sufficiently important. "[M]ere clerical errors" are insufficient to expose a contractor to severe financial penalties,[12] nor is a minor false statement that could not have affected the government's behavior enough to send a banker to prison for lying to the FDIC.[13] In short, for liability to attach, the falsehood at issue must have been material.

What constitutes a material misstatement has long confounded jurists, practitioners, and scholars. Beginning in the 1920s, after centuries of debate, the federal judiciary coalesced around a uniform definition of materiality. With the benefit of several decades of jurisprudence applying this definition, the federal courts now have little trouble determining whether a misstatement is material under the vast majority of anti-fraud statutes.

Curiously, this facility with the concept of materiality largely has eluded FCA litigation. Although most courts have long agreed that the FCA requires proof of materiality, they disagreed over whether to apply the well-known common-law test or a more demanding test unique to the FCA. This tension persists—and, in some ways, has even worsened—despite Congress's explicitly incorporating the common-law definition of materiality into the FCA and the Supreme Court's application of the common-law materiality test in *Escobar*. Even so, many courts still fail to acknowledge the common-law roots of the materiality test, adding an unnecessary layer of complexity to what ought to be a straightforward inquiry.

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8. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5.

9. 18 U.S.C. § 287; 18 U.S.C. § 3571(a)-(d).

10. *See* United States ex rel. Compton v. Midwest Specialties, Inc., 142 F.3d 296, 302 (6th Cir. 1998) (quoting Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920)).

11. *See, e.g.*, United States v. Beer, 518 F.2d 168, 171 (5th Cir. 1975) ("When dealing with such a pervasive, all-encompassing statute, however, the courts must be extremely careful to insure that reasonable limits are observed.").

12. *See, e.g.*, Tyger Const. Co. Inc. v. United States, 28 Fed. Cl. 35, 55 (1993); *accord* United States ex rel. Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 828 (7th Cir. 2011) ("[N]o reasonable jury could think General Dynamics' failure to check the proper box in the Certification Agreement was a material false statement, as required for liability under the False Claims Act.").

13. *Beer*, 518 F. 2d at 171-72.

A. The History of Materiality in American Jurisprudence

Materiality has been subject to numerous competing definitions for most of American history. Although courts generally agreed that materiality was an element of most actions alleging misrepresentation, there was little consensus concerning exactly what evidence was required to prove this element. Fortunately, a consensus rapidly emerged after the Second Circuit ruled on the Prohibition-era case of *Carroll v. United States*,[14] whose salacious details had gripped the press for months. The court's clear and simple opinion contrasted with the disarray that had tended to accompany the question of materiality, and the Second Circuit's approach quickly spread throughout the federal judiciary.

1. Early History

For centuries, materiality has served as a check on the scope of liability for making false statements. As early as 1644, Sir Edward Coke noted that, to sustain a charge of perjury, "the false statement must be 'in a matter material to the issue, or cause in question.'"[15] Sir William Blackstone echoed this point more than a century later, observing "that the false statement . . . 'must be in some point material to the question in dispute.'"[16]

This concept was codified in federal law by 1798, when the legislature penalized making false statements to Congress "touching any matter or thing material to the point in question."[17] Early state laws governing perjury and other false statements contained similar materiality requirements,[18] and throughout the nineteenth century, the federal and

14. 16 F.2d 951 (2d Cir. 1927).

15. Richard B. Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 IND. L.J. 1, 2 (1959) (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 167 (1644)).

16. *Id.* (quoting 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 137 (1769); *see also, e.g.*, Legan v. Stevens, Jeff. 30, 31, 1736 WL 15, at *1 (Va. Gen. Ct. Oct. 1, 1736) ("Even false considerations will not always defeat the King's grant; as where it is personal and executed, as for money paid or service done; though the money was not actually paid or the service done, the grant will be good. The reason is, though this be a deceit, yet the law does not esteem it so weighty or material as to destroy the grant." (citations omitted)).

17. An Act to Authorize Certain Officers and Other Persons to Administer Oaths, 1 Stat. 554 (1798).

18. *E.g.*, N.H. Rev. Stat. § 149:25 (1847); An Act to Ameliorate the Criminal Code, and Conform the Same to the Penitentiary System, § 37, 1811 Ga. Laws 38 (1811); An Act Empowering Commissioners Appointed to Receive and Examine the Claims of the Creditors to Insolvent Estates, 1789 Mass. Acts 497. *See* Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215, 245 (1993) ("The English definition of perjury was, in the main, embraced by the colonists. Many of the new states adopted the common law as a birthright, some by statute and some by constitutional provision.").

state legislatures and courts imposed a materiality requirement on both criminal[19] and civil[20] actions involving allegations of fraud or deceit.

However, these early authorities often struggled to apply the theoretical concept of materiality in a consistent and principled manner. Take, for example, a suit to rescind a contract. On one end of the spectrum, some opinions held that for a falsehood to be material, it must be merely "important to the interests of the party complaining,"[21] or such that it "could have . . . induced" the aggrieved party to enter into the contract.[22] On the other end, some opinions conceived of materiality quite differently, holding that the false statement at issue must actually have "induced . . . [the hearers] to act in a manner that they would not have acted had such representation not been made."[23] And some courts took a middle-ground approach, holding that a matter is material if it is "of that character that a person of ordinary intelligence, and possessing ordinary business qualifications, would be likely to rely thereon, and be misled thereby,"[24] "supposed to have had a bearing upon the contract, and to have

19. *See, e.g.*, State v. Hattaway, 11 S.C.L. (2 Nott & McC.) 118, 120 (S.C. Const. App. 1819); Anonymous, 1 F. Cas. 1032, 1036 (C.C.D. Pa. 1804) (No. 475); State v. Bishop, 1 D. Chip. 120, 124, 1797 WL 620, at *1 (Vt. June 1, 1797). *Cf.* Gibson v. Tilton, 1 Bl. 352, 355 (Md. Ch. 1827); Smith v. Smith, 30 N.C. (8 Ired.) 29, 31-33 (1847); Act of December 1, 1873, ch. 4, § 5392, 18 Stat. 1, 1045.

20. *See, e.g.*, Smith v. Richards, 38 U.S. (13 Pet.) 26, 37 (1839); Hodgson v. Marine Ins. Co. of Alexandria, 9 U.S. (5 Cranch) 100, 111 (1809); McFerran v. Taylor, 7 U.S. (3 Cranch) 270, 281-82 (1806); Hall v. Johnson, 41 Mich. 286, 289-90 (1879); Tuck v. Downing, 76 Ill. 71, 97 (1875); Mitchell v. Zimmerman, 4 Tex. 75, 79 (1849); Fitzsimmons v. Joslin, 21 Vt. 129, 146 (1849); Boyd v. Browne, 6 Pa. (6 Barr.) 310, 316 (1847); Oldham v. Bentley, 45 Ky. (6 B.Mon.) 428, 431 (1846); Warner v. Daniels, 29 F. Cas. 246, 252 (C.C.D. Mass. 1845) (No. 17,181); Steele v. Kinkle, 3 Ala. 352, 357 (1842), *overruled on other grounds by* Adams v. Thornton, 78 Ala. 489 (1885); Tryon v. Whitmarsh, 42 Mass. (1 Metc.) 1, 9 (1840); Daniel v. Mitchell, 6 F. Cas. 1151, 1157 (C.C.D. Me. 1840) (No. 3,562); Richards, Truesdale & Co. v. Hunt, 6 Vt. 251, 253 (1834); Union Ins. Co. v. Stoney, 16 S.C.L. (Harp.) 235, 241 (S.C. Const. App. 1824); Shackelford v. Hendley's Ex'rs, 8 Ky. (1 A.K. Marsh.) 496, 500 (1819); Sherwood v. Salmon, 5 Day 439, 446 (Conn. 1813); Clason v. Smith, 5 F. Cas. 990, 991 (C.C.D. Pa. 1812) (No. 2,868); Williams v. Delafield, 2 Cai. 329, 333 (N.Y. 1805); STORY, *supra* note 1, at 217-18.

21. *Downing*, 76 Ill. at 97.

22. *Stoney*, 16 S.C.L. at 243; *accord* Columbia Ins. Co. of Alexandria v. Lawrence, 35 U.S. (10 Pet.) 507, 516 (1836) (opining that a matter is material if it "might have a real influence upon the" aggrieved party in entering into or setting the terms of the contract).

23. Putnam v. Bromwell, 11 S.W. 491, 492 (Tex. 1889); *accord* Colton v. Stanford, 82 Cal. 351, 399 (1890) ("A misrepresentation . . . can be material only when it is of such a character that if it had not been made the contract would not have been entered into."); Jordan v. Pickett, 78 Ala. 331, 338 (1884) ("[I]t is sufficient if it materially contributes, and is of such character that the purchaser would not have consummated the contract, had he known the falsity of the statement, or the fact suppressed."); Hughes v. Sloan, 8 Ark. 146, 150 (1847) (misrepresentation must "operat[e] as an inducement or consideration to the contract"); STORY, *supra* note 1, at 220 ("In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury."). *See* Vale v. Phoenix Ins. Co., 28 F. Cas. 867, 867 (C.C.D. Pa. 1805) (No. 16,811) (misrepresentation must have actually affected price of contract). *Cf.* Miles v. Stevens, 3 Pa. (3 Barr.) 21, 21 (1846) (a "material fact" is "one which is of the very essence of the contract").

24. Hall v. Johnson, 2 N.W. 55, 57 (Mich. 1879); *accord* Shackelford, 8 Ky. at 501 (mis-

influenced the [aggrieved party] in adjusting its terms,"[25] or an "essential element[] of the contract."[26]

A consistent definition of materiality proved equally elusive with regard to perjury. Some early opinions held that a misstatement is unlawful if it "give[s] weight to the testimony to" a material point[27]—a definition that merely begs the question. Other courts offered a competing definition: the misstatement must be such that it "could have" or "might have" influenced, or "tend[ed] to" influence, the factfinder's ultimate decision.[28] Or, perhaps, the false statement must have been made about "the very fact in issue, or to some fact . . . from which the jury may lawfully infer the fact at issue," such that "if believed, it must prevent the due administration of justice."[29]

Regardless of the context, courts frequently declined to define materiality at all.[30] As a result of these scattershot definitions and general confusion, courts frequently resorted to determining the issue of materiality on an *ad hoc* basis, often with no serious legal analysis. One opinion from the early nineteenth century exemplifies this trend. In that case, a man named Shackleford had been accused of stealing a cow, but was acquitted after a witness, Francis Hattaway, testified that he had seen

representation must "probably . . . [have] influenced the contract"); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 326 (1881) ("[T]he only way in which . . . [the facts] can be material is that a belief in their being true is likely to have led to the making of the contract.").

25. Boardman v. N.H. Mut. Fire Ins. Co., 20 N.H. 551, 557 (1847).

26. Hedden v. Griffin, 136 Mass. 229, 231 (1884).

27. State v. Hattaway, 11 S.C.L. (2 Nott & McC.) 118, 120 (S.C. Const. App. 1819); *accord* United States v. Shinn, 14 F. 447, 453 (C.C.D. Or. 1882) (opining that misstatement is material when it "cloth[es] . . . [the testimony at issue] with circumstances which add to it probability or strengthen the credibility of the witness").

28. State v. Norris, 9 N.H. 96, 100 (1837) (false testimony at issue must "tend[] to affect the verdict of the jury, or extenuate[e] or increase[e] the damage, and thus influenc[e] the judgment of the court); State v. Sargood, 68 A. 49, 50 (Vt. 1907) ("It is clear that all of them were statements that might properly have influenced the jury in reaching its conclusion, and this was sufficient."); Coleman v. State, 118 P. 594, 600 (Okla. Crim. App. 1911) ("[I]f the statement was made for the purpose of influencing the grand jury and was such that it might have had this effect, then it was material."); Fields v. State, 114 So. 317, 318 (Fla. 1927) ("The test is whether the statement made could have influenced the tribunal on the issue before it."). *See* State v. Dodd, 7 N.C. (3 Mur.) 226, 229 (1819) ("[T]o constitute perjury, it must be to some material fact tending to injure some person.").

29. Studdard v. Linville, 10 N.C. (3 Hawks) 474, 478 (1825); *accord* State v. Keenan, 42 S.C.L. (8 Rich.) 456, 457 (S.C. App. L. & Eq. 1832) ("[T]he fact sworn to should have a tendency to lead the jury to a conclusion that the person charged was guilty or not guilty . . . , either by its direct bearing on the issue, or by supporting or weakening the witness's testimony on some other point. And if the same verdict must have been rendered by the jury, whether the oath were true or false, it is obvious that it could not have been material.")

30. *See, e.g.*, March v. Met. Life Ins. Co., 40 A. 1100 (Pa. 1898); Kujek v. Goldman, 44 N.E. 773 (N.Y. 1896); Mason v. Crosby, 16 F. Cas. 1016 (C.C.D. Me. 1846) (No. 9,234); Commonwealth v. Pollard, 53 Mass. (12 Metc.) 225 (1847); Daniel v. Mitchell, 6 F. Cas. 1151 (C.C.D. Me. 1840) (No. 3,562); Curell v. Miss. Marine & Fire Ins. Co., 9 La. 163 (1836).

Shackleford purchase the cow, so he could not have stolen it.[31] Hattaway also testified that, at the time of the ostensible purchase, he lived "perhaps within a few hundred yards of" the seller.[32] However, this testimony was false; Hattaway did not even live in the state.[33] Hattaway was later convicted of perjury for falsely stating his place of residence.[34]

Hattaway appealed his conviction, arguing that his false statement was immaterial. After all, "if he lived a hundred miles off, and was present at the sale, he was a competent witness to prove it. If he lived within fifty yards, and was not present, he could know nothing of the matter."[35] On the other hand, Hattaway's presence at the sale was central to Shackleford's defense, and in the early nineteenth century, travel generally required considerably more time and energy than it does today. Shackleford's jury may have been more likely to believe Hattaway was actually at the sale if he lived within a few hundred yards, rather than in a different state. This apparently was the view of the jurors in Hattaway's trial, who convicted him despite an instruction by the presiding judge that the misstatement was immaterial.[36]

In a brief opinion, the Constitutional Court of Appeals of South Carolina vacated the conviction, holding that the testimony was immaterial as a matter of law. Indeed, it appeared to be an easy decision: the panel could not "conceive[] that the testimony was either directly or indirectly material to the issue."[37] According to the court, to be convicted of perjury, "the particular fact sworn to . . . must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point."[38] The court declined to elaborate as to what constituted a "material fact" and what kinds of statements are sufficient to "give weight" to certain testimony, stating that "perhaps no precise and definite rule can be laid down on the subject."[39]

Having dispensed with legal reasoning, the court simply made a judgment call: whether Hattaway lived nearby or in a different state could not possibly have made it any more or less likely that he was present at the time of the sale. Curiously, however, the court opined that if Hattaway had been called upon to testify as to, say, the yield of the seller's crops, that fact might have been "better known to him, in consequence of the

31. *Hattaway*, 11 S.C.L. at 119.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 120.
36. *See id.* at 119.
37. *Id.* at 121.
38. *Id.* at 120.
39. *Id.* at 121.

contiguity of his residence."[40] But if his proximity would have made it more likely that he visited his neighbor in one context, why wouldn't his proximity have made it more likely that he visited his neighbor in another? And isn't such a judgment call the province of the jury—which already had come to the opposite conclusion as the court?

When any arbiters reckon with an esoteric legal concept but lack clear standards by which to address it, they are left to rely on their own biases and prejudices. Such was the case in *State v. Hattaway*, and such was the case in innumerable additional opinions throughout the eighteenth and nineteenth centuries. Sometimes, the cases were easy, and the courts reached what appeared to be the obvious answer.[41] Just as often, the cases were more complicated, and the right answer proved elusive.[42]

2. The Modern Definition of Materiality

Signs of progress emerged around the turn of the twentieth century, when courts around the country began to coalesce around a uniform definition of materiality in the context of perjury. Under this formulation, a misstatement was deemed to be material if it tended to prove or disprove any "essential fact" of the case, or "tend[ed] to support and give credit to" testimony with regard to such a fact.[43] Under this formulation, materiality was not measured by the actual effect of the misrepresentation, but "by the effect which . . . [the misrepresentation] *could* have had."[44]

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40. *Id.* at 120-21.

41. *See, e.g.*, Marbury v. Stonestreet, 1 Md. 147, 152 (1851) (representation that estate had 669 acres when it actually had 530 acres was material to contract to purchase estate); Mitchell v. Zimmerman, 4 Tex. 75, 79 (1849) (representation that estate had 150 acres of arable land when it actually had less than fifty such acres was material to contract to rent the premises for the purpose of farming); Williams v. Delafield, 2 Cai. 329, 333 (N.Y. 1805) (whether a ship had been at sea for twenty-six or twenty-seven days made no material difference to the likelihood that it had been lost in a well-publicized storm).

42. *See, e.g.*, Dingle v. Trask, 42 P. 186, 187 (Colo. App. 1895) (false threat of lien was immaterial to plaintiff's decision to execute a security); Palmer v. Bell, 27 A. 250, 251 (Me. 1893) (false representation that no property disputes had ever arisen with respect to easement was immaterial to plaintiff's decision to purchase property); Nounnan v. Sutter Cnty. Land Co., 22 P. 515, 516 (Cal. 1889) (false representation that levee would require excavation of 350,000 cubic yards of light, loamy soil, when it would actually require much more difficult excavation of 500,000 yards of hard soil, was immaterial to induce company to enter into contract to construct levee); Sheriff v. Hull, 37 Iowa 174, 177-78 (1873) (representation that defendant owned "all but a few lots" in a tract was material to plaintiff's decision to purchase the tract only if defendant "had [already] sold many more lots than she represented").

43. *See* Wood v. People, 59 N.Y. 117, 117 (1874); *see also, e.g.*, *In re* French, 28 Haw. 47, 56 (1924); State v. Greenberg, 103 A. 897, 898 (Conn. 1918), *overruled on other grounds by* State v. Paige, 40 A.3d 279 (Conn. 2012); State v. Miller, 58 A. 882, 884 (R.I. 1904); State v. Park, 46 P. 713, 713 (Kan. 1896); Rahm v. State, 17 S.W. 416, 417 (Tex. App. 1891); People v. Barry, 63 Cal. 62, 64 (1883); Robinson v. State, 18 Fla. 898, 899 (1882).

44. HARRY CLAY UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE 763 (2d ed. 1910) (emphasis added); *accord* State v. Kellis, 141 N.E. 337, 338 (Ind. 1923); State v. Hoel, 94 P. 267, 270 (Kan. 1908); State v. Wakefield, 9 Mo. App. 326, 332 (1880).

This definition quickly gained favor, and it was gradually refined over the following decades. In 1927, the Second Circuit first articulated something akin to the modern test for materiality in a refreshingly straightforward opinion. During Prohibition, theater impresario Earl Carroll had thrown a raucous, alcohol-soaked party to which he had invited several famous guests, practically daring the authorities to prosecute him:

> The venue was the Earl Carroll Theatre on Seventh Avenue and Fiftieth Street. . . . The crowd, which arrived in limousines and top hats, included Shirley Booth, a rising Broadway star; Condé Montrose Nast, owner of *Vanity Fair* and *Vogue*; Irvin S. Cobb, one of the highest paid journalists in the United States; and Vera Cathcart, a headline-making British countess. In all, several hundred people filled the ornate theater—eating, drinking, dancing, taking swigs from their hip flasks . . . . To the right of the bar lay a bathtub, from which guests filled their glasses to the brim. Taking a sip as she mingled with a . . . reporter, the countess remarked, "Good champagne!"[45]

Around 4:00 a.m., one of the party's prominent guests, *New York Daily News* editor Philip Payne, was preparing to leave.[46] Carroll asked Payne to stay, as he was about to "put on a wow of a stunt."[47] Payne then "watched as the bathtub was moved to center stage and refilled with what appeared to be more alcohol," before seventeen-year-old model and aspiring actress Joyce Hawley removed her clothing and stepped into the tub.[48] "Carroll looked out at the crowd, beaming with satisfaction. 'Gentlemen,' he yelled, 'the line forms to the left!'"[49] A "gaggle" of men proceeded to fill their glasses from the tub until Hawley began to cry and the party concluded.[50] Carroll was incensed that his stunt ended prematurely, telling Hawley: "Damn it, keep your head up or get off the floor."[51]

Following extensive press coverage—"Orgy of Wine in N.Y. Rivals Ancient Rome," read one headline[52]—the U.S. Attorney's Office for the Southern District of New York launched a criminal investigation for

45. Joe Pompeo, *A Jazz Age Murder Scandal, a Tabloid War, and the Birth of America's True-Crime Obsession*, VANITY FAIR (Sept. 7, 2022), https://www.vanityfair.com/news/2022/09/the-birth-of-americas-true-crime-obsession [https://web.archive.org/web/20221005095422/https://www.vanityfair.com/news/2022/09/the-birth-of-americas-true-crime-obsession].

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Girl in Tub Blames Liquor for Her Act*, N.Y. TIMES, May 26, 1926, at 1, 3.

52. Pompeo, *supra* note 45.

alleged violations of the National Prohibition Act.[53] Carroll admitted to the grand jury that he had thrown a party at which guests filled their glasses from a bathtub, but he testified that the tub was filled with ginger ale, not champagne.[54] He also "denied categorically that there was anybody in the bathtub at all," and stated that he did not know if a Miss Hawley had attended the party.[55] Carroll was tried and convicted of perjury after the trial court ruled "that as a matter of law the testimony . . . that no one was in the tub, was material to the investigation before the grand jury."[56]

The Second Circuit affirmed the conviction. First, the court opined that "[t]he test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation."[57] In this instance, Carroll's lies had impeded the grand jury from learning who was at the party, "so that others might be summoned as witnesses."[58] In addition, Carroll had attempted to keep the grand jury from questioning Hawley, who could have determined "by smell, sight, or taste" whether the bathtub contained champagne.[59] In sum, the court concluded:

> [Carroll's] statements were plainly calculated to dissuade the grand jury from further investigation. It would distort the plain meaning of the word 'material' to hold otherwise. His statements were deceptive; they were influential, for the accusing finger was directed at him. Had he answered the question truthfully, he would have furnished a clue to the grand jury tending to establish a violation of the National Prohibition Act.[60]

The Second Circuit thus eschewed the linguistic gymnastics that had characterized earlier opinions in favor of a workable, commonsense approach to materiality. Rather than attempt to resolve the often unanswerable question of whether the misstatement actually misled the hearer, the court considered whether the misstatement would tend to do so. Here, as in many cases, this standard made the court's decision an easy one.

The Second Circuit's straightforward conception of materiality proved highly influential, and federal and state courts across the country soon

53. *See* Carroll v. United States, 16 F.2d 951, 952, 954 (2d Cir. 1927).

54. *Id.* at 952.

55. *Id.* at 952-53.

56. *Id.*

57. *Id.* at 953.

58. *Id.*

59. *Id.* at 954. Indeed, Hawley ended up testifying at Carroll's trial that the tub was filled with wine and that a member of Carroll's staff had plied her with alcohol until she agreed to participate in the stunt. *Girl in Tub Blames Liquor for Her Act*, *supra* note 51, at 1, 3.

60. *Carroll*, 16 F.2d at 954.

adopted some variation of this definition.[61] This definition also gained favor outside of the field of perjury. Within a span of a few decades—nearly overnight as far as jurisprudential shifts go—the modern test largely displaced the myriad standards and pseudo-standards that had governed the materiality inquiry through the nineteenth century. Today, courts apply the same basic test for materiality to nearly every conceivable situation involving false statements,[62] including federal investigations,[63] sworn testimony,[64] naturalization proceedings,[65] tax returns,[66] mail and wire fraud,[67] securities fraud,[68] state-law contract and

61. *See, e.g.*, United States v. Henderson, 185 F.2d 189, 191 (7th Cir. 1950) ("[W]here the false testimony is capable of influencing the tribunal, then the actual effect of the false testimony is not the determining factor, but its capacity to affect or influence the trial judge in his judicial action and the issue before him . . . ."); La Salle v. United States, 155 F.2d 452, 454 (10th Cir. 1946) (adopting *Carroll* definition); Blackmon v. United States, 108 F.2d 572, 573 (5th Cir. 1940) ("[M]ateriality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it."); Fraser v. United States, 145 F.2d 145, 149 (6th Cir. 1944) (same); Boehm v. United States, 123 F.2d 791, 808 (8th Cir. 1941) ("The test of materiality is whether the false testimony has a natural tendency to influence the fact-finding agency in its investigation."); Robinson v. United States, 114 F.2d 475, 476 (D.C. Cir. 1940) ("The ultimate test in either case is whether such statements had a natural tendency to influence the clerk . . . ."); Woolley v. United States, 97 F.2d 258, 262 (9th Cir. 1938) ("The test of materiality is whether the false testimony has a natural tendency to influence the fact-finding agency in its investigation."); People v. Kresel, 147 Misc. 241, 243, 264 N.Y.S. 464, 466-67 (Sup. Ct. 1932) ("Testimony is deemed material if it may be of substantial influence on the jury in their deliberations as to the merits, or if it might influence the jury in believing or disbelieving the witness' other material testimony, that is, other testimony of the witness which directly bears on the merits of the action, that is, if it could influence the jury to believe or disbelieve the witness."); Hower v. Clerkin, 50 N.E.2d 902, 904 (Ohio Ct. App. 1931) ("The rule as to materiality . . . is said to be 'any testimony which might properly affect the bringing of an indictment is material' and 'whether the false testimony has a natural effect or tendency to influence' the bringing or not bringing of an indictment against a person whose conduct is being investigated."); Fields v. State, 114 So. 317, 319 (Fla. 1927) (matter is material if it has a "legitimate tendency to prove or disprove some fact" relevant to the case).

62. *Cf.* Kungys v. United States, 485 U.S. 759, 770 (1988) ("The federal courts have long displayed a quite uniform understanding of the 'materiality' concept as embodied in such statutes.").

63. United States v. Smith, 54 F.4th 755, 769 (4th Cir. 2022); United States v. Adekanbi, 675 F.3d 178, 182 (2d Cir. 2012); United States v. Turner, 551 F.3d 657, 663 (7th Cir. 2008); United States v. Lee, 359 F.3d 412, 417 (6th Cir. 2004); United States v. Baker, 200 F.3d 558, 561 (8th Cir. 2000); United States v. Serv. Deli Inc., 151 F.3d 938, 941 (9th Cir. 1998); United States v. Edgar, 82 F.3d 499, 510 (1st Cir. 1996). *See* United States v. Gaudin, 515 U.S. 506, 509 (1995).

64. *In re* Sealed Case, 162 F.3d 670, 673 (D.C. Cir. 1998); United States v. Regan, 103 F.3d 1072, 1081 (2d Cir. 1997); United States v. Allen, 892 F.2d 66, 67 (10th Cir. 1989); United States v. Swift, 809 F.2d 320, 324 (6th Cir. 1987); United States v. Corbin, 734 F.2d 643, 654 (11th Cir. 1984); United States v. Brown, 666 F.2d 1196, 1200 (8th Cir. 1981); United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980); United States v. Anfield, 539 F.2d 674, 678 (9th Cir. 1976); State v. Lanning, 832 N.E.2d 143, 149 (Ohio Ct. App. 2005); People v. Evans, 704 N.Y.S.2d 418, 419 (N.Y. App. Div. 2000); State v. Fields, 527 N.E.2d 218, 220 (Ind. Ct. App. 1988).

65. *Kungys*, 485 U.S. at 772.

66. Neder v. United States, 527 U.S. 1, 16 (1999); United States v. Herman, 997 F.3d 251, 269 (5th Cir. 2021); United States v. Rosnow, 977 F.2d 399, 409 (8th Cir. 1992); United States v. Fawaz, 881 F.2d 259, 263 (6th Cir. 1989); United States v. Greenberg, 735 F.2d 29, 31 (2d Cir. 1984).

67. *Neder*, 527 U.S. at 16.

68. Wendy Gerwick Couture, *Materiality and a Theory of Legal Circularity*, 17 U. PA. J. BUS. L.

tort actions,[69] and the FCA.[70] In all of these contexts, the essential inquiry is whether the false statement at issue naturally tends to influence, or is capable of influencing, a reasonable hearer.

B. Materiality Under the FCA

During the Civil War, "[t]he government was cheated without conscience in its purchases of military supplies. . . . The term, 'shoddy aristocracy,' came to signify those who reaped fortunes out of government contracts, particularly from supplying the soldiers with inferior clothing."[71] A "series of sensational congressional investigations into the sale of provisions and munitions to the War Department . . . painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war."[72] These reports included examples of "[t]he same mules being sold over and over again to Army quartermasters," "[r]otted ship hulls freshly painted to appear new then sold as new vessels to the [Navy]," "[i]nfantry boots made of cardboard which wore out after a mile of marching," "[u]niform cloth made from recycled rags, which disintegrated when it became wet," and "[g]unpowder barrels that when opened contained sawdust."[73]

Amid this widespread fraud, "Congress passed the False Claims Act to stop the plundering of the public treasury that had resulted from the frauds and corruptions practiced in obtaining pay from the Government."[74] Today, the FCA "is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government." [75]

Prior to 1986, "there were few FCA cases expressly discussing" the application of materiality to the FCA.[76] Instead, courts generally focused

453, 464 (2015) ("[A] misstatement or omission is material if there is a substantial likelihood that a reasonable investor would have considered it important in making an investment decision.").

69. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 193 (2016)

70. *Id.* at 192.

71. United States *ex rel.* Marcus v. Hess, 127 F.2d 233, 235 (3d Cir. 1942) (quoting HOMER CAREY HOCKETT, POLITICAL AND SOCIAL GROWTH OF THE AMERICAN PEOPLE, 1492-1865, at 759 (1940)), *rev'd on other grounds*, 317 U.S. 537 (1943).

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

73. James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1264-65 (2013).

74. United States v. Kellogg Brown & Root Servs., 800 F. Supp. 2d 143, 146-47 (D.D.C. 2011) (internal quotation marks omitted).

75. Avco Corp. v. U.S. Dep't of Just., 884 F.2d 621, 622 (D.C. Cir. 1989).

76. John T. Boese, *The Past, Present, and Future of "Materiality" Under the False Claims Act*, 3 ST. LOUIS U. J. OF HEALTH L. & POL'Y 291, 295 (2010).

on "reliance or causation—terms commonly used interchangeably."[77] One leading authority from 1977 demonstrates the same sort of confusion that had plagued courts a century earlier. In *United States ex rel. Weinberger v. Equifax, Inc.*, the relator alleged that Equifax had entered into government contracts despite being statutorily ineligible to do so.[78] The Fifth Circuit opined that this behavior did not violate the statute: "Unless the government made it clear that it would not employ detective agencies when it contracted for the work, Equifax's application did not make a material misrepresentation, did not mislead the government, and did not defraud the government within the meaning of the False Claims Act."[79] By conflating materiality and inducement, and by failing to address the significance of the statutory prohibition on the defendant's participation in federal contracts, this opinion was hardly a model of clarity. Nevertheless, "[p]ost-1986 concepts of materiality can be traced directly to this decision."[80]

1986 marked the birth of the modern FCA. For the past forty years, the statute had been read "to preclude all qui tam cases involving information already known to the Government, even when the qui tam relator had been the source of that information."[81] In addition, the statute lacked a "guaranteed reward" for whistleblowers, who "may have been reluctant to accept the risks of reporting fraud."[82]

Congress amended the FCA in 1986 to correct these and other deficiencies.[83] Following the 1986 amendments, the Department of Justice consistently took the position "that materiality was not a requirement for FCA liability."[84] Although this position may seem misguided to a modern practitioner, at the time, the statute did not mention materiality and it was not clear whether such a requirement should be implied. Because the Supreme Court had held "that materiality is not implied in *false* statement statutes," but it "is required by statutes prohibiting *fraudulent* statements;" the Court "invite[d] inquiry into whether what the FCA essentially prohibits is fraud or is mere falsity."[85]

This debate was further fueled by the development of additional

77. *Id.*

78. 557 F.2d 456, 458-59 (5th Cir. 1977).

79. *Id.* at 461.

80. Boese, *supra* note 76, at 297.

81. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:9, Westlaw (updated June 2022).

82. *Id.*

83. *Id.*

84. Boese, *supra* note 76, at 298.

85. W. Bradley Tully, *Materiality as a Constraint on False Claims Actions Based upon Regulatory Noncompliance*, 15 HEALTH LAW. 1, 5 (2003) (citing United States v. Wells, 519 U.S. 482 (1997); Neder v. United States, 527 U.S. 1 (1999)).

theories of liability under the FCA. Prior to 1986, the Department of Justice generally had focused on "factually false" cases[86]—that is, where a defendant submits a claim that "rests on inaccurate factual information about the product or service."[87] Following the strengthening of the FCA's private attorney-general provisions, however, whistleblower attorneys became increasingly comfortable asserting claims based on "legal falsity"[88]—that is, situations where "a factually accurate claim . . . violates a legal requirement for the product being billed."[89] The issue of materiality was particularly important to cabin the reach of the "implied false certification" theory, under which "the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment."[90] How central to the transaction at issue the condition of payment had to be, and whether the condition of payment needed to be explicit, "made the theory . . . a moving target and a source of division among courts."[91]

Regardless of the theory of liability, the federal courts generally disagreed with the position of the Department of Justice, holding that the FCA did contain an implied materiality requirement.[92] After suffering several defeats, the Department of Justice acknowledged that the FCA did have a materiality requirement and argued that courts should follow the common-law "natural tendency" test.[93] The government's "change in strategy was, for the most part, successful,"[94] as most courts endorsed the "natural tendency" test.[95] However, some inconsistency remained, with some courts endorsing an "outcome-materiality" standard requiring but-

86. Boese, *supra* note 76, at 297.

87. Monica P. Navarro, *Materiality: A Needed Return to Basics in False Claims Act Liability*, 3 U. MEM. L. REV. 105, 109 (2012)

88. Boese, *supra* note 76, at 298.

89. Navarro, *supra* note 87, at 109.

90. Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001), *abrogated on other grounds by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176 (2016).

91. Navarro, *supra* note 87, at 122. *Compare Mikes*, 274 F.3d at 702 (implied false certification theory requires express designation of condition of payment), *with* United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1177 (9th Cir. 2006) (holding that "[a]n explicit statement . . . is not necessary to make a statutory requirement a condition of payment").

92. *See, e.g.*, United States *ex rel.* Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999); United States v. Southland Mgmt. Corp., 326 F.3d 669, 679 (5th Cir. 2003); United States *ex rel.* A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 442 (6th Cir. 2005); Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732 (7th Cir. 1999); United States *ex rel.* Costner v. United States, 317 F.3d 883, 887 (8th Cir. 2003); Tyger Const. Co. Inc. v. United States, 28 Fed. Cl. 35, 55 (1993).

93. Boese, *supra* note 76, at 300.

94. *Id.*

95. United States *ex rel.* Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1460 (4th Cir. 1997); United States *ex rel.* Longhi v. United States, 575 F.3d 458, 468 (5th Cir. 2009) A+ Homecare, 400 F.3d at 445; *Bourseau*, 531 F.3d at 1171. *Cf. Luckey*, 183 F.3d at 732 (citing *Neder*, 527 U.S. 1).

for causation between the misrepresentation and the government's payment,[96] some using a "broader definition" that penalized false claims "only if they [were] an essential, important, or pertinent part of the claim,"[97] some failing to define materiality at all,[98] and some questioning whether the FCA required proof of materiality to begin with.[99]

The Supreme Court resolved some of this ambiguity in 2008, when it held that causes of action under 31 U.S.C. Section 3729(a)(2)—which imposed liability "on any person who knowingly uses a false record or statement to get a false or fraudulent claim paid or approved by the Government"—and 31 U.S.C. Section 3729(a)(3)—which imposed liability on "any person who conspires to defraud the Government by getting a false or fraudulent claim allowed or paid"—required that the false record or statement at issue be material to the government's decision to pay or approve the false claim.[100] But while this decision and others "required at least some showing of materiality before FCA liability could attach, there still was no explicit requirement of materiality in the language of the statute."[101]

Finally, in 2009, Congress set out to resolve whether the FCA requires proof of materiality and, if so, by what standard materiality should be assessed. Congress clarified that Sections 3729 (a)(2) and (a)(7) require proof of materiality.[102] As for the standard by which courts should decide the issue, Congress codified the common-law definition of materiality: "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[103]

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96. United States *ex rel.* Costner v. United States, 317 F.3d 883, 887 (8th Cir. 2003) (citing Rabushka *ex rel.* United States v. Crane Co., 122 F.3d 559, 563 (8th Cir.1997)). *Cf.* Mikes, 274 F.3d at 696("[A]n improper claim is aimed at extracting money the government otherwise would not have paid.").

97. *Tyger Const. Co. Inc.*, 28 Fed. Cl. at 55.

98. *Sci. Applications Int'l Corp.*, 626 F.3d at 1271.

99. United States *ex rel.* Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999) ("Given that the False Claims Act prohibits merely making a knowingly false claim and does not require a specific intent to defraud, perhaps *Neder* argues against a materiality requirement.").

100. Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 665 (2008) (internal quotation marks omitted).

101. Benjamin A. Dacin, *Legal Materiality and the Implied Certification Theory of the False Claims Act: Why Courts Have Rejected the Traditional Standards of Materiality in Favor of a Precondition to Payment Requirement*, 17 MICH. ST. U. J. MED. & L. 31, 43 (2012).

102. Boese, *supra* note 76, at 302. Congress also renumbered the statute, changing Section 3729(a)(1) to Section 3729(a)(1)(A), and so forth. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621-22.

103. 31 U.S.C. § 3729(b)(4). Today, it is widely accepted that materiality is an element of every FCA claim, not just claims under Sections 3729(a)(2) and (a)(7). *See supra* note 92; *see also* United States ex rel. Feldman v. van Gorp, 697 F.3d 78, 86 (2d Cir. 2012); United States v. Bourseau, 531 F.3d 1159, 1170 (9th Cir. 2008); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1271 (D.C. Cir. 2010). *But see* United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999) ("Given that the False Claims Act prohibits merely making a knowingly false claim and does not require a specific intent to defraud, perhaps Neder argues against a materiality requirement.").

C. Escobar *and Its Aftermath*

Such was the legal landscape when Carmen Correa and Julio Escobar filed suit against Universal Health Services, the parent company of the clinic that had treated their daughter. "The common thread running through" their claims was that Universal had violated Massachusetts Medicaid "regulations regarding qualifications, staffing, and supervision."[104] In determining whether Correa and Escobar "had pleaded the requisite element of falsity, the [district] court drew a distinction between requirements that MassHealth imposes on providers as preconditions to reimbursement ('conditions of payment') and those imposed as preconditions to participation in the program in the first instance ('conditions of participation')."[105] According to the court, only noncompliance with conditions of payment could establish an FCA claim."[106] The district court then ruled that the complaint's "claims failed on the merits, since there was no indication in the text of any of the pertinent regulations that they were intended as conditions of payment, rather than as conditions of participation."[107]

The First Circuit reversed. Rather than hewing to the artificial distinction between the judicially created categories of "conditions of payment" and "conditions of participation," the court focused simply on what strings were attached to the government's payment decision. These conditions could be found by conducting a "fact-intensive and context-specific inquiry" of the "foundational documents, or statutes and regulations, at issue."[108] In this case, the regulations "expressly provide[d]" that services were reimbursable only if the clinic met certain supervision requirements, which it allegedly did not.[109] The opinion addressed materiality very briefly, noting that the language of the regulation and the "repeated references to supervision throughout the regulatory scheme" established that the requirement was material as a matter of law.[110]

The Supreme Court granted certiorari to address the theory of liability underlying the case. Correa and Rivera's complaint sounded in the theory of implied false certification: although the clinic had provided the services it said it did, it had falsely implied that those services were provided in

104. United States *ex rel.* Escobar v. Universal Health Servs., Inc., No. 11-cv-11170, 2014 WL 1271757, at *2 (D. Mass. Mar. 26, 2014).

105. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 780 F.3d 504, 511 (1st Cir. 2015).

106. *Id.*

107. *Id.* (internal quotation marks omitted).

108. *Id.* at 512 (quoting New York v. Amgen Inc., 652 F.3d 103, 111 (1st Cir. 2011)).

109. *Id.* at 513-14.

110. *Id.* at 514.

accordance with federal and state law.[111] Justice Thomas, writing for a unanimous Court, opined that the implied false certification was viable, at least where "the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement."[112] The Court further rejected the view that the requirements at issue be "expressly designated [as] conditions of payment."[113] However, the Court did constrain the reach of the theory, holding that a "misrepresentation about compliance with" such a "requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act."[114] Accordingly, the Court turned to the question of "how that materiality requirement should be enforced."[115]

The Court noted that the FCA "defines materiality using language that we have employed to define materiality in other federal fraud statutes," including mail fraud, bank fraud, wire fraud, and false statements to immigration officials.[116] The Court noted that this language, in turn, "descends from 'common-law antecedents.'"[117] It was unclear whether the Court should apply the statutory definition of materiality—which explicitly applied only to Sections 3729(a)(1)(B) and (a)(1)(G)—or the common-law definition of materiality, since the Court was now imposing a judicially created materiality requirement onto Section 3729(a)(1)(A). However, because the statutory definition and the common-law definition of materiality are the same, it did not matter if the Court began with the statutory text or derived its analysis "directly from the common law."[118]

Curiously, however, the Court largely ignored the common law in crafting its opinion. Without citation, the Court opined that "[t]he materiality standard is demanding," then proceeded to enumerate several factors relevant to the materiality inquiry.[119] According to the Court:

> A misrepresentation cannot be deemed material merely because the

111. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 185 (2016) (internal quotation marks omitted). Determining the contours of the implied false certification theory had challenged jurists ever since the statute was amended in 1986 and private enforcement actions increased. *See* Deborah R. Farringer, *From Guns That Do Not Shoot to Foreign Staplers: Has the Supreme Court's Materiality Standard Under Escobar Provided Clarity for the Health Care Industry About Fraud Under the False Claims Act?*, 83 BROOKLYN L. REV. 1227, 1240-45 (2018).

112. *Escobar*, 579 U.S. at 181.

113. *Id.* at 186.

114. *Id.*

115. *Id.* at 192.

116. *Id.*

117. *Id.* at 193 (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

118. *Id.* at 193.

119. *Id.* at 194.

> Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.
> . . . .
> [T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[120]

Neither the district court nor the First Circuit had applied this standard as articulated by the Supreme Court. The district court had focused on the express identification of a "condition of payment" to the exclusion of all other factors, whereas the First Circuit had focused only on the regulatory text. Although the complaint appeared to pass muster under the Supreme Court's test, the case was remanded so the lower courts could make this finding.[121]

On remand, the First Circuit had "little difficulty" determining that Correa and Escobar had alleged that the clinic's falsehoods were material to the government's payment decisions.[122] The Supreme Court had "ma[de] clear that courts are to conduct a holistic approach to determining materiality in connection with a payment decision, with no one factor being necessarily dispositive."[123] According to the First Circuit, three factors established materiality: "regulatory compliance was a condition of payment," the "licensing and supervision requirements" went to the "very essence of the bargain," and there was "no evidence in the record that Medicaid" paid any claims "despite knowing of the violations" alleged in the complaint.[124] After several more years of litigation, the clinic paid $127 million to resolve the allegations against it.[125]

120. *Id.* at 194-95.

121. *Id.* at 196.

122. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 110 (1st Cir. 2016).

123. *Id.* at 109.

124. *Id.* at 110-11 (internal quotation marks omitted).

125. Press Release, U.S. Att'y's Office, E.D. Pa., Universal Health Services, Inc. to Pay $117 Million to Settle False Claims Act Allegations (July 10, 2020), https://www.justice.gov/usao-

It is difficult to overstate the impact of *Escobar* on FCA jurisprudence. The Supreme Court's decision has, to a significant degree, displaced the very definition of materiality it purported to interpret. For example, from 2020 through 2022, there were fifty-six published federal district and circuit court opinions that substantively assessed the FCA's materiality requirement. Of these opinions, twenty failed even to acknowledge the existence of the statutory definition of materiality, and those that did cite the statutory text often did so only in passing. By contrast, all but six of these opinions cited *Escobar*. Ironically, the Court's decision in Escobar has overshadowed one of the Court's most frequent admonitions: "in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[126]

"Seemingly, the Court's guidance was intended to assist contractors in understanding what might matter for purposes of compliance with a vast number of federal and state laws and regulations to which government contractors are subject, especially federal health care program participants."[127] However, for all of its focus on materiality, *Escobar* did not provide much practical guidance for the lower courts to use in determining whether a misrepresentation is actionable under the FCA. Although the Court identifies two factors that weigh in favor of materiality—the requirement is designated as a condition of payment and the defendant knows the government consistently refuses to pay claims in the mine run of cases based on noncompliance with the requirement at issue[128]—the opinion focuses much more heavily on when a misstatement is *not* material. For instance, the Court repeatedly notes that no one factor in favor of materiality is dispositive—no matter how clear the statutory, regulatory, or contractual language at issue is. The opinion also lists several factors that weigh against materiality: the noncompliance is minor or insubstantial, the government pays a particular claim despite actual knowledge of noncompliance, or the government regularly pays a particular type of claim despite actual knowledge of noncompliance.

edpa/pr/universal-health-services-inc-pay-117-million-settle-false-claims-act-allegations; Press Release, Mass. Office of the Attorney General, Universal Health Services to Pay Massachusetts More Than $15 Million to Resolve Whistleblower False Claims Cases (July 13, 2020), https://www.mass.gov/news/universal-health-services-to-pay-massachusetts-more-than-15-million-to-resolve-whistleblower-false-claims-cases.

126. Conn. Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992).

127. Farringer, *supra* note 111, at 1231-32.

128. The Court further opined that it was not "sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance," but did not say whether this factor was relevant to the materiality inquiry in the first place. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 194 (2016).

Further muddling the materiality inquiry, the opinion declines to say how much weight any of these factors should receive or how they should be measured against each other.

Thus, even after *Escobar*, many courts still struggle to apply the materiality test in a principled and consistent manner, just as their predecessors did in other contexts.[129] By way of example, various courts have held that:

- False labor estimates that fraudulently inflated the value of a contract were immaterial to the government's decision to award the contract.[130]
- A fraudulent misrepresentation that a company qualified for contracts set aside for service-disabled veteran-owned small businesses was immaterial to the government's decision to pay under those contracts.[131]
- A cybersecurity defect in computers sold to the government was immaterial, even though it was "certainly possible that had the agencies been aware of the existence of the [defect] they would have decided not to purchase the . . . computer systems."[132]
- The forgery of documents related to treatment at dialysis clinics was immaterial because a violation of the regulations at issue did not "automatically exclude payment" or "necessarily exclude qualification for payment."[133]
- The fraudulent procurement of products from certain countries in violation of the Trade Agreements Act was immaterial to the government's decision to purchase those products.[134]

Other decisions have wrongly treated the list of *Escobar* factors as exhaustive[135] or have held that a litigant must satisfy every *Escobar* factor to support a finding of materiality.[136]

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129. *See* Farringer, *supra* note 111, at 1233 ("[W]hile *Escobar* does seem to be motivating lower courts to apply a rigorous and demanding materiality standard, the Court's 'back-to-basics' approach in determining materiality seems to be providing little consistency regarding what type of evidence would need to be proffered to satisfy the new materiality standard.").

130. United States *ex rel.* USN4U, LLC v. Wolf Creek Fed. Servs., Inc, No. 17-cv-558, 2020 WL 13281499, at *5 (N.D. Ohio Nov. 3, 2020), *rev'd*, 34 F.4th 507 (6th Cir. 2022).

131. United States v. Strock, No. 15-cv-0887, 2019 WL 4640687, at *9-12 (W.D.N.Y. Sept. 24, 2019), *rev'd in part*, 982 F.3d 51, (2d Cir. 2020).

132. United States *ex rel.* Adams v. Dell Computer Corp., 496 F. Supp. 3d 91, 100 (D.D.C. 2020).

133. Hawaii *ex rel.* Torricer v. Liberty Dialysis-Hawaii LLC, 512 F. Supp. 3d 1096, 1115 (D. Haw. 2021).

134. United States *ex rel.* Folliard v. Comstor Corp., No. 11-cv-731, 2018 WL 5777085, at *7-8 (D.D.C. Nov. 2, 2018).

135. United States *ex rel.* Yu v. Grifols USA, LLC, No. 22-cv-107, 2022 WL 7785044, at *2 (2d Cir. Oct. 14, 2022); United States *ex rel.* Lee v. N. Metro. Found. for Healthcare, Inc., No. 13-cv-4933, 2021 WL 3774185, at *9 (E.D.N.Y. Aug. 25, 2021); United States *ex rel.* Ling v. City of Los Angeles, No. 11-cv-974, 2018 WL 3814498, at *13 (C.D. Cal. July 5, 2018); *Strock*, 2019 WL 4640687, at *9.

136. United States v. Planned Parenthood Fed'n of Am. Inc., 601 F. Supp. 3d 97, 110-11 (N.D. Tex.

In a particularly troubling trend, several courts have misquoted *Escobar* to turn the materiality inquiry on its head. Although the materiality inquiry is prospective—focusing on the potential effect of the misstatement—these decisions have misinterpreted materiality as a retrospective requirement, holding that a defendant cannot be held liable under the FCA unless the misstatement actually changed the government's payment decision. These decisions all stem from the same misquotation. At the end of the *Escobar* opinion, Justice Thomas wrote, in *dicta*, that the complaint at issue "may well have adequately pleaded a violation of" the FCA because it alleged that the defendant "misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations."[137] This isolated passage was distinct from the Court's substantive materiality analysis, and the Court did not hold that a relator must always make such an allegation to survive a motion to dismiss. Nonetheless, particularly in the Fourth and Ninth Circuits, a line of authority has emerged for the proposition that, in every FCA case, "the provision at issue must be 'so central' to the services provided that the Government 'would not have paid these claims had it known of these violations.'"[138] This line of authority explicitly contradicts the text of the statute, the jurisprudence regarding the common-law materiality test, and *Escobar* itself. By immunizing fraudsters from liability unless the government can prove its payment decision was actually affected by the misstatement at issue, these cases would make it impossible to prove a violation of the FCA in all but the rarest of circumstances.

2022) (quoting United States *ex rel.* Lemon v. Nurses To Go, Inc., 924 F.3d 155, 160 (5th Cir. 2019)).

137. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 196 (2016).

138. United States *ex rel.* Taylor v. Boyko, 39 F.4th 177, 190 (4th Cir. 2022) (misquoting *Escobar*, 579 U.S. at 196); *accord* Citynet, LLC v. Frontier W. Va., Inc., No. 14-cv-15947, 2022 WL 4126008, at *19 (S.D.W. Va. Sept. 8, 2022), *vacated in part on other grounds*, 2022 WL 17405840 (Dec. 2, 2022); A1 Procurement, LLC v. Thermcor, Inc., No. 15-cv-15, 2017 WL 2881350, at *5 (E.D. Va. July 5, 2017); United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 44 F.4th 838, 845-46 (9th Cir. 2022); Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1121 (9th Cir. 2020)); Hawaii *ex rel.* Torricer v. Liberty Dialysis-Hawaii LLC, 512 F. Supp. 3d 1096, 1111 (D. Haw. 2021); United States *ex rel.* Williams v. Med. Support L.A., No. 20-cv-0198, 2021 WL 6104016, at *10 (C.D. Cal. Nov. 29, 2021); United States *ex rel.* O'Neill v. Somnia, Inc., No. 15-cv-00433, 2018 WL 684765, at *8 (E.D. Cal. Feb. 2, 2018); United States v. Scan Health Plan, No. 09-cv-5013, 2017 WL 4564722, at *6 (C.D. Cal. Oct. 5, 2017); United States *ex rel.* Ferris v. Afognak Native Corp., No. 15-cv-0150, 2016 WL 9088706, at *3 (D. Alaska Sept. 28, 2016); *United States ex rel. Scharff v. Camelot Counseling*, No. 13-cv-3791, 2016 WL 5416494, at *8 (S.D.N.Y. Sept. 28, 2016); Taylor v. Comhar, Inc., No. 16-cv-1218, 2022 WL 102334, at *3 (E.D. Pa. Jan. 11, 2022); United States *ex rel.* Jackson v. DePaul Health Sys., 454 F. Supp. 3d 481, 494 (E.D. Pa. 2020); United States *ex rel.* O'Laughlin v. Radiation Therapy Servs., P.S.C., 497 F. Supp. 3d 224, 236 (E.D. Ky. 2020); United States *ex rel.* Enloe v. Heritage Operations Grp., LLC, No. 20-cv-1169, 2022 WL 3543228, at *10 (N.D. Ill. Aug. 18, 2022); Illinois *ex rel.* Strakusek v. Omnicare, Inc., No. 19-cv-7247, 2021 WL 308887, at *14 (N.D. Ill. Jan. 29, 2021); United States *ex rel.* Gray v. UnitedHealthcare Ins. Co., No. 15-cv-7137, 2018 WL 2933674, at *5 (N.D. Ill. June 12, 2018).

III. MOVING BEYOND *ESCOBAR*: PRACTICAL GUIDEPOSTS FOR ASSESSING MATERIALITY UNDER THE FALSE CLAIMS ACT

Evidently, *Escobar* has done little to "clarify how th[e] materiality requirement should be enforced," as the Supreme Court promised.[139] By identifying a nonexhaustive list of factors to consider, the Court left readers guessing as to what other factors might be relevant—and in the absence of further guidance, the lower courts' materiality analysis rarely strays beyond the factors enumerated in *Escobar*. By declining to comment on how to weigh each factor, the Court left readers guessing as to their relative importance, forcing the lower courts to engage in an ad hoc balancing test for each case.[140] And by commenting, in *dicta*, on whether the allegations in that particular case would pass muster, the Court has led numerous readers to adopt an outcome-materiality standard that directly contradicts the statutory text.

Read in its proper context, however, *Escobar* is merely one decision—albeit a prominent one—in a long line of cases on materiality. At bottom, the opinion evinces a commonsense approach toward liability under the FCA. "[I]mplied certification is a form of fraud by omission, and an omission can only render a statement false if the omitted fact is material to the statement, such that leaving that fact out renders the claim a 'misleading half-truth[].'"[141] Put differently, "[a] claim that merely omits an immaterial fact cannot be false or fraudulent, because there would be no reason for the listener to expect the fact to be included."[142] And how would we know the listener could reasonably expect the fact to be included? It could be "expressly identif[ied] as a condition of payment," or there could be evidence "that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the" requirement at issue.[143] But it certainly could not be "minor or insubstantial," and continued payment despite actual knowledge of noncompliance would tend to show that a reasonable listener would not consider the requirement to be material.[144] These are just a few examples of factors that could be relevant, and the Supreme Court never intended

139. *Escobar*, 579 U.S. at 192.

140. As one prominent commentator has noted, "[t]he flaw in this approach . . . is its very randomness. The avoidance of a true miscarriage of justice relies on judges, at both the district and appellate levels, creating definitions of 'capable of influencing' and 'natural tendency to influence' . . . ." Boese, *supra* note 76, at 305. Fortunately, the federal judiciary has already been interpreting these terms for nearly a century.

141. United States *ex rel.* Goodman v. Arriva Med., LLC, 471 F. Supp. 3d 830, 838 (M.D. Tenn. 2020) (quoting *Escobar*, 579 U.S. at 190).

142. *Id.*

143. *See Escobar*, 579 U.S. at 194-95.

144. *See id.*

them to take on such talismanic significance.[145]

Perhaps *Escobar*'s central weakness is that its substantive legal analysis does not cite a single decision interpreting the well-known "natural tendency" test. Indeed, the "natural tendency" test is all but absent from the opinion, apart from a cursory acknowledgement of the legal standard on a single page.[146] But as the Supreme Court has stated elsewhere, "[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."[147] This principle is doubly appropriate in the context of the FCA, where Congress explicitly intended to incorporate the common-law definition of "material" into the statute.[148]

Although the Court's decision not to seek more guidance from the common law is curious, the opinion does acknowledge that the statute "incorporates the common-law meaning of fraud" and that the "materiality descends from 'common-law antecedents.'"[149] Fortunately, courts have been interpreting the exact same materiality standard in analogous contexts for nearly a century, and a careful study of these decisions reveals several practical guideposts that can assist jurists and practitioners alike to assess the FCA's materiality requirement.

A. Materiality is an Objective Standard That Focuses on The Potential Effect of The Misrepresentation, Not Its Actual Effect.

A misstatement is material under the FCA if it has "a natural tendency to influence, or [is] capable of influencing, the payment or receipt of money or property."[150] No matter the context, courts generally describe the "natural tendency" test as objective and forward-looking—focusing on the potential effect of the misrepresentation—rather than subjective

145. *See id.* (holding that "proof of materiality *can include, but is not necessarily limited to*," the factors enumerated by the Court (emphasis added)).

146. *Id.* at 194 & n.5.

147. NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981).

148. S. REP. NO. 111-10, at 12 & n.6 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 439 (citing Neder v. United States, 527 U.S. 1, 16 (1999)) (noting that the statutory definition is "consistent with the Supreme Court definition, as well as other courts interpreting the term as applied to the FCA"); United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008); United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008); United States *ex rel.* Bahrani v. Conagra, Inc., 465 F.3d 1189, 1204 (10th Cir. 2006); United States *ex rel.* A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428, 446 (6th Cir. 2005); United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913, 916-17 (4th Cir. 2003); United States *ex rel.* Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415-16 (3d Cir. 1999)).

149. *Escobar*, 579 U.S. at 187, 192-93 (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

150. 31 U.S.C. § 3729(b)(4).

and backward-looking—focusing on how the particular listener acted or would have acted.[151] The FCA is no different: "[t]he element of materiality is evaluated under an objective test, in which we must examine 'the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end.'"[152]

Two factors have led to some confusion on this point. First, some practitioners and courts have failed to appreciate the distinction between an FCA case and a common-law deceit case. At common law, plaintiffs complaining of deceit must prove not only that the misstatement is material, but that they justifiably relied on the misrepresentation to their detriment.[153] No matter how material the misrepresentation is, plaintiffs cannot recover unless they are actually justifiably misled.[154] Put differently, justifiable reliance "concerns the issue of whether [a] plaintiff *should* have acted upon the representation,"[155] whereas materiality concerns the issue of whether a reasonable person *could* have acted upon the representation in the first place.

The FCA, by contrast, does not require proof of reliance. As the First Circuit has explained:

151. *See, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013) (materiality in securities fraud case is objective); United States v. Singh, No. 21-30267, 2022 WL 17749250, at *1 (9th Cir. Dec. 19, 2022) (materiality in naturalization proceeding is objective); United States v. Williams, 865 F.3d 1302, 1310 (10th Cir. 2017) (materiality in bank fraud prosecution is objective); United States v. McBane, 433 F.3d 344, 351 (3d Cir. 2005) ("[B]oth the language of the materiality standard and the decisions applying that standard require only that the false statement at issue be of a type capable of influencing a reasonable decisionmaker."); Mut. Life Ins. Co. of N.Y. v. Moriarty, 178 F.2d 470, 474 (9th Cir. 1949) ("The test of materiality is whether the facts, if truly stated, might have influenced a reasonable insurer in deciding whether to accept or reject the risk; the insurer need not show that it would have rejected the applicant had it known of the falsity of the claim."); York Mut. Ins. Co. v. Bowman, 746 A.2d 906, 909 (Me. 2000) ("the common factor" in state-law insurance regulation "is that materiality is treated as an objective test") (collecting cases); Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Tr. Co., 72 F. 413, 429 (6th Cir. 1896) (materiality focuses on how "reasonably careful and intelligent men would have regarded the fact"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 753 (5th ed. 1984) (materiality inquiry focuses on "facts to which a reasonable man might be expected to attach importance in making his choice of action").

152. United States v. Lindsey, 850 F.3d 1009, 1014 (9th Cir. 2017) (quoting United States v. Peterson, 538 F.3d 1064, 1072 (9th Cir. 2008)); United States *ex rel.* Feldman v. Van Gorp, 697 F.3d 78, 95 (2d Cir. 2012); United States v. United Techs. Corp., 626 F.3d 313, 321 (6th Cir. 2010); United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008); Shin v. United States, No. 04-cv-00150, 2017 WL 2802866, at *11 (D. Haw. June 28, 2017).

153. *See* Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407 (1995) (justifiable reliance and materiality have been recognized as separate elements since the late eighteenth century).

154. *See, e.g.*, Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 599 (2d Cir. 1991). Conversely, no matter how badly the plaintiff is injured, he cannot recover if the misrepresentation was "of such a character that no person of ordinary intelligence could be misled thereby, and that could have had no influence whatever in inducing the other party to enter into the agreement"—that is, if the misrepresentation was not material. Hall v. Johnson, 2 N.W. 55, 57 (Mich. 1879).

155. Joseph M. Stool, *The Element of Materiality in Deceit Cases*, 29 TEX. L. REV. 644, 650 (1951).

> [T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the "claim for payment." Indeed, a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss. This focus on the claim for payment appears to reflect a congressional judgment that fraud by government contractors is best prevented by attacking the activity that presents the risk of wrongful payment, and not by waiting until the public fisc is actually damaged. By attaching liability to the claim or demand for payment, the statute encourages contractors to "turn square corners when they deal with the government."[156]

However, "the courts often do not recognize th[e] distinction" between justifiable reliance and materiality.[157] Historically, this confusion has led to several anomalous and unsupportable conceptions of materiality that collapse these two elements into one.[158] Today, this confusion undergirds opinions such as those wrongly endorsing an outcome-materiality standard whereby the ultimate touchstone is not the potential effect of the statement, but its actual effect.[159]

Second, some have erroneously read *Escobar* to endorse a new, subjective conception of materiality whereby the actual effect on the government agency at issue is dispositive.[160] At first glance, *Escobar* seems to lend some support to this proposition; the Supreme Court noted that "materiality look[s] to the effect on the likely *or actual* behavior of the recipient of the alleged misrepresentation," and the Court opined that the government's continued payment despite actual knowledge of

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156. United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995) (quoting Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920)) (citations omitted). There is no serious debate concerning the issue; proof of actual damages are not required under the FCA. United States v. Tieger, 234 F.2d 589, 590 n.4 (3d Cir. 1956); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 n.7 (4th Cir. 1999); United States v. Ridglea State Bank, 357 F.2d 495, 497 (5th Cir. 1966); United States v. Hughes, 585 F.2d 284, 286 n.1 (7th Cir. 1978); Bly-Magee v. California, 236 F.3d 1014, 1017 (9th Cir. 2001); Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964); Com. Contractors, Inc. v. United States, 154 F.3d 1357, 1371 (Fed. Cir. 1998).

157. Stool, *supra* note 155, at 650.

158. *See, e.g.*, Putnam v. Bromwell, 11 S.W. 491, 492 (Tex. 1889) ("[A] material representation is one . . . which is believed and relied on by the persons to whom it is made, and which moves and induces them to act in a manner that they would not have acted had such representation not been made."). No less an authority than Justice Story made this error when he defined a material misrepresentation as one "constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury." STORY, *supra* note 1, at 220.

159. *See* Kungys v. United States, 485 U.S. 759, 771 (1988) ("It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation.")

160. *See* Latoya C. Dawkins, *Not So Fast: Proving Implied False Certification Theory Post-Escobar*, 42 SETON HALL LEG. J. 163, 178 (2017) ("Under *Escobar*, the government and relators must meet both the objective and subjective standards when judging if a misrepresentation was material to the decision to its pay.").

noncompliance is "very strong evidence that those requirements are not material."[161] Nevertheless, with the benefit of the common-law precedent on which *Escobar* relied, these statements are best understood as a practical application of the objective materiality standard within the unique context of the FCA.

An objective materiality inquiry "does in fact 'look to the effect on the likely or actual behavior of the recipient.' . . . In those circumstances, however, the recipient is a 'reasonable man . . . determining his choice of action in the transaction in question.'"[162] Therefore, "evidence of the Government's" behavior with respect to a particular requirement may be "admissible to show that a defendant's violation of that requirement is not material"[163]—not because *Escobar* replaced the objective framework with a subjective one, but because the government's behavior in the face of actual knowledge of noncompliance is relevant to whether a reasonable person could have been influenced by the misconduct at issue. As the Sixth Circuit has opined:

> [I]n the absence of any indication that the actual decision-makers acted unreasonably, their statements remain highly relevant to any objective inquiry. Statements by the actual decision-makers may be (and often are) the best available evidence of whether alleged misrepresentations had an objective, natural tendency to affect a reasonable government decision-maker, especially if they are consistent with a rational decision-making process and a common sense reading of the record as a whole.[164]

Escobar further acknowledges that "the Federal Government in an FCA case is in a far different position than is an individual" victim of fraud because the government "represents the entire market for issuing federal government contracts. The weight the Government gives to a particular statutory, regulatory, or contractual requirement is analogous not to the weight an individual . . . gives to a statement . . . , but rather the weight the entire . . . industry gives to that type of statement."[165] Even so, focusing on the government's behavior may sometimes be misguided, as "[a] statement or omission is 'capable of influencing' a decision even if those who make the decision are negligent and fail to appreciate the statement's significance":

> [L]aws against fraud protect the gullible and the careless—perhaps *especially* the gullible and the careless—and could not serve that function

161. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 193, 195 (2016) (emphasis added) (internal quotation marks omitted).

162. United States v. Raza, 876 F.3d 604, 621 (4th Cir. 2017) (quoting *Escobar*, 579 U.S. at 193).

163. United States v. Lindsey, 850 F.3d 1009, 1017 (9th Cir. 2017)

164. United States *ex rel.* Am. Sys. Consulting, Inc. v. ManTech Advanced Sys. Int'l, 600 F. App'x 969, 976 (6th Cir. 2015).

165. *Lindsey*, 850 F. 3d at 1017.

> if proof of materiality depended on establishing that the recipient of the statement would have protected his own interests. The United States is entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers; the False Claims Act does this by insisting that persons who send bills to the Treasury tell the truth.[166]

Thus, each case requires a unique inquiry to determine whether the government's payment decision was rational and considered.

Moreover, even where the misconduct at issue is "capable of affecting" the decision to pay, the factfinder must consider that the government may have a good reason for continuing to pay. For instance, the government may continue to pay where terminating the contract would result in excessive costs to the government,[167] where there is no court order conclusively establishing its right to relief,[168] where the contract at issue is "essential to an important government interest,"[169] where the defendant agrees to correct its misconduct moving forward,[170] where enforcement is precluded by "difficulties of proof or resource restraints,"[171] where the government "is required by law" to pay,[172] or where the government elects to take less drastic enforcement actions.[173]

Even after *Escobar*, then, the common-law principle that it does not matter "whether the false statement actually influenced the agency's decision-making process"[174] remains relevant to the FCA. Although the

166. United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008) (citation omitted); *accord* United States *ex rel.* McIver v. ACT for Health, Inc., 536 F. Supp. 3d 839, 847 (D. Colo. 2021) ("The continuing payment of [defendant]'s claims could . . . reflect bureaucratic neglect or indifference that a reasonable person would not permit."). *Cf. Lindsey*, 850 F.3d at 1014-15 ("[N]egligence is not a defense to criminal charges under the federal fraud statutes.") (collecting cases).

167. *ManTech*, 600 F. App'x at 978.

168. United States *ex rel.* Cimino v. Int'l Bus. Machines Corp., 3 F.4th 412, 423 (D.C. Cir. 2021).

169. United States *ex rel.* Al-Sultan v. Pub. Warehousing Co. K.S.C., No. 05-cv-2968, 2017 WL 1021745, at *6 (N.D. Ga. Mar. 16, 2017).

170. United States *ex rel.* Gillespie v. Kaplan Univ., No. 09-cv-20756, 2012 WL 1852085, at *4 (S.D. Fla. May 21, 2012).

171. Rose v. Stephens Inst., No. 09-cv-05966, 2016 WL 5076214, at *6 (N.D. Cal. Sept. 20, 2016).

172. United States *ex rel.* Bibby v. Mortg. Invs. Corp., 987 F.3d 1340, 1350 (11th Cir. 2021).

173. *Id.* at 1352.

174. United States v. Hamilton, 699 F.3d 356, 362 (4th Cir. 2012); *accord* United States v. Edgar, 82 F.3d 499, 510 (1st Cir. 1996); United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975); United States v. Greenberg, 735 F.2d 29, 31-32 (2d Cir. 1984); United States v. Berardi, 629 F.2d 723, 728 (2d Cir. 1980); United States v. Giarratano, 622 F.2d 153, 156 n.7 (5th Cir. 1980); United States v. White, 270 F.3d 356, 365 (6th Cir. 2001); United States v. Fawaz, 881 F.2d 259, 263 (6th Cir. 1989); May v. United States, 280 F.2d 555, 562 (6th Cir. 1960); United States v. Turner, 551 F.3d 657, 663 (7th Cir. 2008); United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1977); United States v. Henderson, 185 F.2d 189, 191 (7th Cir. 1950); United States v. Baker, 200 F.3d 558, 561 (8th Cir. 2000); United States v. Brown, 666 F.2d 1196, 1200 (8th Cir. 1981); United States v. Serv. Deli Inc., 151 F.3d 938, 941 (9th Cir. 1998); Vitello v. United States, 425 F.2d 416, 424 (9th Cir. 1970); United States v. Masters, 484 F.2d 1251, 1254 (10th Cir. 1973); United States v. Neder, 197 F.3d 1122, 1128 (11th Cir. 1999). *See* United States v. Rosnow, 977 F.2d 399, 409 (8th Cir. 1992) ("The fact that most of defendants' forms were

government's behavior may bear on the issue of materiality in certain cases, a court could so hold only after undertaking a fact-intensive inquiry to determine whether the government's actions were careful, rational, and untainted by any extraordinary factors that may justify continued payment even in the face of a material falsehood.

B. Materiality Focuses on The Purpose to be Accomplished by The Payment Decision at Issue.

Courts and commentators generally have described the common-law materiality inquiry as a "low hurdle,"[175] "quite low,"[176] or "minimal."[177] At first blush, these descriptions appear difficult to reconcile with the Supreme Court's characterization of the FCA's materiality standard as "demanding" and "rigorous."[178] However, a closer inspection reveals that the Court's characterization is not so much a reformulation of the materiality standard as a reminder that materiality requires a common-sense approach so that minor infractions are not punished with the full force of the FCA.

The archetypal FCA case involves a situation in which the government plainly did not get what it paid for. In *Escobar*, the Supreme Court used the example of a contractor providing the government with "guns that do not shoot."[179] In such a case, liability would be easy to determine: "because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to 'deliberate ignorance' or 'reckless disregard' of the 'truth or falsity of the information' even if the Government did not spell this out."[180] However, the scope of the FCA has broadened considerably since it was first enacted, and the implied false certification theory theoretically threatened to burden contractors with "compliance with the entire U.S. Code and Code of Federal Regulations"—millions upon millions of technical, ancillary requirements—lest they be subjected to treble damages and civil penalties under the FCA.[181] To put this threat in perspective, the Court devised a counter-

discovered before the IRS . . . [acted] does not obviate the capability of such forms to influence the agency's functions.").

175. *E.g.*, *White*, 270 F.3d at 365.

176. Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 119 (2019).

177. Chad B. Pimentel, *False Statements*, 38 AM. CRIM. L. REV. 709, 716 (2001).

178. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 194, 195 n.6 (2016).

179. *Id.* at 191.

180. *Id.*

181. *Id.* at 196.

example to the "guns that do not shoot": a contract for "health services" that adds a minor and tangential requirement that the contractor "buy American-made staplers."[182] At least under most circumstances, such a requirement likely would not be material.

Even before *Escobar*, most courts shared this understanding. In 2001, for instance, the Second Circuit explained that not all instances of noncompliance resulted in FCA liability:

> [C]learly, a claim for reimbursement made to the government is not legally false simply because the particular service furnished failed to comply with the mandates of a statute, regulation or contractual term that is only tangential to the service for which reimbursement is sought. Since the Act is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay. Accordingly, while the Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," . . . it does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions.[183]

Numerous additional authorities shared this concern, noting that the courts must "rigorously" enforce the materiality requirement to shield contractors from undue liability.[184]

It was in this context that the Supreme Court characterized materiality as "demanding" and "rigorous." In some cases, a contractor will plainly violate a material term of the contract and will be liable under the FCA. In others, the complaint will seek to recover for misconduct that no reasonable person could have believed would affect the government's payment decision.[185] Both circumstances require a careful examination of

182. *Id.* at 195.

183. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)), *abrogated on other grounds by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176 (2016).

184. *See, e.g.*, United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1271 (D.C. Cir. 2010) (By enforcing this requirement rigorously, courts will ensure that government contractors will not face onerous and unforeseen FCA liability as the result of noncompliance with any of potentially hundreds of legal requirements established by contract." (internal quotation marks omitted); *accord* United States *ex rel.* Thomas v. Black & Veatch Special Projects Corp., 820 F.3d 1162, 1169-70 (10th Cir. 2016) ("[O]ur precedent—consistent with that from other circuits—requires that we consider the purpose of the underlying contract and the significance of the relevant violation to that purpose in assessing whether the alleged violation may have affected the government's payment decisions."); United States v. Triple Canopy, Inc., 775 F.3d 628, 637 (4th Cir. 2015) (citing *Sci. Applications*, 626 F.3d at 1266), *vacated on other grounds sub nom.* Triple Canopy, Inc. v. United States *ex rel.* Badr, 579 U.S. 924 (2016).

185. It is worth noting, however, that the Supreme Court's insistence that "[t]he False Claims Act is not 'an all-purpose antifraud statute,'" Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 194 (2016) (quoting Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008)), is on shaky ground. The case in which that phrase originated, *Allison Engine*, was legislatively overruled precisely because it adopted too circumscribed a view of who could be held liable under the

the facts—rather than a formulaic recitation of the nonexhaustive list of criteria set forth in *Escobar*—to determine whether the noncompliance reasonably could have affected the payment decision:

> [T]he Supreme Court seems to be attempting to steer FCA application . . . towards a back-to-basics application akin to common law fraud. As is the case of common law fraud, the Court's new analysis advises lower courts that there is no strict definition of "fraud," rather[,] the court must look at whether a particular admission or omission of certain details was a misrepresentation made for the purpose of misleading or defrauding. The Court's examples bear this out: contractors that are selling the government guns, but such guns do not actually shoot, are perpetuating a fraud and contractors that are selling the government guns, but are using foreign-made staplers to staple their invoices as opposed to American-made staplers, even if in violation of a federal regulation, are not perpetuating a fraud. Thus, the Court is telling relators, prosecutors, and courts alike that they should stop focusing on the regulation and the characteristics of the regulation and instead focus on the act itself and whether such act is intended to defraud.[186]

Ultimately, while the adjectives "rigorous" and "demanding" "give flavor to the Court's discussion," they "do not establish the test that the Court requires . . . . The actual test to be applied is . . . : what is the effect of a misrepresentation on the likely or actual behavior of the government."[187] *Escobar* serves as reminder of the important role the materiality inquiry plays, but it does not fundamentally alter the common-law definition of materiality incorporated into the statutory definition.

C. The Materiality Inquiry is Straightforward And Draws From a Large Body of Precedent.

The definition of materiality adopted by Congress in the text of the FCA and echoed by the Supreme Court in *Escobar* is a common one. Because it applies in a wide variety of contexts, "judges are accustomed to using it, and can consult a large body of case precedent."[188]

How, then, should a court approach the materiality inquiry in an FCA case? As the Supreme Court has opined in the parallel context of making

FCA. *See* S. REP. NO. 111-10, at 10 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 438. Indeed, with the exception of tax fraud, which is explicitly excluded from the statute, 31 U.S.C. § 3729(d), it is difficult to imagine a situation in which one could materially defraud the government and *not* be potentially liable under the FCA. After the 2009 amendments to the FCA, it is truer than ever that the FCA is designed "expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 129 (2003) (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

186. Farringer, *supra* note 111, at 1265.

187. United States *ex rel.* Rose v. Stephens Inst., 909 F.3d 1012, 1019 n.3 (9th Cir. 2018).

188. Kungys v. United States, 485 U.S. 759, 771 (1988).

false statements under 18 U.S.C. Section 1001:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts.[189]

In a typical FCA case, the answer to the first question will be relatively simple: the defendant must have made an affirmative misstatement or withheld some fact from the government. The answers to the second and third questions will require an individualized analysis of the facts and law at issue, with more than blind adherence to a rigid checklist of factors.

First, the court must identify the particular requirement at issue. "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 other formal place."[190]

Next, the court "must specially focus on the importance to payment that the . . . [agreement] 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 the government's payment'"[191] or are otherwise reasonably capable of affecting the government's payment decision. At one extreme, if the evidence shows that the government definitely would not have paid had it known the truth, the requirement is material.[192] At the other extreme, if the misrepresentation could not possibly have affected the transaction, it is not material.[193]

Between those poles, the inquiry is more complex, but several questions likely will be relevant. Did the government know of the falsehood before it entered into the contract,[194] or did the requirement

189. United States v. Gaudin, 515 U.S. 506, 512 (1995).

190. Navarro, *supra* note 87, at 129; *see* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010) ("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.").

191. Navarro, *supra* note 87, at 130 (quoting United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1218 (10th Cir. 2008)).

192. *Cf.* United States v. Gillion, 704 F.3d 284, 296 (4th Cir. 2012); Aspiazu v. Mortimer, 82 P.3d 830, 832 (Idaho 2003).

193. *Cf.* Hill v. Wrather, 323 P.2d 567, 570 (Cal. Ct. App. 1958).

194. *Cf.* Banque Franco-Hellenique de Com. Int'l et Mar., S.A. v. Christophides, 106 F.3d 22, 26 (2d Cir. 1997).

touch on a matter that was not germane to the contract?[195] If so, the requirement is likely to be immaterial. Did the contractor mislead the government with respect to information whose value is "readily apparent" such that the falsehood interferes with the purpose of the contract,[196] did the government clearly rely on the misstatement,[197] or did the misstatement go to the cost[198] or quality[199] of the goods or services to be provided? If so, the requirement is likely to be material. At every point in the analysis, courts should take care to avoid overly formalistic legal categories and should be unafraid to use their "common sense."[200]

Finally, in answering these questions, the courts can draw on a deep well of case law interpreting identical materiality requirements in other contexts. For instance, criminal defendants sometimes will face charges for fraudulently attempting to secure a contract or otherwise gain favorable agency action—the same types of misconduct at issue in many FCA actions.[201] This line of authority is just one example of the additional guidance that courts may consult in determining whether the allegations at issue are actionable under the FCA.

IV. CONCLUSION

"Materiality is a theoretical concept with devastating real-world ramifications."[202] If courts take too expansive a view of materiality, contractors can suffer "treble damages and per-claim civil penalties under the FCA—even though the services or goods were delivered as promised."[203] If courts take too narrow a view of materiality, they risk insulating from liability fraudsters who cheated American taxpayers out of significant sums.

When the stakes are so high, "the tendency of the law must always be

195. *Cf.* Inv. Almaz v. Temple-Inland Forest Prod. Corp., 243 F.3d 57, 80 (1st Cir. 2001).

196. *See* United States *ex rel.* Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 416 (3d Cir. 1999).

197. *See* LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, L.L.C., 659 F.3d 450, 459 (5th Cir. 2011).

198. United States *ex rel.* Grubea v. Rosicki, Rosicki & Assocs., P.C., 318 F. Supp. 3d 680, 701 (S.D.N.Y. 2018); United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 102 (D.D.C. 2017).

199. *Cf.* Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1250 (11th Cir. 2002); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997).

200. *See* United States *ex rel.* Badr v. Triple Canopy, Inc., 857 F.3d 174, 178 (4th Cir. 2017).

201. *See, e.g.*, United States v. Puente, 982 F.2d 156, 159 (5th Cir. 1993) (withholding fact of prior felony conviction was material to government's decision to award federal contract); United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. Unit A Sept. 1981) (false statement regarding use of federal funds was material where program was designed to use funds for a particular purpose); United States v. Jones, 464 F.2d 1118, 1122 (8th Cir. 1972) (same); United States v. Johnson, 937 F.2d 392, 397-99 (8th Cir. 1991) (allegedly inflated quantity and cost estimate was not material to government's decision to award federal contract where estimate could not have influenced government).

202. Boese, *supra* note 76, at 294.

203. *Id.*

to narrow the field of uncertainty."[204]. Unfortunately, *Escobar* has done little to resolve the uncertainty faced by courts in determining whether misstatements or omissions are material. "Like many Supreme Court opinions, the *Escobar* opinion answered a few questions and raised a few more. . . . While some aspects of the opinion appear to be easily applied across jurisdictions, there are a number of other areas that are causing a great deal of confusion and variability . . . ."[205]

Long before *Escobar* was decided, the late James Helmer cautioned that "judicial tinkering with the elements of a statutory claim" was sure to lead to problems.[206] Such is the case with the FCA and materiality. To the extent the statute has a materiality requirement, Congress intended to incorporate the common-law understanding of the term. However, *Escobar* all but ignored the common law in favor of a multi-factor balancing test that was admittedly incomplete and omitted instructions as to how to weigh each factor. In so doing, the Supreme Court exacerbated much of the confusion that had plagued the question of materiality under the FCA.

By returning to the common-law roots of materiality, *Escobar* can be understood in its proper context. The Court's decision was not intended to displace the common-law definition of materiality, but to complement it and to provide further guidance in the unique context of the FCA, which carries particularly severe penalties. The common-law path is well-worn and familiar, and the courts should accept Congress's direction to follow it.

204. HOLMES, *supra* note 24, at 127.

205. Farringer, *supra* note 111, at 1249.

206. James B. Helmer, Jr. & Julie Webster Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839, 858 (2003).