

BRINGING LENDERS BACK TO THE GAME: HARMONIZING ACCESS TO AFFORDABLE HOUSING WHILE PROTECTING YOUR TAX DOLLARS FROM FRAUD

INTRODUCTION

Even the most ardent advocates for mortgage lenders agree that a well-regulated lending industry is necessary to protect taxpayers, homebuyers, and communities.¹ After all, high-risk mortgages were at the center of the mid-2000s credit crisis, which resulted in significant losses to consumer wealth.² In response, Congress challenged the Federal Housing Administration (FHA) to take on a greater role in serving creditworthy borrowers who could not meet the sizeable down payment requirements of lenders operating in the distressed credit environment.³ The FHA insures private lenders against the risk of a borrower default on eligible mortgages, thereby expanding access to credit beyond what is otherwise available.⁴ As a result, the overall share of residential mortgages insured by the FHA increased from 3% in 2005 to a

1. David Stevens, *The False Claims Act Has No Place in Housing*, HOUSINGWIRE (July 17, 2017), <https://www.housingwire.com/articles/40701-the-false-claims-act-has-no-place-in-housing/>; David Stevens was President and CEO of the Mortgage Bankers Association, a member network of real estate housing finance participants, from 2011-2017. *Id.*

2. John V. Duca, *Subprime Mortgage Crisis*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis.

3. *Id.* (“To buttress the funding of mortgages, the Congress greatly increased the maximum size of mortgages that FHA would insure.”); see Office of Public Affairs, *The False Claims Act & Federal Housing Administration Lending*, DEP’T OF JUST. (Mar. 15, 2016), <https://www.justice.gov/archives/opa/blog/false-claims-act-federal-housing-administration-lending> (“The mission of the FHA is to help creditworthy low income and first time homebuyers—individuals and families often denied traditional credit—to obtain a mortgage and purchase a home.”).

4. Katie Jones, *FHA-Insured Home Loans: An Overview*, CONG. RESEARCH SERV. (last updated Jan. 16, 2019), <https://fas.org/sgp/crs/misc/RS20530.pdf>.

staggering 21% in 2009.⁵ Only two years would pass before the mortgage lending industry would scramble to grasp the potential impact of the “first public False Claims Act case for mortgage fraud against a major financial firm.”⁶

FHA mortgage loans, which are regulated by the Department of Housing and Urban Development (HUD), include insurance for private lenders and banks who are approved by the FHA.⁷ In the event of a borrower default, the lender may submit a claim for payment from HUD to offset any remaining amount owed.⁸ When a lender submits a claim for payment, the lender is required to certify that the loan “complies with all relevant HUD rules.”⁹ In addition, lenders are required to certify on an annual basis that their origination and quality control procedures “comply with all relevant HUD rules.”¹⁰ Finally, lenders are required to self-report an issue of non-compliance to HUD if a mistake or error is later discovered.¹¹

Intended to protect taxpayers from fraud committed by lenders within the context of the FHA program, a statute called the False Claims Act (FCA)¹² imposes civil liability on any lender that “knowingly” submits a government insurance claim that did not meet program rules.¹³ FCA liability is limited to circumstances where records or statements are provided by the

5. *Id.*

6. Kelley Drye & Warren LLP, *The Government’s False Claims Act Complaint Against Deutsche Bank: FCA Claims and Program Certifications*, LEXOLOGY (May 9, 2011), <https://www.lexology.com/library/detail.aspx?g=845e4fc7-1fe9-4d35-9563-847f85e72098> (Ominously, U.S. Attorney Preet Bharara said “it would not be a fantastical stretch to think we are looking at other lending institutions as well.”); see Office of Public Affairs, *United States Sues Deutsche Bank and Subsidiary MortgageIT for Years of Reckless Lending Practices*, DEP’T OF JUST. (May 3, 2011), <https://www.justice.gov/opa/pr/united-states-sues-deutsche-bank-and-subsidiary-mortgageit-years-reckless-lending-practices>.

7. Jones, *supra* note 4, at 3.

8. *Id.* A default occurs when the borrower does not repay what is owed to the lender, resulting in foreclosure of the home. As is often the case with FHA loans, the foreclosure sale of the home is insufficient to cover the remaining balance owed to the lender, making insurance a critical component to a lender’s willingness to offer the loan. *Id.*

9. Laurie Goodman, *Wielding a Heavy Enforcement Hammer Has Unintended Consequences for the FHA Market*, URB. INST. (May 2015), <https://www.urban.org/sites/default/files/publication/52171/2000220-Wielding-a-Heavy-Enforcement-Hammer-Has-Unintended-Consequences-for-the-FHA-Mortgage-Market.pdf>.

10. *Id.*

11. *Id.*

12. 31 U.S.C. § 3729.

13. 31 U.S.C. § 3729(a)(1)(A); see DEP’T OF JUST., *supra* note 3 (“In other words, the False Claims Act requires more than mere negligence or a simple mistake to hold a person liable”); Jessica Renier et al., *A Financial System That Creates Economic Opportunities*, U.S. DEP’T OF THE TREASURY (July 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.

lender to support the claim, and the records or statements are “material” to the government’s decision to honor the claim.¹⁴ Remarkably, approximately \$7 billion was recovered under FCA judgments and settlements from 2012-2016.¹⁵ This figure is particularly imposing when juxtaposed against the fact that the FCA was enacted in 1863¹⁶ and the FHA loan program was launched in 1934,¹⁷ yet the FCA was only first aimed at a mortgage lender for FHA fraud in 2011.¹⁸

Citing the cost of FCA liability and “the ongoing fear of future action by the government,” several of the largest banks and private mortgage lenders chose to stop offering FHA loans.¹⁹ However, the mortgage industry would get some clarity on the issue of materiality when the Court decided *Universal Health Services v. United States ex rel. Escobar*.²⁰ The Court appeared to deliver a victory for lenders by ruling, “the materiality standard is demanding,” and challenging the government’s use of the FCA as an “all-purpose antifraud statute.”²¹

Although *Escobar*’s materiality ruling added some hope for FHA mortgage lenders, more definitive case law has been slow to develop, and unless HUD and Congress take further action, lenders will continue to freeze out a large number of creditworthy borrowers. Part I of this note provides a history of the FCA and its legal theories. Part II will explain specific applications on the mortgage industry. Part III will detail the *Escobar* decision and how it left critical questions unanswered. Finally, Part IV will propose recommendations within the powers of HUD and Congress as proactive measures for making FHA lending more viable.

14. 31 U.S.C. § 3729(a)(1)(B); see DEP’T OF JUST., *supra* note 3 (“Thus, insignificant violations that have no effect on a person’s entitlement to the payment of a claim also do not give rise to liability.”).

15. See U.S. Department of Justice, *Fact Sheet: Significant False Claims Act Settlements & Judgments, Fiscal Years 2009-2016*, <https://www.justice.gov/opa/press-release/file/918366/download>; see also 31 U.S.C. § 3729(a)(1)(G) (Violators are “liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.”).

16. See Goodman, *supra* note 9.

17. See Jones, *supra* note 4.

18. See Kelley Drye & Warren LLP, *supra* note 6.

19. See Jones, *supra* note 4, at 110; see also Ben Lane, *FHA Commissioner: We’re Easing False Claims Act Use to Bring Big Banks Back to FHA Lending*, HOUSINGWIRE (July 10, 2018), <https://www.housingwire.com/articles/46029-fha-commissioner-were-easing-false-claims-act-use-to-bring-big-banks-back-to-fha-lending>. (“JPMorgan Chase CEO Jamie Dimon cited the False Claims Act as a reason that the bank moved away from FHA lending. Dimon previously said that the bank drastically cut its FHA lending in 2015 due, in part, to the risk of a False Claims Act charge from the government.”).

20. 136 S. Ct. 1989 (2016).

21. *Id.* at 2003.

I. ORIGINS OF THE FALSE CLAIMS ACT

Commonly referred to as “Lincoln’s Law,” Congress enacted the False Claims Act in 1863 to “effectively police defense contractor fraud” in the midst of the Civil War.²² The FCA permits a civil cause of action for the Department of Justice or a qualified whistleblower against persons who commit certain fraudulent acts against the United States federal government.²³ Despite the Act’s acute and humble origins, in more recent decades it has been aggressively used to penalize and deter government-contracting fraud across several industries, including “defense, healthcare, for-profit higher education, and mortgage lending.”²⁴ Yet its future application is uncertain, as HUD Secretary Ben Carson criticized the enforcement of the FCA on government insured mortgage lenders in particular as “ridiculous, quite frankly” in a speech made to the House Financial Services Committee.²⁵ Unsurprisingly, HUD and the DOJ have not filed a single case under the FCA against a mortgage lender since the start of the Trump administration in January 2017.²⁶ Participants in HUD’s FHA insured mortgage lending program should not grow complacent, however, as application of the FCA has varied significantly since its 1863 enactment.²⁷

22. See Patricia Meador et al., *The False Claims Act: A Civil War Relic Evolves Into A Modern Weapon*, TENN. L. REV. 455, 458 (1998); see also Christopher L. Martin, Jr., *Reining in Lincoln’s Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CAL. L. REV. 227, 229 (2013).

23. 31 U.S.C. § 3729; see Martin, Jr., *supra* note 22, at 230.

24. See Martin, Jr., *supra* note 22, at 229; see also Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46 (Mar. 1990) (explaining how a 1986 amendment to the Act under the Reagan Administration was intended to reign in abuses and frequent cost overruns in the defense industry); Robert Salcido, *The Government’s Increasing Use of the False Claims Act Against the Healthcare Industry*, 24 J. LEGAL MED. 457 (2003) (explaining the increase in FCA actions related to the expansion of Medicare and Medicaid fraud); Gayland O. Hethcoat II, *For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector*, 24 LOY. CONSUMER L. REV. 1, 11-13 (2011) (summarizing the significant increase in cases involving for-profit educational institutions in the 2000s); OFF. OF PUB. AFFAIRS, *United States Sues Deutsche Bank and Subsidiary MortgageIT for Years of Reckless Lending Practices*, DEP’T OF JUST. (May 3, 2011), <https://www.justice.gov/opa/pr/united-states-sues-deutsche-bank-and-subsidiary-mortgageit-years-reckless-lending-practices> (introducing the first FCA action against a mortgage company).

25. See Erika K. Kelton, *Ben Carson is Wrong. Law Used to Fight FHA Fraud is Essential*, AM. BANKER (Nov. 6, 2017), <https://www.americanbanker.com/opinion/ben-carson-is-wrong-law-used-to-fight-fha-fraud-is-essential>.

26. See Brian Collins, *Do Justice and HUD See Eye To Eye On False Claims Act Enforcement?*, NAT’L MORTGAGE NEWS (Nov. 10, 2017), <https://www.nationalmortgagenews.com/news/do-justice-and-hud-see-eye-to-eye-on-false-claims-act-enforcement>.

27. See *id.*

A. Original Construction of the Act and 1943 Amendment

In the FCA's initial construction and application, any person could bring an action on behalf of the government and, if successful, was entitled to 50% of the recovery.²⁸ Liability on the defendant was double damages and a \$2,000 penalty per false claim.²⁹ In 1943, Congress passed the first significant changes to the FCA, limiting its reach for the next four decades.³⁰ Prior to the change, an influx of private individuals brought FCA actions on the basis of public information, as opposed to bringing undiscovered fraud to light.³¹ Known as "parasitic" lawsuits, private individuals would often copy criminal indictments verbatim and pursue FCA actions.³² Congress responded by stripping from federal court jurisdiction any suit which based its claim on information already possessed by the government.³³

B. Modernizing the Act and Ushering a New Era of Whistleblower Activity

The government would again shift course in 1986, modernizing the statute in near identical form to the current version.³⁴ The changes came in response to *United States ex rel. Wisconsin v. Dean*.³⁵ In *Dean*, the State of Wisconsin Medical Board revoked Alice Dean's medical license when local authorities discovered she had committed Medicare fraud.³⁶ Alice Dean was criminally convicted of fraud under a state statute, and the Medical Board notified the federal government of the Medicare fraud.³⁷ Subsequently, the State of Wisconsin brought a civil action under the FCA against Alice Dean for 912 fraudulent claims for reimbursement.³⁸ The Court ruled that the jurisdictional bar prohibiting FCA actions when the federal government already has knowledge of the fraud applies "even when the plaintiff is the source of that knowledge."³⁹ Congress, on the other hand, did not embrace

28. See Salcido, *supra* note 24, at 460.

29. *Id.*

30. *Id.*

31. *Id.*; see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (reasoning that the statute's "any person" element effectively allows persons to bring FCA actions even when they contribute nothing to the discovery of the crime).

32. See *Hess*, 317 U.S. at 545.

33. See Meador et al., *supra* note 22, at 459.

34. *Id.* at 460-61.

35. 729 F.2d 1100, 1100 (7th Cir. 1984).

36. *Id.* at 1102.

37. *Id.* at 1106.

38. *Id.* at 1103.

39. *Id.* The Court instructed that Wisconsin could only bring the FCA claim if they were granted a waiver by Congress. *Id.* at 1106.

this restrictive interpretation of the Act and sought to strike a new balance with the 1986 amendment.⁴⁰

First, the 1986 amendment permitted federal jurisdiction for claims where the government had knowledge of the alleged fraud, so long as the plaintiff in the FCA action was the party who provided such knowledge.⁴¹ Next, the knowledge requirement was broadened from “requiring that defendants have a specific intent to defraud the government to only requiring that defendants act recklessly or in deliberate ignorance of the truth or falsity of the information.”⁴² Congress also increased the government’s recovery from double to treble damages and increased the per claim civil penalty from \$5,000 to \$10,000 per claim.⁴³ Overwhelmed by increasing reports to the DOJ of defense contractor fraud at the height of the Cold War, Congress intended to motivate more private whistleblowers to pursue FCA claims.⁴⁴

The 1986 amendment proved undeniably successful at recovering stolen taxpayer dollars; FCA actions netted nearly \$3 billion in 1986, compared with only \$54 million in 1985.⁴⁵ Of course, government contractors wouldn’t simply lay down and accept this new reality. Defense attorneys went about challenging “every provision and nearly each of the 3,000 or so words of the False Claims Act.”⁴⁶ In addition, major trade groups such as the Defense Industry Initiative and the American Hospital Association lobbied Congress on behalf of the defense and healthcare industries, respectively.⁴⁷ Despite their efforts to persuade and offer to create self-policing bodies, these groups were unsuccessful in convincing Congress to diminish the reach of the FCA on their members.⁴⁸

40. See Meador et al., *supra* note 22, at 460. “Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute.” See S. REP. NO. 99-345, at 4 (1986).

41. See Robert Salcido, *The Government’s Increasing Use of the False Claims Act Against the Healthcare Industry*, 24 J. LEGAL MED. 457, 461 (2003).

42. *Id.*

43. *Id.*

44. See James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1272-73 (2013).

45. *Id.* at 1275-76.

46. *Id.* at 1276.

47. *Id.*

48. *Id.*

C. Applying the Act to Healthcare and Beyond . . .

Beginning in the 1990s, the DOJ shifted focus to prioritizing healthcare fraud.⁴⁹ Fraud in the healthcare context generally arises when private medical practitioners are required to complete and sign a variety of forms in order to receive reimbursement or compensation from federal health care programs, such as Medicare.⁵⁰ Foreshadowing what would later occur in the mortgage lending industry, healthcare providers quickly learned that clerical or “billing errors once viewed as mistakes in need of correction” were now the basis of multi-million dollar FCA actions.⁵¹ Critics of the FCA’s expanding application chided that the law was not built and designed with the complexity of modern business transactions in mind.⁵² In addition, and as laid out in this Note, federal courts have been split on several key issues, and case law applying the FCA is not clearly defined.⁵³ For example, scholars who highly anticipated the Court’s ruling in *Hughes Aircraft v. United States ex rel. Schumer*⁵⁴ were left unsatisfied.⁵⁵

II. DEVELOPMENT OF LEGAL THEORIES UNDER THE ACT

The FCA is constructed to emulate common-law concepts of fraud, and because the statute does not contain a definition for “false or fraudulent,” the Court has significant latitude in its application.⁵⁶ FCA cases typically involve two types of legal theories, “factually false” claims and “legally false” claims.⁵⁷ Factually false claims have appeared more in the defense and

49. See Sherryl E. Michaelson, *Federal Initiatives in the Prosecution of Health Care Fraud*, HEALTH CARE REFORM L. INST. 379, 381 (1994) (“The United States Department of Justice has listed health care fraud as a priority, second only to violent crime”).

50. See Charles J. Williams, *Toward a Comprehensive Health Care Anti-Kickback Statute*, 64 UMKC L. REV. 291, 306 (1995); see also Frank LaSalle, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497, 502 (1995) (stating that the 1986 amendments may have the greatest impact in the health care area).

51. See Meador et al., *supra* note 22, at 456.

52. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 2-5 (Aspen L. and Bus. 1997 & Supp. 1999) (arguing that the FCA was not crafted with attention to modern complex business customs or the degrees of liability involved inaccurate claims or statements).

53. See Meador et al., *supra* note 22, at 457.

54. 519 U.S. 1088 (1997).

55. See Meador et al., *supra* note 22, at 457. In a case involving critical issues such as “government knowledge,” “original source,” and whether a plaintiff had to show actual damages under the FCA, the Court decided the case on issues unrelated to the FCA. *Id.*

56. See 31 U.S.C. § 3729; Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud that “Counts” Under the False Claims Act*, 2017 U. ILL. L. REV. 1811, 1816 (2017); see, e.g., *Universal Health Services, Inc. v. Escobar*, 136 S. Ct. 1989, 1999 (2016) (citing *Neder v. United States*, 527 U.S. 1, 22 (1999)).

57. See Krause, *supra* note 56, at 1816-17.

healthcare sectors, and generally involve claims requesting payment for more expensive categories of services rendered or goods offered, or for services or goods which were never rendered at all.⁵⁸ A legally false claim, on the other hand, is where items or services were provided but the defendant had also violated some other underlying legal requirement.⁵⁹ The Court has accepted two distinct legal theories involving legal falsity, “express certification” and “implied certification.”⁶⁰ FCA actions against mortgage lenders by the DOJ and HUD are traditionally brought under these two theories.

A. Express Certification Theory: Be Careful What You Say

The express certification theory applies when a claimant makes an “explicitly false certification of compliance with an underlying program condition,”⁶¹ as is the contested issue in *United States v. Guild Mortgage Co.*⁶² In *Guild*, an officer of the defendant certified in a written statement to HUD that the company was in compliance with all HUD guidelines, regulations and requirements, as part of an annual program certification.⁶³ One rule at issue stated that “employees who perform underwriting and loan servicing activities may not receive commissions.”⁶⁴ The plaintiff alleged that defendant “paid commissions to underwriters . . . allowing them to earn a bonus based on the number of loans approved for FHA insurance,” a clear violation of the rule.⁶⁵ The officer’s certification of “full compliance,” combined with the allegation of breach of that rule, is a straightforward application of the express certification theory.

B. Implied Certification Theory: Silence Isn’t Always Golden

The more contentious of the two theories, the implied certification theory applies even in the absence of making a statement or any express

58. See, e.g., *United States ex rel. Conner v. Salina Regional Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008) (describing a traditional factually false set of circumstances); *United States v. Krizek*, 859 F. Supp. 5, 7 (D.D.C. 1994) (explaining that physician billed for more extensive and expensive therapy than he actually provided to the patient).

59. See Krause, *supra* note 56, at 1816; see also Goodman, *supra* note 9, at 2 (explaining that mortgage lenders are required to make broad assertions regarding their strict compliance with federal regulations on an annual basis and when submitting a claim for FHA insurance payment).

60. See Krause, *supra* note 56 at 1817.

61. *Id.*

62. Complaint at 3, (D.D.C 2016) (No. 2016-cv-02909), formerly No. 13-1913.

63. *Id.* at 26-27.

64. *Id.*; see U.S. DEP’T OF HOUS. & URB. DEV., FHA Title II Approval Handbook 4060.1, Rev. 2, ch. 2-9(A) (Aug. 14, 2006).

65. See Complaint, *supra* note 62, at 39.

assertion about compliance with government regulations.⁶⁶ Under this theory “the act of submitting a claim for reimbursement itself implies compliance with governing federal rules.”⁶⁷ Whereas express certification is by definition confined to the assertions that a claimant has made in order to be paid, the implied certification extends to the claimant’s “*silence* regarding a failure to comply with thousands of additional program conditions.”⁶⁸ Of course, when Congress liberated the FCA by way of the 1986 amendment, it intended that “each and every claim submitted under a contract, loan guarantee, or other agreement . . . constitutes a false claim.”⁶⁹

The question numerous courts would grapple with in applying these theories was which program requirements were substantial enough to form the basis of an FCA claim?⁷⁰ If strictly applied, it could extend to “the totality of all regulations applying to the relevant federal program.”⁷¹ Conversely, and the argument that would ultimately become the general rule, an FCA claim could only be brought involving program requirements where “adherence to the statutory or regulatory mandate lies at the *core* of the agreement with the Government.”⁷² Notably, the 1986 amendment did not include any element of materiality in applying the FCA.⁷³ During the interim period, and up until *Escobar*,⁷⁴ the circuits were split and relied on “two broad approaches to defin[e] the universe of actionable violations.”⁷⁵

Developed within the Second Circuit, and the narrowest application of the two approaches, the court in *Mikes v. Straus* held that implied

66. See Krause, *supra* note 56, at 1817.

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

68. See Krause, *supra* note 56, at 1817.

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

70. See Krause, *supra* note 56, at 1820; see also *Gaidon v. Guardian Lice Ins. Co.*, 94 NY.2d 330, 349-50 (1999) (explaining that not every misrepresentation or omission rises to the level of fraud; an omission or misrepresentation may be so trifling as to be legally inconsequential, or so egregious as to be fraudulently criminal, or it may fall somewhere in between).

71. See Krause, *supra* note 56, at 1820.

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

73. Fraud Enforcement and Recovery Act of 2009, 31 U.S.C. §§ 3729(a)(1)(B), 3729(a)(1)(G), 3729(b)(4) (2012) (incorporating an element of materiality to all components of the FCA).

74. 136 S. Ct. 1989 (2016).

75. See Krause, *supra* note 56, at 1820.

certification FCA actions are limited to violations of statutes or regulations clearly identified as express conditions of payment.⁷⁶ Sometimes referred to as the “*Mikes* rule” or the “precondition to payment,” the Second Circuit was joined in applying this approach by the Third,⁷⁷ Sixth,⁷⁸ and Tenth⁷⁹ Circuits.⁸⁰ A defendant is liable under this rule when he submits a claim for payment to the government and fails to disclose a knowing violation of a contractual, statutory, or regulatory provision material to the government’s decision to pay *and* on which the government has *expressly conditioned* payment.⁸¹

On the other end of the spectrum, the First Circuit established a much broader interpretation, holding in *Hutcheson v. Blackstone* that implied certification FCA actions are based on a “material to the government’s decision to pay” standard.⁸² This standard could be more broadly applied and was more favorable to plaintiffs, since it did not require that a payment condition be expressly stated in order for a claim to be actionable.⁸³ The First Circuit was joined by the D.C.⁸⁴ and Fourth⁸⁵ Circuits in applying this version of the implied certification theory.⁸⁶ Until the Court in *Escobar*⁸⁷ adopted the implied certification theory as valid law, the Fifth, Seventh, and Eighth Circuits declined to recognize the theory, while the Ninth and Eleventh

76. 274 F.3d 687, 700 (2nd Cir. 2001) (“Liability under the Act may properly be found therefore when a defendant submits a claim for reimbursement while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant.”).

77. See *Wilkins v. United Health Grp.*, 659 F.3d 295, 309 (3d Cir. 2011) (“a plaintiff must show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government”).

78. See *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011) (holding that “it is not the violation of a regulation itself that creates a cause of action under the [FCA]. Rather, noncompliance constitutes actionable fraud only when compliance is a prerequisite to obtaining payment.”).

79. See *United States ex rel. Conner v. Salina Reg’l Health Ctr.*, 543 F.3d 1211, 1218 (10th Cir. 2008) (holding that the FCA “cannot support . . . expansive liability in the absence of an underlying statute or regulation that conditions payment on compliance with the certification.”).

80. See *Martin, Jr.*, *supra* note 22, at 242.

81. See *id.* at 243.

82. See 647 F.3d 377, 394 (1st Cir. 2011).

83. See *Latoya C. Dawkins, Not So Fast: Proving Implied False Certification Theory Post-Escobar*, 42 SETON HALL LEGIS. J. 163, 172 (2017).

84. See *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) (holding that “express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality” but is not “a necessary condition”).

85. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 639 (4th Cir. 2015) (rejecting the defendants’ reliance on express conditions of payment standard from the *Mikes* court).

86. See *Martin, Jr.*, *supra* note 22, at 242-43.

87. 136 S. Ct. 1989 (2016).

Circuits adopted the theory without expressing a preference for either the *Mikes* or *Blackstone* rule.⁸⁸

C. *Materiality in the pre-Escobar Context*

While *Mikes* rule limits FCA liability to express conditions of payment, both *Mikes* and *Blackstone* were consistent in requiring that noncompliance by the defendant be *material* to the government's decision to pay.⁸⁹ Though not formally incorporated into the statute until a 2009 amendment,⁹⁰ materiality was not a new concept under the FCA,⁹¹ though its history is as convoluted as the legal theories that applied it.⁹² Critics have even called the application of materiality arbitrary.⁹³

For example, the court in *Harrison v. Westinghouse Savannah River Co.* ruled in favor of materiality for certain claims and against materiality in others.⁹⁴ The facts in *Harrison* involve a contractor facing FCA liability for a payment submitted to the Department of Energy (DOE) to reimburse for a subcontractor the contractor hired in completing a job for the DOE.⁹⁵ The court held, on the one hand, that misrepresentations made to induce approval from the government to permit the use of a particular subcontractor was material to the government's decision to approve payments.⁹⁶ While, on the other hand, misrepresentations made about the scope of the job in order to win the contract were *not* material to the government's decision to approve payments.⁹⁷ The court explained that the government should anticipate some degree of cost overrun and that additional costs for a contracted job should be anticipated.⁹⁸

Another complicated and divisive issue amongst the courts was how to define materiality.⁹⁹ Since the Supreme Court had not directly ruled on this issue, and the statute was silent to it, the lower courts looked to how the Court

88. See Martin, Jr., *supra* note 22, at 242, 248.

89. See Krause, *supra* note 56, at 1824-25.

90. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended at 31 U.S.C. § 3279).

91. See *United States v. McNinch*, 356 U.S. 595, 599 (1958) (holding that the FCA "was not designed to reach every kind of fraud practiced on the Government").

92. See Krause, *supra* note 56, at 1825.

93. *Id.*

94. See 176 F.3d 776 (4th Cir. 1999).

95. See *id.* at 780.

96. *Id.* at 791.

97. *Id.* at 789.

98. See *id.* at 789-90.

99. See Krause, *supra* note 56, at 1826.

defined it across a spectrum of cases ranging from criminal to civil.¹⁰⁰ In the criminal context, the Court held in *Kungys v. United States* that “a concealment or misrepresentation is material if it ‘has a natural tendency to influence, or was capable of influencing, the decision of’ the decision-making body to which it was addressed.”¹⁰¹ However, in the civil context, the Court in *Neder v. United States* relied on the Second Restatement of Torts, saying materiality depends on whether “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action” or whether “the maker of the representation knows . . . its recipient . . . is likely to regard the matter as important in determining his choice of action.”¹⁰² Naturally, the lower courts were split on the matter.

The Fourth and Sixth Circuits adopted the criminal based “natural tendency test,” which focuses on the potential effect of the false statement on the recipient, rather than on the actual impact after it is discovered.¹⁰³ By contrast, the Eighth Circuit opted for an “outcome materiality test,” where a plaintiff must show that the defendant’s actions caused the government to pay out money it is not obligated to pay.¹⁰⁴ The Fifth Circuit had perhaps the broadest test, requiring “only that the false or fraudulent statements . . . make the government prone to a particular impression.”¹⁰⁵ However, even judges within the Fifth Circuit were critical of this test, warning that it could have the effect of blurring the lines between ordinary breach of contract and valid FCA liability.¹⁰⁶ This disagreement would seemingly come to an end in 2009, when Congress passed the Fraud Enforcement and Recovery Act (FERA),¹⁰⁷ once again attempting to modernize “Lincoln’s Law.”¹⁰⁸

A congressional act which garnered bipartisan support, FERA made substantive changes to the FCA and signaled which industry might soon be in its crosshairs.¹⁰⁹ Even the subtitle of FERA was pointed in aim: “An Act [t]o improve enforcement of mortgage fraud, securities and commodities

100. *Id.*

101. 485 U.S. 759, 770 (1988) (internal quotations omitted).

102. 527 U.S. 1, 22 n.5 (1999).

103. See Krause, *supra* note 56, at 1827.

104. *Id.*

105. *United States ex rel. Longhi v. United States*, 575 F.3d 458, 470 (5th Cir. 2009).

106. See *United States v. Southland Mgt. Corp.*, 326 F.3d 669, 680 (5th Cir. 2003) (Jones, J., concurring) (“[E]ras[ing] the crucial distinction between ‘punitive’ FCA liability and ordinary breaches of contract . . .”).

107. Fraud Enforcement and Recovery Act of 2009, *supra* note 90.

108. See Krause, *supra* note 56, at 1828; Martin, Jr., *supra* note 22, at 229.

109. See James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years For Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1278 n.92 (2013) (explaining how a Congress united to tackle the complexities of the financial crisis voted 86% in favor of passing FERA).

fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds.”¹¹⁰

Regarding the FCA, Congress defined materiality as “having a natural tendency to influence, or be capable of influencing, the payment . . . of money or property.”¹¹¹ This is effectively an adoption of the criminal definition of materiality in *Kungys*.¹¹² The materiality definition was expressly applied to two sections of the FCA: the false statement provision and the reverse false claim provision.¹¹³ Defendants would be liable under the false statement provision only for a false statement that is material to a false or fraudulent claim.¹¹⁴ Under the reverse false claim provision of the FCA, defendants would only be liable for false records or statements material to an obligation to pay the government.¹¹⁵

However, the 2009 amendment failed to address the scope of applying materiality to all elements of FCA claims.¹¹⁶ While the amendment did address the materiality of false statements that is generally the basis of express certification actions,¹¹⁷ materiality wasn’t expressly added to the claim presentment provision. That provision, which assigns liability to anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” is the basis of the implied certification theory.¹¹⁸ In the interim period between the 2009 amendment and the 2016 *Escobar* decision, lower courts remained divided on which definition of materiality to apply in the implied certification cases—the statutory definition or the common law.¹¹⁹

110. Fraud Enforcement and Recovery Act of 2009, *supra* note 90.

111. 31 U.S.C. § 3279(b)(4); Fraud Enforcement and Recovery Act of 2009, *supra* note 90 at Section 4.

112. *See Kungys*, 485 U.S. at 470.

113. Lori L. Pines, *Understanding the False Claims Act*, PRACTICAL L. LITIG. 1, 11 (2018).

114. 31 U.S.C. § 3279(a)(1)(B) (“[K]nowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”).

115. 31 U.S.C. § 3279(a)(1)(G) (“[K]nowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government . . .”).

116. *See Krause*, *supra* note 56, at 1828.

117. *See Kelley Drye & Warren LLP*, *supra* note 6.

118. 31 U.S.C. § 3279(a)(1)(A).

119. *See Krause*, *supra* note 56, at 1828; *see also Longhi v. United States*, 575 F.3d 458, 470 (5th Cir. 2009) (explaining “[i]f Congress intended materiality to be defined under the [narrower] outcome materiality standard, it had ample opportunity to adopt the outcome materiality standard in FERA.”).

III. FCA APPLIED TO MORTGAGE LENDERS PRE-*ESCOBAR*

The DOJ's FCA action against Deutsche Bank opened the door to liability against mortgage lenders.¹²⁰ In that case, the government paid out insurance claims on more than 3,100 mortgages, totaling a sum of \$386 million.¹²¹ The DOJ alleged that the company's "false certifications to HUD" regarding their quality control program wrongly caused the government to make insurance payments on ineligible loans.¹²² The company agreed to settle for \$202.3 million less than a year after the complaint was launched.¹²³

In 2014, the DOJ reached a \$418 million settlement with SunTrust Bank.¹²⁴ The lender in this case failed to self-report, as per HUD requirements, any loans it deemed defective by its own quality control standards.¹²⁵ Even though the company identified many defective loans, and even attempted to cure, it still breached the requirement to self-report to HUD.¹²⁶ In announcing the settlement, Assistant Attorney General Stuart Delery remarked, "SunTrust's irresponsible FHA lending practices caused grievous harm to homeowners and the housing market, as well as wast[ed] hundreds of millions of dollars in taxpayer funds."¹²⁷

IV. CLARIFICATION FOR IMPLIED CERTIFICATION AND MATERIALITY

The critical issue in *Escobar* was twofold.¹²⁸ First, the Court sought to resolve the longstanding circuit split¹²⁹ regarding whether the implied false

120. See Kelley Drye & Warren LLP, *supra* note 6.

121. See Office of Public Affairs, *United States Sues Deutsche Bank and Subsidiary MortgageIT for Years of Reckless Lending Practices*, DEP'T OF JUST. (May 3, 2011), <https://www.justice.gov/opa/pr/united-states-sues-deutsche-bank-and-subsidiary-mortgageit-years-reckless-lending-practices>.

122. *Id.*

123. Stipulation and Order of Settlement and Dismissal, *United States v. Deutsche Bank*, (S.D.N.Y. 2012) (No. 1:11-cv-02976-LAK).

124. Office of Public Affairs, *The False Claims Act & Federal Housing Administration Lending*, DEP'T OF JUST. (Mar. 15, 2016), <https://www.justice.gov/archives/opa/blog/false-claims-act-federal-housing-administration-lending>.

125. *Id.*

126. *Agreement Provides Homeowner Relief and New Protections, Stops Abuses*, DEP'T OF JUST., <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-nearly-1-billion-agreement-suntrust> (last updated Mar. 7, 2016).

127. *Id.*

128. See 136 S. Ct. 1989, 2001 (2016).

129. See Martin, Jr., *supra* note 22, at 242-43 (explaining how the Fifth, Seventh, and Eighth Circuits had not recognized the theory, while the Second, Third, Sixth, and Tenth Circuits adopted the *Mikes* interpretation, and the First, Fourth, and D.C. Circuits adopted the *Blackstone* interpretation).

certification theory is a valid basis for FCA liability.¹³⁰ Second, if the theory was valid, should the statutory definition of materiality apply, or the *Mikes*¹³¹ rule requiring an express condition of payment?¹³² The Court held that the implied certification theory can be a basis for liability and the theory is not subject to the express condition limiting principle in *Mikes*.¹³³

The plaintiffs in *Escobar* were the parents of a teenage girl who died from a seizure after having an adverse reaction to medication for bipolar disorder.¹³⁴ The girl, Yarushka Rivera, was a beneficiary of the government's Medicaid¹³⁵ program, which helped her cover the cost of bipolar treatment during the five years which she had been diagnosed.¹³⁶ Ms. Rivera's treatment included counseling sessions from staff members of Universal Health Services, defendant.¹³⁷ She was also prescribed medication by a staff member who had held herself out as a licensed psychiatrist.¹³⁸ In fact, plaintiffs later discovered that twenty-three of the staff members "lacked licenses to provide mental health services, yet—despite regulatory requirements to the contrary—they counseled patients and prescribed drugs without supervision."¹³⁹ Tragically, many of these staff members had treated Ms. Rivera.¹⁴⁰

The basis for applying FCA liability was that defendant "submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services."¹⁴¹ Unaware of these violations, Medicaid paid defendant for services rendered; however, it "would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff."¹⁴² In holding that the implied certification theory was a valid basis for FCA action,

130. See *Escobar*, 136 S. Ct. at 1995.

131. See 274 F.3d 687, 700 (2nd Cir. 2001) ("Liability under the Act may properly be found therefore when a defendant submits a claim for reimbursement while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant.").

132. See *Escobar*, 136 S. Ct. at 1995.

133. *Id.* at 2001.

134. *Id.* at 1997.

135. See *id.* at 1996-97. Medicaid is a "joint state-federal program in which healthcare providers serve poor or disabled patients and submit claims for government reimbursement." *Id.*

136. *Id.* at 1997.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1997-98.

142. *Id.* at 1998.

the Court explained that when “a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant’s representations misleading with respect to the goods or services provided.”¹⁴³

The Court established two conditions for when the implied certification theory could apply.¹⁴⁴ First, “the claim does not merely request payment, but also makes specific representations about the goods or services provided.”¹⁴⁵ In *Escobar*, defendant made payment requests based on a claim that the services were provided by licensed staff, which garnered a greater billable amount.¹⁴⁶ The second condition is that “defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”¹⁴⁷ The Court explained that it wasn’t that the services weren’t provided, but that they were provided by workers who did not “possess the prescribed qualifications for the job.”¹⁴⁸

Regarding the second issue, the Court rejected *Mikes* rule on materiality that a violation is only material if “the Government expressly designated [it as] a condition of payment.”¹⁴⁹ Though it rejected this narrow application of the theory, the Court did acquiesce “that not every undisclosed violation of an express condition or payment automatically triggers liability.”¹⁵⁰ Furthermore, “[w]hether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.”¹⁵¹ The Court justified this reasoning by saying that government programs often involve “thousands of complex statutory and regulatory provisions,” and that the government could on one extreme designate none of the provisions as conditions of payment, or all of them.¹⁵² In addition, the Court emphasized

143. *Id.* at 1999; *see also id.* (“Because common-law fraud has long encompassed certain misrepresentations by omission, ‘false or fraudulent claims’ include more than just claims containing express falsehoods.”).

144. *Id.* at 2001.

145. *Id.*

146. *Id.* at 2000.

147. *Id.* at 2001.

148. *Id.* at 2000.

149. *Id.* at 2001.

150. *Id.*

151. *Id.*

152. *See id.* at 2002 (“[F]orcing the Government to expressly designate a provision as a condition of payment would create further arbitrariness.”); *see also* Krause, *supra* note 56, at 1829 (explaining that the Court had little trouble rejecting the request to limit the theory to violations of expressly designated conditions of payment, “noting that such a limit would be both over- and under-inclusive”).

that there is no materiality “where noncompliance is minor or insubstantial.”¹⁵³

The Court also weighed in on the statutory definition of materiality and whether the lower courts’ competing definitions should still apply.¹⁵⁴ Ultimately, the Court rejected the various constructions by the lower courts, siding with the statutory construction and providing factors for future courts to consider.¹⁵⁵ First, the Court explained that proof of materiality can be based on whether the government “consistently refuses to pay claims . . . based on noncompliance” with particular requirements.¹⁵⁶ Second, when the government has paid a claim in full despite “its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.”¹⁵⁷ Finally, when the government has “signaled no change in position” regarding payment of claims it knows involves violations, that too is “strong evidence that the requirements are not material.”¹⁵⁸

Critics of the ruling argue that the Court’s attempt to straddle the statutory construction while following precedent on what constitutes materiality, only “served to unmoor the concept” altogether.¹⁵⁹ Furthermore, the Court missed an opportunity to address how specific misrepresentations need to be in order to be misleading.¹⁶⁰ The Court did, however, make it clear that not all misrepresentations are actionable under the FCA.¹⁶¹ Ultimately, this means that the central battleground for FCA claims under the implied certification theory of liability focuses on the issue of materiality.¹⁶²

V. A ROADMAP FOR REVITALIZING FHA LENDING

Although lenders finally received clarity regarding whether they could be subject to implied certification liability across all jurisdictions, their new confusion would focus on the issue of materiality. Very little case law exists

153. *Escobar*, 136 S. Ct. at 2003.

154. *Id.* at 2001-02 (embarking on a review of the rules established in *Neder and Kungys*).

155. *Id.* at 2003-04; see Krause, *supra* note 56 at 1830 (“Although they did not provide a clear definition, the Justices proceeded to reject essentially all of the standards adopted by the lower courts over the years.”).

156. *Escobar*, 136 S. Ct. at 2003.

157. *Id.*

158. *Id.* at 2004.

159. See Krause, *supra* note 56 at 1832.

160. *Id.*

161. *Id.*

162. *Id.* (explaining that “the centrality of materiality as the defining factor in implied certification cases will require courts to grapple with crucial issues of scope, temporality, and competing authority—none of which the Justices acknowledged” sufficiently in *Escobar*).

involving mortgage lenders, as virtually all FCA actions have reached settlement, giving lenders few hardlines to follow. Mortgage industry commentators generally agree on the need to balance the merits of applying the FCA with the need to provide services to the public by experienced lenders.¹⁶³ Perhaps the most direct approach toward achieving this goal is administrative reform at HUD and the DOJ.¹⁶⁴

First, HUD should continue to improve the annual and loan level certifications, to ensure they include sufficient specificity and scope that aligns with lenders' business practices.¹⁶⁵ For example, the current certification requires that lenders originate "quality" loans, yet there is no definition for what constitutes quality.¹⁶⁶ As it stands, this degree of specificity gives lenders little guidance on how to determine a material misrepresentation of quality. Although HUD amended these certifications in 2015 and 2016, HUD should further narrow the scope of certification to those requirements necessary to maintain approval with the FHA program, rather than all FHA requirements.¹⁶⁷

Second, HUD should utilize the severity grades in its Loan Quality Assessment Methodology (LQAM) as indicators of materiality. Although the Court said express conditions of payment do not always constitute material FCA claims, if HUD were to refuse payment based on certain tiers, then that could be the basis of establishing materiality. The current LQAM describes nine types of defects and four tiers of defect severity.¹⁶⁸ Without precise identification of potential indemnifiable defects to ensure that lenders have clear expectations of the consequences associated with certain tiers of defects, the framework will not have a meaningful impact on lender confidence.¹⁶⁹

Third, in recognizing that the FCA was not intended as the exclusive and all encompassing weapon to counter fraud against the government, HUD

163. See Bob Barnett, *FHA Defect Taxonomy and the False Claims Act*, OUR PERSPECTIVES 1, Apr. 2017, at 1.

164. *Id.*

165. See Goodman, *supra* note 9.

166. See *FHA Lender Annual Certifications Supervised and Nonsupervised Mortgagees*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/sites/documents/SFH_RECERT_CERTS.PDF (Aug. 1, 2016).

167. See *HUD Revises Form 92900-A for Loan-Level Certifications and Requests Comments Regarding Lender-Level Certifications*, WEINER BRODSKY KIDER PC (Mar. 23, 2016), <https://www.thewbkfirm.com/industry/hud-revises-form-92900-a-for-loan-level-certifications-and-requests-comments-regarding-lender-level-certifications>.

168. *FHA's Single Family Housing Loan Quality Assessment Methodology*, U.S. DEP'T OF HOUS. & URB. DEV. (June 18, 2015), https://www.hud.gov/sites/documents/SFH_LQA_METHODODOLOGY.PDF.

169. See Barnett, *supra* note 163, at 2.

should, as a preliminary step, pursue claims independently under the Inspector General Act of 1978.¹⁷⁰ The damages provision under this law is limited to a cap of \$150,000 and a civil penalty of \$5,000 per claim.¹⁷¹ This lesser penalty in comparison to treble damages under the FCA will draw smaller lenders back to the FHA market.

Finally, considering the nationwide housing crisis and policy interest in promoting homeownership, Congress should consider preempting FCA actions altogether in FHA lending. Though this sounds extreme, Congress afforded similar protection to the airline industry in the wake of the September 2011 terrorist attacks in the interest of protecting the airlines from the threat of crippling liability.¹⁷²

In conclusion, although *Escobar*'s materiality ruling added some hope for FHA mortgage lenders, more definitive case law has been slow to develop. Unless HUD and Congress take further action, lenders will continue to freeze out a large number of creditworthy borrowers.

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170. See Goodman, *supra* note 9.

171. See *The False Claims Act: A Primer*, U.S. DEP'T OF JUST., https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (last visited Mar. 24, 2020).

172. Aaron Smith, *The 9/11 Fund: Putting a Price on Life*, CNN MONEY (Sep. 7, 2011), https://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/index.htm.

* J.D. 2020, Southwestern Law School; B.B.A Finance 2008, University of Notre Dame. I dedicate this article to my friend and colleague John Doulong, who always encouraged me to press forward. I am grateful for the hands-on support from my talented legal writing professors, Ms. Anahid Gharakhanian and Ms. Alexandra D'Italia. Finally, to my wife and children, none of this would have been possible without your love and sacrifice; we did it.