Reining in Lincoln’s Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act

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The False Claims Act is widely considered the nation’s preeminent civil litigation weapon against fraud by federal contractors. Under the Act’s newest theory of liability known as implied certification, a contractor is liable for civil penalties and treble damages if it knowingly presents a claim for payment to the government and fails to disclose its violation of a contract provision, statute, or regulation material to the government’s decision to pay the claim. While a majority of federal courts of appeals have embraced the implied certification theory, they have struggled to define the scope of a contractor’s duty to disclose in the absence of an agreement between the contracting parties. Under the default rule developed by the Second Circuit in Mikes v. Straus, liability attaches only when a contractor submits a claim and fails to disclose its violation of a material contractual, statutory, or regulatory provision that the government has expressly identified as a condition of payment. A broader default rule, enunciated by the First Circuit in United States ex rel. Hutcheson v. Blackstone Medical, Inc., imposes liability when a contractor submits a claim and fails to disclose its violation of a material contractual, statutory, or regulatory provision, regardless of whether the provision was an express condition of payment.

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Because the choice between these two default rules can be outcome determinative in cases with hundreds of millions of dollars at stake, there is an urgent need to resolve the split of authority and ensure uniformity across the federal courts. This Comment argues that the U.S. Supreme Court should resolve the circuit split by recognizing the implied certification theory and adopting the express condition-of-payment requirement set forth by the Second Circuit in *Mikes*. The Court should recognize the implied certification theory because the language and structure of the False Claims Act support liability for at least some undisclosed contractual, statutory, and regulatory violations; Congress has emphasized that the Act broadly targets fraud against the government; and the theory comports with the common-law recognition of fraud by omission. At the same time, neither the statutory language nor legislative history authorizes the use of the implied certification theory to police garden-variety contractual breaches or statutory or regulatory violations. Accordingly, the Court should adopt the *Mikes* express condition-of-payment requirement, which confines liability to cases of clear fraud. In addition to enforcing the proper limits of implied certification liability, the *Mikes* rule has two distinct advantages over the *Blackstone* alternative: it provides federal contractors with fair notice of punitive antifraud liability, and it reduces their compliance and litigation costs.
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INTRODUCTION

The False Claims Act creates a civil cause of action for the Attorney General or a qui tam relator\(^1\) against persons who commit certain fraudulent acts against the U.S. federal government.\(^2\) Violators are subject to civil penalties and treble damages.\(^3\) Known as “Lincoln’s Law” for its Civil War origins, the Act in recent years has been used aggressively to deter and punish government-contracting fraud across a number of industries, including defense,\(^4\) health care,\(^5\) for-profit higher education,\(^6\) and mortgage lending and financial services.\(^7\) Heightened enforcement has transformed the False Claims Act into a significant profit center for the Treasury. As of June 2012, the government has recovered more than $33 billion in False Claims Act settlements and judgments since Congress overhauled the Act in 1986.\(^8\)

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1. Qui tam is a form of civil action that a private citizen can bring on behalf of the government. The private plaintiff who brings the suit is known as a “relator” during the course of the litigation. See Vt. Agency of Natural Res. v. United States \textit{ex rel.} Stevens, 529 U.S. 765, 769 (2000).
The key provision of the False Claims Act imposes civil liability on any person who knowingly submits a “false or fraudulent claim for payment or approval” to the government. Courts originally interpreted the phrase “false or fraudulent claim” in a limited fashion to mean a “factually false claim,” which is a claim for payment containing “an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.” In addition to factually false claims, courts now routinely recognize a second category of false claims known as “legally false claims,” which are based on false certifications of compliance with the terms of a contract, statute, or regulation.

Courts initially applied the concept of legal falsity only to claims containing an express false certification of compliance. An express false certification is “any false statement that relates to a claim, whether made through certifications on invoices or any other express means.” In 1994, the U.S. Court of Federal Claims became the first court to recognize a claim as legally false based on a theory of implied false certification. Under this theory, the bare act of submitting a claim for payment to the government impliedly certifies that the contractor has not violated a contractual, statutory, or regulatory provision material to the government’s decision to pay. The theory thus attaches liability when a contractor knowingly submits a claim for

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11. See, e.g., United States ex rel. Conner v. Salina Reg’l Health Ctr., 543 F.3d 1211, 1217 (10th Cir. 2008). Even though courts have heard cases involving legally false claims for decades, see, e.g., United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977), the terms “factual falsity” and “legal falsity” appear to have been first used in a 1999 Alabama Law Review article and subsequently adopted by the Second Circuit in Mikes. See Mikes, 274 F.3d at 697 (citing Robert Fabrikant and Glenn E. Solomon, Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry, 51 Ala. L. Rev. 105, 112 (1999)). While the first cases involving legally false claims dealt with a certification of compliance with statutes or regulations, courts now recognize a legally false claim when a contractor falsely certifies compliance with a contract. See, e.g., Shaw v. AAA Eng’g & Drafting, Inc., 213 F.3d 519, 531 (10th Cir. 2000) (“Permitting FCA liability based on a false certification of compliance with a government contract . . . is consistent with the legislative history of the 1986 Amendments to the FCA.”).
13. Conner, 543 F.3d at 1217. For example, in United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Rosen Constr. Co., 183 F.3d 1088, 1091–92 (9th Cir. 1999), the Ninth Circuit held that the relator stated an express false certification claim by alleging that the defendant contractor had expressly certified that its laborers were paid in accordance with the legally required wage rate while paying them a lower rate. Any affirmative act can trigger liability under the express certification theory. As the Ninth Circuit has explained, “It matters not whether it is a certification, assertion, statement, or secret handshake.” United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1172 (2006).
15. Mikes, 274 F.3d at 699.
payment while in violation of such a provision, unless the contractor discloses
the violation. The implied certification theory represents a dramatic expansion
of liability beyond affirmative misstatements because it creates for government
contractors a duty to disclose material contractual, statutory, and regulatory
violations, and punishes silence with liability.

Viewed in this light, the critical issue raised by the implied certification
theory is the scope of a contractor’s duty to speak, that is, to disclose a
contractual, statutory, or regulatory violation when submitting a claim for
payment to the government. One mechanism for resolving this question is by
contract. A government contractor and federal procurement officers can
prospectively define the contractor’s potential implied certification liability by
specifying in the procurement contract what certifications, if any, are implied
by the submission of a claim for payment. However, for several reasons—
chief among them contractor competence and the adhesive nature of
government contracts—businesses entering into procurement contracts with
the government often fail to include provisions governing the extent to which a
claim for payment impliedly certifies compliance with contractual, statutory,
and regulatory provisions.

In the absence of an agreement between the parties, default rules
established by courts regulate the scope of a contractor’s disclosure duty.
Unfortunately, federal courts of appeals have adopted remarkably inconsistent
views of the implied certification theory. The Fourth, Fifth, Seventh, and
Eighth Circuits have not formally adopted the theory and recognize only

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16. This follows from the generally accepted principle that disclosure of the contractual,
statutory, or regulatory violation at issue defeats the implied certification theory because the claim is
no longer “false or fraudulent.” “[A] contractor could avoid [False Claims Act] liability by expressly
informing the Government of any material breach or violation when requesting payment . . . .” See
Holt & Klass, supra note 18; see also United States ex rel. Burlbaw v. Orenduff, 548 F.3d 931, 959
(10th Cir. 2008); United States ex rel. Costner v. United States, 317 F.3d 883, 888 (8th Cir. 2003) (“A
contractor that is open with the government regarding problems and limitations and engages in a
cooperative effort with the government to find a solution lacks the intent required by the Act.”); United
States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 327 (9th Cir. 1995) (“[I]f the district
court correctly found that the only reasonable conclusion a jury could draw from the evidence was that
MDHC and the Army had so completely cooperated and shared all information during the testing that
MDHC did not ‘knowingly’ submit false claims, then we must affirm . . . .”); Wang v. FMC Corp.,
975 F.2d 1412, 1421 (9th Cir. 1992) (“The government knew of all the deficiencies identified by
Wang, and discussed them with FMC. The fact that the government knew of FMC’s mistakes and
limitations, and that FMC was open with the government about them, suggests that while FMC might
have been grooping for solutions, it was not cheating the government in the effort.”).

17. See Michael Holt and Gregory Klass, Implied Certification Under the False Claims Act, 41
PUB. CONT. L.J. 1, 3 (2011) (“[T]he implied certification rule is also a contractual default: claims for
payment are interpreted in accordance with the first default only if the parties have not provided
otherwise in the contract.”).

18. Holt & Klass, supra note 17, at 39; See Sandnes’ Sons, Inc. v. United States, 462 F.2d
1388, 1392 (Ct. Cl. 1972) (noting that government contracts are contracts of adhesion).
factually false claims and express false certifications.\footnote{See, e.g., Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 786 n.8 (4th Cir. 1999) (describing implied certification theory as “questionable”); see also infra Part III.A.} A second position enunciated by the Second Circuit in \textit{Mikes v. Straus} and later adopted by the Third, Sixth, and Tenth Circuits recognizes implied certification liability only when a contractor knowingly submits a claim and fails to disclose its violation of a material contractual, statutory, or regulatory provision that the government has expressly identified as a condition of payment. Courts refer to this position as the express condition-of-payment requirement.\footnote{See \textit{Mikes v. Straus}, 274 F.3d 687, 700 (2d Cir. 2001). Many statutes contain provisions that expressly condition payment on compliance. The Second Circuit, for example, has observed that § 1395y(a)(1)(A) of the Medicare statute expressly conditions the payment of claims on compliance with a number of directives, including one requiring that all care provided under the statute be “reasonable and necessary for the diagnosis or treatment of illness or injury.” \textit{Mikes}, 274 F.3d at 700; see also United States \textit{ex rel. Kappeman v. Compassionate Care Hospice of the Midwest, LLC}, No. CIV. 09-4039-KES, 2012 WL 602315, at *5 (D.S.D. Feb. 23, 2012) (denying in part defendant’s motion for summary judgment on grounds that similar provision of Medicare statute, § 1391(a)(1)(c), was a condition of payment). The Third Circuit has held that compliance with the Anti-Kickback Statute is an express condition of payment under Parts C and D of Medicare. See United States \textit{ex rel. Wilkins v. United Health Grp.}, 659 F.3d 295, 313 (3d Cir. 2011); accord United States \textit{ex rel. Compton v. Circle B Enters.}, No. 7:07-cv-32 (HL), 2010 WL 942293, at *10 (M.D. Ga. Mar. 11, 2010). Other courts have identified additional express conditions of payment. See United States \textit{ex rel. Sanchez-Smith v. AHS Tulsa Reg’l Med. Ctr.}, 754 F. Supp. 2d 1270, 1289–94 (N.D. Okla. 2010) (holding that “active treatment” regulations of Oklahoma’s Medicaid program expressly condition payment on compliance); United States \textit{ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.}, 238 F. Supp. 2d 258, 264 n.2 (D.D.C. 2002) (pointing out in dicta that 42 U.S.C. § 1395nn(g)(1) expressly conditions payment for health services on compliance with the Stark law, which prohibits physicians from referring patients to entities with which he or she has a financial relationship).} A third position, recently set forth by the First Circuit in \textit{United States \textit{ex rel. Hutcheson v. Blackstone Medical, Inc.}}, rejects the \textit{Mikes} requirement and imposes liability when a contractor knowingly submits a claim and fails to disclose its violation of any contractual, statutory, or regulatory provision material to the government’s decision to pay, regardless of whether the provision is an express condition of payment.\footnote{See \textit{United States \textit{ex rel. Hutcheson v. Blackstone Medical, Inc.}}, 647 F.3d 377, 388 (1st Cir. 2011), cert. denied, 132 S. Ct. 815 (2011).} A fourth position, adopted by the Ninth and Eleventh Circuits, recognizes the implied certification theory but does not take a clear position on the express condition-of-payment requirement.\footnote{See, e.g., McNutt \textit{ex rel. United States v. Haleyville Med. Supplies, Inc.}, 423 F.3d 1256, 1259 (11th Cir. 2005).}  

This Comment argues that the Supreme Court should resolve the circuit split by recognizing the implied certification theory and adopting the express condition-of-payment default rule set forth by the Second Circuit in \textit{Mikes}. The Court should recognize the implied certification theory because the plain language and structure of the False Claims Act support it; Congress intended the Act to target broadly fraud against the government; and the theory comports with the common-law treatment of fraud as inclusive of both affirmative
misrepresentations and certain omissions. At the same time, this Comment urges the Court to adopt the Mikes express condition-of-payment requirement as a limitation on implied certification liability that preserves the traditional distinction between fraudulent acts, which are targeted by the statute’s punitive remedial scheme, and routine contractual, statutory, and regulatory violations, which are not. In addition to respecting Congress’s desire to limit liability to acts of fraud, the Mikes rule has two clear advantages. First, it establishes a fair enforcement regime by providing advance notice of the conduct that will result in a punitive sanction. Second, it reduces the costs of the implied certification theory both by limiting the need for excessive contractor due diligence and the expense of litigating claims under the False Claims Act.

This Comment proceeds as follows. Part I outlines the provisions of the False Claims Act and explains the salient features that make it one of the most powerful antifraud statutes in the United States. Part II traces the history of the Act and outlines the development of the implied certification theory of liability. Part III describes the four-way split among the federal courts of appeals about the scope and extent of the theory. Part IV situates the eventual resolution of the circuit split in a discussion of contractual default rules and lays out the practical consequences of adopting one default rule over another. Finally, Part V recommends that the U.S. Supreme Court adopt the implied certification theory and the Mikes express condition-of-payment requirement.

I. THE CONTOURS OF THE FALSE CLAIMS ACT

A. Statutory Structure

The False Claims Act imposes civil liability on persons who engage in certain fraudulent practices in the course of their dealings with the U.S. government. The statute contains five sections: (1) section 3729 establishes liability for specified fraudulent acts; (2) section 3730 creates a civil cause of action for the Attorney General or a qui tam relator to enforce section 3729; (3) section 3731 sets forth the relevant procedural requirements for bringing a claim; (4) section 3732 establishes federal jurisdiction for actions brought under the False Claims Act; and (5) section 3733 outlines the requirements for civil investigative demands by the government.

Sections 3729(a)(1)(A)–(G) establish liability for seven fraudulent acts. Of these seven, the conduct prohibited by subsection (a)(1)(A) has produced

25. § 3729(a)(1)(A)–(G). Because the Act excludes tax-related claims as well as claims connected with public benefits, these subsections apply in practice almost exclusively to government contractors. See § 3729(b)(2)(B), (d).
the most litigation. Subsection (a)(1)(A) imposes liability on “any person” who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the government.” Most courts have read an additional materiality requirement into subsection (a)(1)(A), limiting liability to false claims that are material to the government’s decision to pay. Thus, in most jurisdictions, a person violates subsection (a)(1)(A) if he or she “(1) knowingly present[s] or cause[s] to be presented, (2) a false claim, (3) to the United States federal government, (4) knowing its falsity [scienter], (5) which [is] material, (6) seeking payment from the federal treasury.” Because a claim under the False Claims Act sounds in fraud, a complaint must plead each of these elements with particularity in accordance with Rule 9(b) of the Federal Rules of Civil Procedure.

Congress has laid out definitions for most of these elements. To establish scienter, the plaintiff need not show specific intent to defraud but must demonstrate that the contractor (1) possessed “actual knowledge of the information [that makes the claim false or fraudulent],” (2) acted “in deliberate ignorance of the truth or falsity of the information,” or (3) acted “in reckless disregard of the truth or falsity of the information.” The statute defines “claim” as “any request or demand, whether under a contract or otherwise, for money or property” that “is presented to an officer, employee, or agent of the United States” or “is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest.” Finally, the statute defines “material” to mean “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” Notably, the statute does not define the phrase “false or fraudulent.”

26. § 3729(a)(1)(A).
29. See United States ex rel. Elms v. Accenture LLP, 341 F. App’x 869, 872 (4th Cir. 2009); United States ex rel. Gross v. AIDS Research Alliance-Chicago, 415 F.3d 601, 604 (7th Cir. 2005); Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010). The Eleventh Circuit explained that requiring compliance with Rule 9(b) “makes it hard for many persons to bring a qui tam suit and guards against ‘guilt by association.’” United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1308 (11th Cir. 2002) (quoting United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla., 19 F.3d 562, 567 (11th Cir. 1994) (per curiam)).
31. § 3729(b)(1)(A).
32. § 3729(b)(2).
33. § 3729(b)(4). Although the word “material” appears only in subsection (a)(1)(B), many courts use the (b)(4) definition to interpret the judicially created materiality requirement imposed on (a)(1)(A) claims. There is, however, some disagreement between courts about the meaning of this definition. See United States ex rel. Longhi v. United States, 575 F.3d 458, 468–70 (5th Cir. 2009) (explaining different views of materiality before settling on the “natural tendency” test in part because Congress codified it in subsection (b)(4) by passing the Fraud Enforcement and Recovery Act of
B. Deterrent Effects

Three features of the False Claims Act make it one of the most powerful antifraud statutes in the United States. First, in contrast with a common-law fraud claim, the False Claims Act contains no reliance or injury requirements. “[T]he statute attaches liability, not to the underlying fraudulent activity or to the government’s wrongful payment, but to the ‘claim for payment.’” Thus, a contractor is liable under the statute for the submission of a “false or fraudulent claim,” regardless of whether the government relied on the misrepresentation that accompanied the claim or even paid the claim at all. In the event that the government does not pay the false claim, the contractor “remains liable for the Act’s civil penalty.” The Fifth Circuit explained this oddity by noting that the False Claims Act does more than respond to fraud after it occurs. Rather, it "protects the Treasury from monetary injury.”

Second, the False Claims Act not only protects the government from fraud and compensates it for losses caused by fraud, but also exacts a penalty from violators in an effort to punish fraudulent conduct. The Act provides that a party who has committed any of the seven acts of fraud enumerated in section 3729 “is 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.” In practice, damages under the False Claims Act vastly exceed those available under other civil actions. For example, when the government brought a case against a defense contractor in 2010, the jury awarded the government $78 on its breach of contract claim and more than $6 million for violations of the False Claims Act. Thus, the Act provides opportunities for substantially larger recoveries than plaintiffs would otherwise have, for example, under a breach of contract


34. See *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001); see also *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (“Taking the phrase ‘false or fraudulent claim’ in its entirety, though, is more complicated, because the phrase has become a term of art.”).


38. *See Harrison*, 176 F.3d at 785 n.7 (“In fact, there is no requirement that the government have suffered damages as a result of the fraud.”).

39. *Grubbs*, 565 F.3d at 189; *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (“No damages need be shown in order to recover the penalty.”) (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 n.5 (1956)).

40. *Grubbs*, 565 F.3d at 189.


action. The Supreme Court has held that damages under the Act are “essentially punitive in nature.”43

Third, the False Claims Act is one of only four remaining federal civil statutes in the United States that provides for enforcement both by the government and a private citizen.44 Section 3730(a) authorizes the Attorney General to bring a civil action against a person who has violated or is violating section 3729. Section 3730(b) provides that “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government.”45 These *qui tam* actions under the Act, though filed by private citizens, are “brought in the name of the Government.”46 Once a private relator files a *qui tam* suit, the government has sixty days either to intervene and take over the case or to decline to take the case and allow the relator to bring it alone.47 If the government intervenes, the relator receives between 15 and 25 percent of the recovery or settlement amount.48 If the government declines to proceed with the action, the relator receives between 25 and 30 percent of the recovery or settlement amount.49 Between 1986 and 2011, private citizens filed more than 7800 False Claims Act suits.50 Nearly 70 percent of all False Claims Act recoveries during this period resulted from suits initiated by private citizens.51

II.

THE EMERGENCE OF THE IMPLIED CERTIFICATION THEORY

A. The Evolution of the False Claims Act

The False Claims Act dates to the Civil War era, when Congress passed the Informer’s Act to punish and deter “the massive frauds perpetrated by large . . . contractors” against the War Department.52 With Abraham Lincoln’s

44. *Id.* at 768 n.1.
46. *Id.*
47. § 3730(b)(4). It is worth pointing out that the government intervenes in relatively few *qui tam* cases. For every ten suits filed by private citizens, the government intervenes in two. See Delery, *supra* note 8.
48. § 3730(d)(1).
49. § 3730(d)(2).
presidential imprimatur, it became known as “Lincoln’s Law.” The Act allowed private “informers” to bring *qui tam* actions on behalf of the government against government contractors and collect as a bounty 50 percent of the total recovery.

During the early part of the twentieth century, the government grew increasingly hostile to *qui tam* actions on the view that they interfered with enforcement discretion and had the power to undermine the government’s own antifraud cases. In response to this concern, Congress amended the Act in 1943 to rein in *qui tam* actions. The amendment created a government-knowledge bar, which prevented informers from filing suits based on information that the federal government already knew, even if the same informers originally provided that information to the government. The amendment also decreased the payout to informers and allowed the government to intervene and take control of an informant’s case. These changes made *qui tam* actions less lucrative, and as a result, the number of such suits filed declined precipitously for the next four decades.

This period of quiescence ended when Congress passed the False Claims Amendments Act of 1986 in response to allegations of fraud against several of the largest defense contractors in the country. Congress explained that the amendments precluded “restrictive interpretations of the act’s liability standard, burden of proof, *qui tam* jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud.” These amendments provided three major changes that strengthened the Act. First, the amendments exempted from the government-knowledge bar relators who were the original source of information about a false claim. Second, they allowed private relators to remain parties to False Claims Act cases and collect bounties even after government intervention. Third, they instituted a minimum civil penalty of $5000 and replaced double damages with treble damages.

Because of these changes, the False Claims Act is now the government’s “primary litigation tool for recovering losses sustained as a result of fraud.” It has also become a significant profit center for the Treasury. Since Congress

54. Meador & Warren, supra note 52, at 459.
55. Id.
56. Id. at 460 n.43
57. Id. at 459–60.
59. Meador and Warren, supra note 52, at 460.
60. Id.
61. Id.
62. United States *ex rel.* Marcy v. Rowan Cos., 520 F.3d 384, 388 (5th Cir. 2008); see also Delery, supra note 8 (“It is abundantly clear that, twenty-five years after this statute was significantly amended, it remains the government’s most potent civil weapon in addressing fraud against the taxpayers.”).
reinvigorated the False Claims Act in 1986, the government has recovered more than $33 billion in settlements and judgments.\textsuperscript{63} Use of the Act has escalated dramatically over the past three years. Between January 2009 and January 2012 alone, the government recovered nearly $9 billion in False Claims Act judgments and settlements, which represents 28 percent of all recoveries since the 1986 amendments.\textsuperscript{64} Aggressive use of the False Claims Act likely will continue to generate significant sums for the Treasury in the coming years. The Obama Administration has promised “aggressive civil enforcement action aimed at fraud, including increased use of the False Claims Act.”\textsuperscript{65}

False Claims Act litigation has also spread to new industries over the past two decades. While fraud by defense contractors motivated the enactment of the 1986 amendments, attention quickly shifted during the 1990s to the health care industry.\textsuperscript{66} In 1987, the Department of Health and Human Services was the client agency in only 12 percent of \textit{qui tam} suits under the False Claims Act.\textsuperscript{67} By 1998, that number had swelled to 61 percent of all \textit{qui tam} actions.\textsuperscript{68} In June 2012, the Justice Department announced that approximately $7.4 billion of the $11 billion recovered under the Act since 2009 came from cases involving the health care industry.\textsuperscript{69} To a far lesser extent, the government and relators have used the False Claims Act to target fraud in the for-profit higher education sector.\textsuperscript{70} Most recently, the government and \textit{qui tam} relators have used the False Claims Act to root out mortgage fraud. In the wake of the 2008 collapse of the residential mortgage market, the Department of Justice has used the False Claims Act to punish mortgage lenders for allegedly misrepresenting portfolio mortgages in certifications made to the Department of Housing and Urban Development.\textsuperscript{71}

\begin{thebibliography}{99}
\footnotesize
\item 63. See Delery, \textit{supra} note 8.
\item 64. See Press Release, Dep’t of Justice, Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986 (Jan. 31, 2012), available at \url{http://www.justice.gov/opa/pr/2012/January/12-ag-142.html}.
\item 65. Tony West, Assistant Attorney Gen., Dep’t of Justice, Remarks at the American Bar Association Eighth Annual National Institute on the Civil False Claims Act and \textit{Qui Tam} Enforcement (June 3, 2010), available at \url{http://www.scribd.com/doc/32485437/Tony-West-Aba-Fca-qui-Tam-6-3-10}.
\item 66. See Salcido, \textit{supra} note 5.
\item 68. \textit{Id}.
\item 69. Delery, \textit{supra} note 8.
\item 70. See, e.g., Press Release, Dep’t of Justice, Government Files Complaint Against Dallas Area-Based For-Profit Chain of Schools for False Claims Act Violations (Aug. 30, 2012), available at \url{http://www.justice.gov/opa/pr/2012/August/12-civ-1068.html}.
\item 71. See Manhattan U.S. Attorney Sues Deutsche Bank and Subsidiary Mortgageit for Years of Reckless Lending Practices, \textit{supra} note 7; see also Press Release, Dep’t of Justice, National City Mortgage to Pay $4.6 Million to Settle False Claims Allegations Involving Federally Insured Mortgages (May 22, 2008), available at \url{http://www.justice.gov/opa/pr/2008/May/08-civ-457.html}; Press Release, Dep’t of Justice, Manhattan U.S. Attorney Sues Allied Home Mortgage, CEO, and
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B. New Theories of Liability

As the False Claims Act has evolved, so too have the theories on which courts predicate liability under the Act. For much of the early history of the Act, courts considered claims for payment to be false or fraudulent only if they were “factually false.” A factually false claim is one that includes “an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.” For example, in *Hill v. Morehouse Medical Associates*, the Eleventh Circuit held that a billing professional stated a claim against her former employer, a medical services provider, by alleging that the provider intentionally submitted Medicare reimbursement requests that contained incorrect billing and diagnosis codes as part of a scheme to receive more Medicare funds than it was entitled to receive. In another context, a court held that the government stated a claim against a defense supplier by alleging that the supplier had provided the General Services Administration with unauthorized substitute tools that failed to conform to the invoice descriptions of the tools ordered. In both cases, the invoices sent to the government contained on their faces false statements or descriptions.

This narrow construction eventually gave way to a broader view that the Act prohibits “all fraudulent attempts to cause the Government to pay out sums of money” and that a false claim is therefore any request “aimed at extracting money the government otherwise would not have paid.” Using this rationale, courts began recognizing what are now known as “legally false” claims. These claims do not contain factual misstatements about goods or services provided (or not provided) to the government but rather are “predicated upon a false representation of compliance with a federal statute or regulation or prescribed contractual term.” Courts have developed two theories of liability for legally false claims: express certification and implied certification. The express certification theory holds that a person violates subsection (a)(1)(A) when he or she submits a claim for payment that contains a false affirmative declaration of compliance with the government’s decision to pay. By contrast, the implied
certification theory does not require an affirmative declaration of compliance to find a violation. Instead the “the act of submitting a claim for reimbursement itself implies compliance” with contractual provisions, statutes, and regulations.80

The first court to recognize the implied certification theory was the U.S. Court of Federal Claims in the 1994 case Ab-Tech Construction, Inc. v. United States.81 Ab-Tech had secured a construction contract through the Small Business Administration’s program for minority-owned businesses.82 The company sought equitable adjustment of its contract in the Court of Federal Claims on the basis that it was entitled to a higher price for its work.83 Shortly thereafter, Ab-Tech’s president was indicted and convicted of making false statements to the government about the existence of an indemnification agreement between Ab-Tech and a non-minority-owned contractor.84 The government contended that it never would have awarded the contract to Ab-Tech had it known about the indemnification agreement, and asserted counterclaims under the False Claims Act.85

The Court of Federal Claims held that progress payment vouchers submitted by Ab-Tech to the government constituted false claims because they “represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the [minority contractor] program.”86 The court concluded that “the Government was duped by Ab-Tech’s active concealment of a fact vital to the integrity of that program. The withholding of such information—information critical to the decision to pay—is the essence of

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80. Mikes, 274 F.3d at 699.
82. Id. at 431–32.
83. Id. at 430–31.
84. Id. at 431.
85. Id. at 433–36.
86. Id. at 434.
a false claim.”

The court therefore entered judgment for the government, and the Federal Circuit upheld the decision in an unpublished table opinion.

III.
THE IMPLIED CERTIFICATION CIRCUIT SPLIT

Since Ab-Tech, federal courts of appeals have reached dramatically different decisions about whether to recognize the implied certification theory and its scope. Each circuit has adopted a variant of four positions. Under the first position, the implied certification theory is not yet recognized—but has not been foreclosed—as a basis for liability under the False Claims Act. The Fourth, Fifth, Seventh, and Eighth Circuits have adopted this position. The second position, which the Second Circuit first articulated in Mikes, holds that submitting a claim for payment impliedly certifies compliance with material contract provisions, regulations, and statutes on which the government has expressly conditioned payment (the express condition-of-payment requirement). In addition to the Second Circuit, the Third, Sixth, and Tenth Circuits have adopted this position. The third position holds that the submission of a claim for payment creates an implied certification of compliance with all contractual provisions, statutes, and regulations material to the government’s decision to pay, regardless of whether the government has expressly conditioned payment on compliance with any of the provisions. The First Circuit expressed this position in its purest form in Blackstone, and the D.C. Circuit and Federal Circuit have likewise adopted it. The fourth position, which the Ninth and Eleventh Circuits have embraced, recognizes the implied certification theory but does not hold a particular view of the express condition-of-payment issue.

87. Id.
TABLE 1: Positions of the federal courts of appeals on the implied certification theory

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A. Position I—Implied Certification Theory Not Recognized

The Fourth, Fifth, Seventh, and Eighth Circuits have not yet recognized the implied certification theory. While the Fourth Circuit has voiced skepticism about the theory in dicta and in unpublished opinions, it has neither accepted nor rejected it. The Fifth Circuit has on at least four occasions declined to decide whether implied certification is a cognizable theory of liability under the False Claims Act. The Seventh Circuit has discussed the requirements for claims alleging false certification of compliance with statutes and regulations but in recent cases has explained that a claim must allege express certification. Finally, the Eighth Circuit Court of Appeals has not addressed

89. See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 n.8 (4th Cir. 1999) (calling implied certification “questionable” in dicta but refusing to accept or reject the theory); United States ex rel. Herrera v. Danka Office Imaging Co., 91 F. App’x 862, 864 n.3 (4th Cir. 2004) (“[W]e need not decide whether claims for implied certification are viable under the False Claims Act.”); United States ex rel. Godfrey v. KBR, Inc., 360 F. App’x 407, 412 (4th Cir. 2010) (upholding the dismissal of a relator’s claim under the implied certification theory predicated on the breach of a contract provision because “there were no allegations that any contract required certification of compliance with contract terms”).


91. See United States ex rel. Yannacopoulos v. General Dynamics, 652 F.3d 818, 824 n.4 (7th Cir. 2011) (holding that a defendant’s violation of a statute would not support a claim under the False Claims Act if the defendant had not certified compliance); United States ex rel. Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005) (“[F]raud requires more than breach of promise: fraud entails making a false representation, such as a statement that the speaker will do something it plans not to do.”); see also United States ex rel. Kennedy v. Aventis Pharm., 610 F. Supp. 2d 938, 946 (N.D. Ill.)
the implied certification theory. However, at least one district court in the circuit has adopted the theory.

**B. Position II—Implied Certification Recognized with Express Condition-of-Payment Requirement**

The Second, Third, Sixth, and Tenth Circuits have recognized the implied certification theory but have limited it with an express condition-of-payment requirement. Under this view, submitting a claim for payment impliedly certifies compliance with all contractual provisions, statutes, and regulations material to the government’s decision to pay and on which the government has expressly conditioned payment. A person is liable under this rule if he or she 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. The best articulation of this narrow interpretation of the

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94. Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001); see also United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94, 114 (2d Cir. 2010) (“An implied false certification takes place where a statute expressly conditions payment on compliance with a given statute or regulation, and the contractor, while failing to comply with the statute or regulation (and while knowing that compliance is required), submits a claim for payment.”), rev’d on other grounds, 131 S. Ct. 1885 (2011). While some courts have pointed out that the express condition-of-payment requirement may be dispositive evidence of materiality, see United States v. Sci. Applications Int’l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010), the Second Circuit in *Mikes* explained that the two requirements are related but distinct. The court explained that the materiality requirement “holds that only a subset of admittedly false claims is subject to False Claims Act liability,” while the express condition-of-payment requirement tests the falsity of a claim based on regulatory noncompliance. See *Mikes*, 274 F.3d at 697; see also discussion infra Part V.

95. “[A] contractor could avoid [False Claims Act] liability by expressly informing the Government of any material breach or violation when requesting payment . . . .” Holt & Klass, supra note 18; see also United States ex rel. Burlbaw v. Orenduff, 548 F.3d 931, 959 (10th Cir. 2008); United States ex rel. Costner v. United States, 317 F.3d 883, 888 (8th Cir. 2003) (“A contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required by the Act.”); United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 327 (9th Cir. 1995) (“[I]f the district court correctly found that the only reasonable conclusion a jury could draw from the evidence was that MDHC and the Army had so completely cooperated and shared all information during the testing that MDHC did not ‘knowingly’ submit false claims, then we must affirm . . . .”); Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) (“The government knew of all the deficiencies identified by Wang, and discussed them with FMC. The fact that the government knew of FMC’s mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort.”).
implied certification theory appears in *Mikes*, a 2001 case in the Second Circuit.

In that case, the relator, Mikes, filed a *qui tam* suit against her former partner-physicians alleging that they sought Medicare reimbursement for pulmonary function tests that did not meet American Thoracic Society guidelines and therefore, according to Mikes, were not “reasonable and necessary.”96 Because the Medicare statute limits payment to “reasonable and necessary” services, Mikes contended that the defendants’ requests for payment from Medicare were implied false certifications of compliance with the Medicare statute.97 The Second Circuit recognized a limited version of the implied certification theory, holding that “[l]iability 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.”98

The court urged litigants not to view the theory “expansively and out of context.”99 It disagreed with the Court of Federal Claims’ broad opinion in *Ab-Tech*, noting that “the False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment—and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act’s reach.”100 Instead, the Second Circuit concluded that the implied certification theory “is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid.”101 Applying this express condition-of-payment requirement, the Second Circuit rejected one of the relator’s claims because the cited Medicare regulation “[did] not expressly condition payment on compliance with its terms.”102

Three other circuit courts have adopted the express condition-of-payment requirement. The Third Circuit first recognized the implied certification theory in the 2011 case *Wilkins*, holding that “to plead a claim upon which relief could be granted under a false certification theory, either express or implied, a plaintiff must show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government.”103 In that case, the court rejected the relator’s attempt to predicate liability on a violation of Medicare marketing regulations because they did not condition payment on

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96. *Mikes*, 274 F.3d at 698.
97. *Id.* at 699–701.
98. *Id.* at 700 (emphasis added).
99. *Id.* at 699.
100. *Id.*
101. *Id.* at 700.
102. *Id.* at 702. The court held that another provision of the statute, § 1395(a)(1)(A), conditioned payment on compliance but that the relator had not made a showing of a violation.
compliance.104 The Sixth Circuit in Chesbrough likewise imposed on the implied certification theory an express condition-of-payment requirement.105 Like the Third Circuit, the Sixth Circuit rejected the relator’s attempt to proceed under the implied certification theory because “Medicare does not require compliance with an industry standard as a prerequisite to payment.”106

The Tenth Circuit has also limited the certification theory of liability by requiring an express condition of payment.107 In Conner, the relator alleged liability under the express certification theory based on the violation of “various regulations and statutes establishing Medicare conditions of participation.”108 The court focused its inquiry on whether “the underlying contracts, statutes, or regulations themselves . . . make compliance a prerequisite to government payment.”109 It held that the False Claims Act “cannot support . . . expansive liability in the absence of an underlying statute or regulation that conditions payment on compliance with the certification.”110 The court rejected the relator’s claims because the Medicare regulations giving rise to liability “did not condition payment on the certification of compliance within the annual cost report.”111 Similarly, in 2009, the Tenth Circuit affirmed a district court order explicitly requiring an express condition-of-payment clause.112

While none of these courts of appeals has heard a case where the underlying statute or regulation expressly conditioned payment on compliance (and where the defendant violated the statute), lower courts in these circuits have heard such cases. For instance, in United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, the Anti-Discrimination Center of Metro New York (ADC) brought a claim under the False Claims Act against Westchester County. ADC alleged that the County failed to analyze the impact of race discrimination on housing opportunities, violating its obligations as a Housing and Urban Development grant recipient.113 ADC alleged further that the County made express false certifications by annually pledging that it would take action based on an

104. Id. at 309–10.
105. 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 [False Claims Act]. Rather, noncompliance constitutes actionable fraud only when compliance is a prerequisite to obtaining payment”).
106. Id.
108. Id. at 1215–16.
109. Id. at 1218.
110. Id.
111. Id.
analysis that it had never conducted and by failing to “affirmatively further fair housing” as required by the statute that authorized the disbursement of the grants.\footnote{114. Id. at 565.}

In addition to recognizing an express certification claim, the court concluded that “it is easy to find that federal law conditioned payment of the housing and community development funds on compliance with the duty to [affirmatively further fair housing] and that each time the County submitted a request for payment of those funds it made an impliedly false certification.”\footnote{115. Id. at 566.} On that basis, the court granted ADC’s motion for partial summary judgment on the allegation that the County made a false or fraudulent claim to the United States government.\footnote{116. Id. at 570–71.}

C. Position III—Implied Certification Theory Recognized Without an Express Condition-of-Payment Requirement

The First, D.C., and Federal Circuits attach liability under the implied certification theory when a contractor submits a claim for payment and fails to disclose any knowing breach of a contractual, statutory, or regulatory provision material to the government’s decision to pay.\footnote{117. See, e.g., United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 386–88 (1st Cir. 2011).} The Federal Circuit was the first circuit to adopt this position in the landmark implied certification case Ab-Tech. There, the court held that a contractor’s submission of progress payment vouchers to the government impliedly certified its compliance with regulations governing a Housing and Urban Development program that gave preferential treatment to minority contractors.\footnote{118. See Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994), aff’d mem., 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).}

In 2011, the First Circuit in Blackstone, although not relying expressly on Ab-Tech, articulated these same principles.\footnote{119. Id. at 380–81.} In Blackstone, Hutcheson, a former regional manager at Blackstone Medical, brought a \textit{qui tam} action alleging that her former employer paid kickbacks to hospitals and doctors in exchange for pledges to use the company’s products in spinal surgeries on Medicare and Medicaid patients.\footnote{120. Id. at 380–81.} Hutcheson argued that Blackstone’s kickbacks violated the Anti-Kickback Statute\footnote{121. 42 U.S.C. § 1320a-7b (2006).} and caused hospitals and doctors to submit false or fraudulent claims because compliance with the Anti-Kickback Statute was “a condition of receiving payment from federally-funded healthcare programs, including Medicare, Medicaid, and TRICARE.”\footnote{122. Blackstone, 647 F.3d at 381.}
The district court granted Blackstone’s motion to dismiss the claims related to the hospital’s alleged submission of false claims in part because the government did not expressly condition payments to hospitals under Medicare, Medicaid, and TRICARE on compliance with the Anti-Kickback Statute. The First Circuit reversed, holding that the language of the False Claims Act did not support an express condition-of-payment requirement and that the implied certification theory reached any undisclosed violation of a contractual, statutory, or regulatory provision material to the government’s decision to pay the defendant.

The court began its opinion by declining to adopt the “[j]udicially created categories” of express and implied certification and asserted that “these categories may do more to obscure than clarify the issues . . . .” It then rejected the express condition-of-payment requirement imposed on the implied certification theory by the Second Circuit in Mikes for two reasons. First, it concluded that the literal language of the Mikes opinion arbitrarily limited the implied certification theory to statutes and regulations and pointed out that other courts, including the Tenth Circuit in Conner, had applied the theory to contract breaches. Second, it concluded that the language of the False Claims Act wholly failed to support the express condition-of-payment requirement that the Second Circuit established in Mikes.

The First Circuit dismissed the concern of the Second Circuit and others that the express condition-of-payment requirement is necessary to prevent the excessively broad application of the implied certification theory. The court argued that “other means exist to cabin the breadth of the phrase ‘false or fraudulent’ as used in the [False Claims Act].” In particular, the court pointed out that “liability cannot arise under the [Act] unless a defendant acted knowingly and the claim’s defect is material.”

The D.C. Circuit has taken several different positions on implied certification over the past ten years. As late as 2000, the D.C. Circuit in United States ex rel. Siewick v. Jamieson Science and Engineering, Inc. insisted that “a false certification of compliance with a statute or regulation cannot serve as the basis for a qui tam action under the [False Claims Act] unless payment is conditioned on that certification.” But recently, the court has adopted a more

123. Id. at 383.
124. Id. at 388.
125. Id. at 385–86; cf. New York v. Amgen, 652 F.3d 103, 109–10 (1st Cir. 2011) (refusing to use the certification framework in the context of state false claims statutes).
126. Blackstone, 647 F.3d at 387.
127. Id. at 388.
128. Id.
129. Id.
130. Id.
131. 214 F.3d 1372, 1376 (D.C. Cir. 2000). In United States v. Science Applications International Corp., the court insisted that its holding in Siewick did not squarely address the express
expansive view of the theory. In 2002, the court departed from Siewick and cited Ab-Tech’s more liberal standard with approval. 132 Today, the D.C. Circuit appears to agree firmly with the approach of the Federal and First Circuits. In the recent case SAIC II, the court unambiguously held that to proceed under the implied certification theory in the context of a breach of contract action, the plaintiff need only show “that the contractor withheld information about its noncompliance with material contractual requirements.” 133

In that case, Science Applications International Corporation (SAIC) contracted with the Nuclear Regulatory Commission “to provide technical assistance and expert analysis to support the agency’s potential rulemaking” about the disposal and recycling of radioactive substances. 134 The government brought breach of contract and False Claims Act claims against SAIC after it discovered that the company had violated conflict-of-interest provisions in at least two of its contracts. The district court allowed the government to proceed on an implied certification theory, rejecting SAIC’s argument that compliance with the contract provisions must be an express condition of payment to establish liability. 135 While the jury awarded the government just $78 on its breach of contract claim, treble damages and penalties under the False Claims Act exceeded $6 million. 136 The D.C. Circuit affirmed, 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.” 137

D. Position IV—De Facto Recognition of the Implied Certification Theory Without Adoption of the Mikes or Blackstone View

The Ninth and Eleventh Circuits have recognized the implied certification theory but have not taken a position on the express condition-of-payment requirement. The Ninth Circuit, in particular, has taken a number of positions on this issue. 138 In 2006, the court appeared to disavow the Mikes express condition-of-payment requirement in United States ex rel. Hendow v.
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University of Phoenix. But in the 2010 case *Ebeid ex rel. United States v. Lungwitz*, the court made clear that it had not previously decided “whether to adopt the Second Circuit’s requirement” and would not do so in the case at bar.

Along similar lines, the Eleventh Circuit has recognized the implied certification theory without using the label “implied certification.” In *McNutt ex rel. United States v. Haleyville Medical Supplies, Inc.*, the court held that “[w]hen a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the government does not owe, that violator is liable, under the Act, for its submission of those false claims.” The court has not, however, ruled on the express condition-of-payment requirement.

**IV. DEFAULT RULES AND THE RISING STAKES OF THE CIRCUIT SPLIT**

At stake when the U.S. Supreme Court eventually resolves this circuit split is the default rule governing the extent to which, if at all, a contractor’s claim for payment contains implied certifications of compliance with contract provisions, statutes, or regulations. Any rule that the Supreme Court adopts will be a contractual default, because the contractor and the government can contract around implied certifications, just as they have the power to contract around any default terms in an agreement. As Professors Michael Holt and Gregory Klass have explained, “claims for payment are interpreted in accordance with the first default only if the parties have not provided otherwise in their contract.”

Even so, the Supreme Court should be interested in developing sensible contractual default rules because they are often “sticky,” that is, they frequently remain operative even though “parties who would or should prefer to say something other than the default fail to opt out of it.” The default rule providing that a claim for payment signifies compliance may be particularly “sticky” because it runs contrary to general contract principles. Moreover, a contractor might not opt out of the compliance default. At least two factors explain why: contractor competence and the nature of government contracts. First, unsophisticated contractors may not understand that the submission of a

139. *Hendow*, 461 F.3d at 1177 (“An explicit statement, however, is not necessary to make a statutory requirement a condition of payment, and we have never held as much.”).
140. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 n.3 (9th Cir. 2010).
142. 423 F.3d 1256, 1259 (11th Cir. 2005).
143. *See Holt & Klass, supra* note 18, at 3.
144. *Id.*
145. *Id.* at 39.
146. *Id.*
claim for payment represents an implied certification of compliance with every conceivable statute or regulation. 147 Second, government contractors may not be able to “contract around” the implied certification default rules because many agreements between contractors and the federal government are contracts of adhesion. 148 The need for thoughtful default rules is especially acute in the context of the False Claims Act because of the statute’s *qui tam* enforcement mechanism and its punitive remedial scheme.

Indeed, because of these features of the Act, the creation of an effective default rule is not simply an academic exercise. Rather, it has profound implications for present and future False Claims Act litigation across the country. The difference between the *Mikes* and *Blackstone* positions is particularly stark. For example, under the *Mikes* express condition-of-payment requirement, a Medicare contractor would be liable for submitting a claim for payment while knowingly violating a Medicare regulation *only if* the applicable Medicare regulation expressly stated that the government would withhold payment in the event of noncompliance. By contrast, under the *Blackstone* rule, the same Medicare contractor would be liable for submitting a false claim for payment while knowingly violating the provision *regardless* of whether the Medicare regulation indicated the consequences of noncompliance.

In three recent implied certification cases, the outcome of a dispositive motion turned on whether or not the circuit had adopted the *Mikes* default or the *Blackstone* default. One district court pointedly acknowledged as much in its opinion. 149 Plaintiffs in two of the three cases sought more than one hundred million dollars in treble damages and statutory penalties. 150 In the third, tens of millions of dollars were at risk. 151

In *United States v. Kellogg Brown & Root Services (KBR)*, for instance, the government brought a False Claims Act suit seeking more than $100 million against defense contractor KBR, alleging that the company withheld information about its violation of a material contract provision. 152 KBR had entered into a contract with the government to provide logistical services in

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147. *Id.* (“The general law of contracts does not interpret a claim for payment as representing material compliance. Unsophisticated government contractors are therefore less likely to know what they are saying by asking for payment.”); see also Richard Doan, *The False Claims Act and the Eroding Scienter in Healthcare Fraud Litigation*, 20 ANNALS HEALTH L. 49 (2011) (highlighting the risk of False Claims Act exposure to unsophisticated medical providers who participate in the federal Medicare and Medicaid programs).


152. 800 F. Supp. 2d at 147.
support of global military operations, including those in Iraq. The government alleged that KBR billed the government for the services of private security subcontractors even though the contract explicitly disallowed the use of private security subcontractors. KBR moved to dismiss on the grounds that compliance with the contract term prohibiting reimbursement was not an express condition of payment.

The U.S. District Court for the District of Columbia noted that the outcome depended on the choice of *Mikes* or *Blackstone*. Following the D.C. Circuit’s precedent in *SAIC II*, the court held that, contrary to the *Mikes* rule, the government “need only show that ‘the contractor withheld information about its noncompliance with material contractual requirements.’” It concluded that the government had adduced sufficient evidence that KBR had violated a provision of its contract and had not disclosed the violation. The court then analyzed the factual sufficiency of the complaint’s allegations of scienter and materiality and, finding that the complaint met the pleading requirements, denied KBR’s motion to dismiss. Importantly, the court explained that KBR likely would have prevailed under the *Mikes* default because “[n]othing in the contractual or regulatory provisions cited by the government expressly conditions payment of [the KBR contract] claims on compliance with those provisions.” But it ultimately found this argument unpersuasive given that “the Court of Appeals for the D.C. Circuit [has] outlined a different standard to govern implied certification cases like this one,” a reference to the *Blackstone* default.

Similarly, in a second case before the U.S. District Court for the District of Columbia in 2011, *United States v. Honeywell International*, the government brought an action under the False Claims Act against conglomerate Honeywell International for causing a downstream manufacturer to breach a provision of its contract with the government. Honeywell sold fiber panels made from the synthetic fiber Zylon to Armor Holdings for use in the manufacture of bulletproof vests. In turn, Armor Holdings sold bulletproof vests, complete with a five-year manufacturer’s warranty, to federal and state agencies through the Bullet Proof Vest Grant Partnership Act Program at a total cost of $20

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153. *Id.*
154. *Id.*
155. *Id.* at 156.
156. *Id.* at 158 (quoting United States v. Sci. Applications Int’l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010)).
157. *Id.*
158. *Id.* at 158–60.
159. *Id.* at 157.
160. *Id.*
162. *Id.* at 16.
million to the federal government.\textsuperscript{163} After tests revealed that Zylon degradation diminished the vests’ effectiveness earlier than the end of the five-year warranty period, the government began investigating Honeywell and Armor Holdings.\textsuperscript{164} The government settled its investigation against Armor Holdings for approximately $30 million.\textsuperscript{165}

It brought an action under the False Claims Act against Honeywell, alleging that the company knew the Zylon it sold would deteriorate faster than Honeywell had initially anticipated and that Honeywell withheld this information from Armor Holdings.\textsuperscript{166} Honeywell moved to dismiss the complaint on the ground that it had not made a “false or fraudulent claim for payment” to the federal government because payment was not conditioned on compliance with the terms of warranty.\textsuperscript{167}

The U.S. District Court for the District of Columbia held that the government could proceed under an implied certification theory. First, the court noted that the government had properly alleged that Honeywell’s knowing concealment of information about the performance of Zylon resulted in Armor Holdings’ breach of the contract provision containing the five-year warranty on bulletproof vests sold to the government.\textsuperscript{168} Next, because the D.C. Circuit had rejected the express condition-of-payment requirement and because the plaintiff had established a false claim, the court proceeded to an analysis of scienter and materiality, on which liability would turn.\textsuperscript{169} In considering these two factors, the court held that the claim could not be dismissed for lack of scienter in part because the plaintiff alleged that Honeywell “possessed a wealth of scientific data showing that [the Zylon] degraded quickly over time in hot and humid environmental conditions.”\textsuperscript{170} In its materiality analysis, the court concluded that even though the contract did not expressly condition payment upon compliance with the terms of the warranty, the record demonstrated that Honeywell “understood payment to be conditioned upon compliance with these requirements.”\textsuperscript{171} The court held that the complaint’s allegations were “sufficient to state an implied certification claim with respect to a contractual condition” and denied Honeywell’s motion to dismiss.\textsuperscript{172} Had the case been decided in a jurisdiction that had adopted the\textit{ Mikes} default, however,
Honeywell would have been liable only if the contract between Armor Holdings and the government had expressly conditioned payment on Armor Holdings’ fulfillment of the warranty.

The Tenth Circuit also confronted the certification theory in United States ex rel. Conner v. Salina Regional Health Center, Inc. There, an ophthalmologist filed a False Claims Act suit seeking more than $100 million from the hospital where he formerly worked. The relator alleged that the hospital submitted claims for payment to federal health care programs, including Medicare and Medicaid, while it knowingly violated conditions of participation in those programs. He attempted to establish a False Claims Act violation for a number of relatively minor infractions, such as the provision of damaged surgical instruments, “the facility’s failure to supply dust-free surgical gloves for use when and as medically necessary,” and “the presence of airborne debris in operating rooms.” Other complaints included staffing shortages in the surgery department, and one instance in which “[t]here was lint on the surgical field.” The relator also asserted claims based on violations of the Emergency Medical Treatment and Active Labor Act, which requires that emergency rooms stabilize patients regardless of their ability to pay, as well as Title VII of the Civil Rights Act of 1964, which requires hospitals to provide language-interpretation services for patients.

The U.S. District Court for the District of Kansas rejected the plaintiff’s claims on the ground that none of these statutes expressly conditioned payment on compliance. The Tenth Circuit affirmed, recognizing that “Conner fundamentally contends that any violation by [the hospital] to comply with any underlying Medicare statute or regulation during the provision of any Medicare-reimbursable service renders this certification false, and the resulting payments fraudulent.” Had the Tenth Circuit not applied the express condition-of-payment requirement, Conner may well have prevailed on his claim, so long as he could show that a violation of one of the statutes was material to the government’s decision to pay.

173. United States ex rel. Conner v. Salina Reg’l Health Ctr., 459 F. Supp. 2d 1083–84 (D. Kan. 2006); United States ex rel. Conner v. Salina Reg’l Health Ctr., 543 F.3d 1211, 1219 (10th Cir. 2008). The relator claimed to proceed solely under a theory of express false certification, but the certification was a boilerplate pledge to comply with all relevant regulations. In essence, the relator’s argument was that any material violation of a Medicare statute or regulation triggered False Claims Act liability. Thus, while an express certification case, Conner shares many similarities with most implied certification cases.


176. Id. at 16.

177. Id. at 9–11.


Each of the these high-stakes cases turned on whether the court applied the Mikes express condition-of-payment requirement or embraced the broader view that liability attaches to any violation of a contractual, statutory, or regulatory provision, regardless of whether the government has expressly conditioned payment of the claim on compliance. The U.S. District Court for the District of Columbia all but called the issue outcome determinative when it declared that KBR “would likely prevail” under the Second Circuit’s standard, but not the D.C. Circuit’s, which “unanimously rejected the ‘express conditioning’ requirement set out in the Second Circuit cases.”\footnote{United States v. Kellogg Brown & Root Servs., 800 F. Supp. 2d 143, 157–58 (D.D.C. 2011).} To establish consistency in the case law and to prevent disparate outcomes across circuits, the Supreme Court should resolve this issue.

V.
THE CASE FOR THE IMPLIED CERTIFICATION THEORY AND THE MIKES DEFAULT

The Supreme Court should resolve the circuit split by recognizing the implied certification theory and by adopting the Mikes default rule, which limits liability under the theory to cases where the defendant has failed to disclose its violation of a contractual, statutory, or regulatory provision on which the government has expressly conditioned payment. Recognizing the implied certification theory honors the plain language and structure of the False Claims Act, Congress’s intent to fashion a powerful remedial statute, and the common-law tradition of extending fraud liability to certain omissions. At the same time, Congress never intended the False Claims Act to be used outside of the antifraud context as a mechanism for resolving routine instances of contractor noncompliance with contract terms, statutes, or regulations. The Mikes rule preserves the boundary between fraudulent and nonfraudulent omissions of noncompliance. It also has two distinct advantages over the competing default rule offered by Blackstone: first, it promotes fairness by giving contractors ex ante notice of the conduct that will result in punitive antifraud liability; and second, it reduces the cost of the implied certification theory on the contracting system by limiting contractors’ compliance and litigation costs.

A. The Supreme Court Should Adopt the Implied Certification Theory

The Supreme Court should recognize the implied certification theory because the plain language, structure, and legislative history of the False Claims Act support it. Moreover, the theory is consistent with common-law fraud doctrine.

First, the unambiguous language of the Act imposes liability on any person who “knowingly presents, or causes to be presented, a false or
fraudulent claim for payment or approval.” 181 Because the Act does not qualify the phrase “false or fraudulent claim,” it creates liability for the submission of any false claim, irrespective of whether the claim is false because of an affirmative misstatement or because of an omission. This statutory language strongly supports recognition of the implied certification theory because the theory is, in essence, one of fraud by omission. A claim for payment is an implied false certification when the contractor has failed to disclose—i.e., omitted—a contractual, statutory, or regulatory violation. 182 The plain language of the statute targets all types of fraud, including fraud by omission—the very type of fraud targeted by the implied certification theory.

Second, the structure of the statute also supports reading the phrase “false or fraudulent claim” to include both affirmative misstatements and omissions. Other sections of the statute expressly condition liability on making an affirmative false statement. For example, section (a)(1)(B) of the statute imposes liability for making “a false record or statement,” that is, an affirmative false statement. 183 Section (a)(1)(A), by contrast, imposes liability for submitting a “false or fraudulent claim” and, notably, does not require a false statement. 184 The Tenth Circuit has explained that because section (a)(1)(A) creates liability for a “claim” and not a “statement,” “liability [under section (a)(1)(A)] . . . may arise even absent an affirmative or express false statement by the government contractor.” 185

Third, the legislative history of the False Claims Act supports the recognition of the implied certification theory. 186 The Senate Report on the 1986 amendments to the Act provided:

The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most...
The language of the Senate report makes clear that liability can arise solely from the submission of a claim while in violation of a contractual, statutory, or regulatory provision; nowhere in the report does the committee argue that an affirmative statement is required.

Although the plain language, structure, and legislative history of the False Claims Act support recognition of liability based on implied false certifications, the Fourth, Fifth, Seventh, and Eighth Circuits have declined to decide whether the theory is viable. These courts’ refusal to recognize the implied certification theory excludes entirely from the ambit of the Act instances of fraud by omission. The problem with this approach is that it makes the Act inconsistent with common-law fraud doctrine, which recognizes that the failure to disclose a material fact can, in certain contexts, constitute fraud.

Under the Restatement (Second) of Torts, a party is liable for fraudulent misrepresentation not only when it makes an affirmative misstatement, but also when it fails to disclose a material fact and owes the plaintiff a duty to disclose the information. There is no suggestion in the text or legislative history of the False Claims Act that Congress meant to abandon the Second Restatement’s approach in the context of fraud by government contractors. On the contrary, Congress insisted that the False Claims Act target “all fraudulent attempts” to cause the government to pay money. It seems rather unlikely that it would reinstate a distinction between affirmative misstatements and omissions that courts and commentators had widely abandoned decades earlier.

Of course, at common law, not all omissions are actionable as fraudulent misrepresentations: a defendant cannot be held liable for an omission in the absence of a duty to disclose. The Fourth Circuit, one of the most vocal skeptics of the implied certification theory, has suggested that its hesitation to recognize the theory rests, in part, on its view that the False Claims Act incorporates this principle—that contractors do not owe the government a duty to disclose violations of contractual, statutory, or regulatory provisions, and therefore cannot be liable for failing to do so. In Harrison I, the Fourth Circuit called implied certification “questionable” based on a previous decision.

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187. S. REP. NO. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added); see also id. at 10 (“Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.”).

188. See RESTATEMENT (SECOND) OF TORTS § 551(1) (1977) (“One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.”) (emphasis added).


190. RESTATEMENT (SECOND) OF TORTS § 551(1).
holding, in part, that “there can be no False Claims Act liability for an omission without an obligation to disclose.”

The Fourth Circuit is correct that, for the implied certification theory to be consistent with principles of common-law fraud, a contractor must have a duty to disclose material violations when submitting a claim for payment. While most circuit courts have not discussed the implied certification theory in terms of a contractor’s duty to disclose, all but four have expressly endorsed the theory or adopted a theory of liability that closely resembles implied certification. The lack of interest in precisely locating a contractor’s duty to disclose can be explained in at least two ways. One explanation is that the existence of a duty—whether created by the statute or arising out of the relationship between the contractor and the government—is plainly obvious because “[r]equesting payment on a government contract that one has knowingly materially breached is simply wrong.” A second explanation is that courts are confident that Congress intended to impose on contractors a duty to disclose. For example, in a number of opinions recognizing the implied certification theory, courts have referenced the Senate report to the 1986 amendments, which suggests that Congress intended to punish contractors for submitting claims for payment while in violation of contractual, statutory, or regulatory provisions. Other circuits have reasoned that in enacting the False Claims Act, Congress provided a means to ensure that contractors “turn square corners when they deal with the Government.”

In short, the plain language, statutory structure, and legislative history of the Act strongly suggest that it reaches the conduct targeted by the implied certification theory—a contractor’s failure to disclose a contractual, statutory, or regulatory violation material to the government’s decision to pay. Moreover, the implied certification theory brings the False Claims Act into alignment with the common-law tradition of labeling certain omissions as fraudulent. For these reasons, the Supreme Court should adopt the implied certification theory.

**B. The Supreme Court Should Adopt the Mikes Express Condition-of-Payment Default Rule**

The central battleground in the implied certification debate today is not whether contractors have a duty to disclose noncompliance with material

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192. See Holt & Klass, supra note 18, at 38 (acknowledging that implied certification “effectively impos[es] on contractors a duty to disclose material breaches”).

193. See id. at 38.

194. See, e.g., Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001); see also United States ex rel. Wilkins v. United Health Grp., 659 F.3d 295, 306 (3d Cir. 2011).

provisions of contracts, statutes, and regulations, but rather, the scope of that duty. The *Blackstone* default draws the obligation to disclose broadly, because contractors bear the risk that a court might later deem undisclosed violations material. The *Mikes* default, by contrast, creates a bright-line obligation to disclose only violations of contractual, statutory, and regulatory provisions on which the government has expressly conditioned payment. 196 The Supreme Court should adopt the *Mikes* default rule for three reasons. First, it alone defines “false or fraudulent claim” in a way that maintains the “crucial distinction” between actual attempts to defraud the government and garden-variety contractual, statutory, and regulatory violations. 197 Second, the *Mikes* default serves the normative goal of fairness by giving contractors advance notice as to when silence will result in a punitive sanction under the Act. Third, it reduces the economic burden of the implied certification theory by limiting costly contractor due diligence and lowering the likelihood of expensive suits under the Act.

1. Statutory Authority for an Express Condition-of-Payment Requirement

The initial inquiry is whether the statutory language of the False Claims Act allows for a limitation on liability of the kind proposed by the *Mikes* court. In establishing the *Blackstone* rule, the First Circuit rejected the express condition-of-payment requirement on the ground that it “do[es] not appear in the text of the [False Claims Act].” 198 The D.C. Circuit, which adopted the position later refined in *Blackstone*, similarly observed that “[n]othing in the statute’s language specifically requires [an express condition-of-payment requirement], and we fear that adopting one would foreclose [False Claims Act] liability in situations that Congress intended to fall within the Act’s scope.” 199 In short, the First and D.C. Circuits have forcefully argued that the *Mikes* express condition-of-payment requirement is a judicial invention divorced entirely from the text of the statute and Congress’s clear intent to enact broad remedial legislation.

However, the *Blackstone* adherents’ critique of the *Mikes* rule is wrong on both counts. Like the *Blackstone* rule, the *Mikes* rule finds support in the text of the False Claims Act because it tests, under subsection (a)(1)(A) of the statute,

196. This raises an additional question that cannot be answered here: How do contracting parties make compliance with a contract, statute, or regulation an express condition of payment? In *Mikes*, the Second Circuit found that the language “no payment may be made” established an express condition of payment, but did not speculate as to what other language might create an express condition. See *Mikes*, 274 F.3d at 700. The Fifth Circuit has suggested that the inquiry is case dependent. See United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 269 n.4 (5th Cir. 2010).

197. *Steury*, 625 F.3d at 268.


whether a court can properly conclude that a contractor has “knowingly present[ed] . . . a false or fraudulent claim for payment.” While the statute defines “claim” to mean “a request or demand . . . for money or property,” it is silent as to the meaning of “false or fraudulent.” Both the Mikes and Blackstone rules resolve this ambiguity by fashioning default assumptions about when it is fair to label a claim “false or fraudulent” based on an undisclosed violation of a contractual provision, statute, or regulation. The Mikes rule interprets the phrase “false or fraudulent” in a manner that is more consistent with Congress’s intent to balance the competing policy aims of the Act: on the one hand, establishing a broad remedial scheme, and on the other, preserving the distinction between claims sounding in fraud, which Congress intended the Act to cover, and claims based on other theories of liability, which fall outside the Act’s purview.

The False Claims Act is, at its core, a statute targeting fraud on the government. Despite Congress’s intention to enact a broad remedial statute, it never intended the False Claims Act to be used as a “blunt instrument” for the enforcement of contracts, statutes, and regulations. That is, in enacting the False Claims Act, Congress did not intend to abandon the longstanding distinction between claims sounding in fraud and claims arising out of a breach of contract or the violation of a statute or regulation. “Not every breach of federal contract is [a False Claims Act] problem.” Nor does the violation of a statute or regulation “necessarily constitute false or fraudulent claims under the [False Claims Act].”

The Blackstone rule eviscerates the distinction between true acts of fraud on the one hand and routine contract breaches and statutory and regulatory violations on the other. It does this by defining “false or fraudulent” indirectly through a judicially created materiality requirement. Courts have largely adopted the statutory definition of “material,” which is “having a natural

200. 31 U.S.C. § 3729(a)(1)(A) (2006); Steury, 625 F.3d at 269 (“The prerequisite requirement . . . ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place.”).
201. 31 U.S.C. § 3729(b)(2)(A); see Mikes, 274 F.3d at 696.
203. See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999) (“The phrase ‘false or fraudulent claim’ in the False Claims Act should be construed broadly.”).
204. Mikes, 274 F.3d at 699; see Steury, 625 F.3d at 268 (holding that the Act is not a “general enforcement device” for federal statutes, regulations, and contracts”); United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997).
205. See Steury, 625 F.3d at 268; cf. RESTATEMENT (SECOND) OF TORTS § 551 cmt. b on subsec. (1) (1977) (“The conditions under which liability is imposed for nondisclosure in an action for deceit differ in one particular from those under which a similar nondisclosure may confer a right to rescind the transaction or to recover back money paid or the value of other benefits conferred.”).
206. Steury, 625 F.3d at 268.
207. Thompson, 125 F.3d at 902.
208. See United States ex rel. Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010).
tendency to influence, or be capable of influencing, the payment or receipt of money or property.”209 Under this approach, a contractor presents a “false or fraudulent claim” when it submits a claim and fails to disclose a knowing violation of a contractual, statutory, or regulatory provision that has “a natural tendency to influence” or is “capable of influencing” the government’s decision to pay.

The elastic meaning of the phrase “false or fraudulent” under Blackstone subjects a broad swath of conduct to punitive fraud liability that Congress never intended the Act to cover. Broadly, Blackstone potentially transforms any undisclosed contractual, statutory, or regulatory violation into fraud because the materiality requirement sets a staggeringly low bar as to what counts as “false or fraudulent.” Relatively insignificant contract provisions and regulations—which may or may not even be related to the subject matter of the contract entered into between the contractor and the government—could be “capable of influencing” the government’s decision to pay. While the legislative record shows that Congress intended to subject some contractual, statutory, and regulatory violations to punitive antifraud liability,210 it in no way suggests that Congress sought to supplant the primary methods of enforcing contracts and regulatory schemes—a breach of contract action and administrative enforcement—with a punitive antifraud statute that imposes civil penalties and treble damages on violators.

The illogic of expanding the implied certification theory in this way becomes clearer in light of the statute’s qui tam enforcement provision. Under Blackstone, a qui tam relator can bring a claim under the implied certification theory for failing to disclose a knowing contractual or regulatory violation that could influence the government’s decision to pay, even if the government had exercised its discretion not to pursue such violations in the past. A relator can also bring a claim under Blackstone against a contractor for failing to disclose its knowing violation of a hypothetically important contractual, statutory, or regulatory provision, even if the government believed that an administrative remedy would be preferable.

Under these circumstances, a contractor could be liable for penalties and treble damages, even though it has committed an act that would more appropriately be characterized as a simple breach of contract or ordinary regulatory violation than as “fraud.”211 As explained in Part V.A, there is no

209. See 31 U.S.C. § 3729(b)(4) (2006). The requirement is considered judicially imposed because it does not appear in subsection (a)(1). However, courts applying the materiality requirement have used the statutory definition of materiality. Supra Part I.A.


211. Steury, 625 F.3d at 269 (“Even if a contractor falsely certifies compliance (implicitly or explicitly) with some statute, regulation, or contract provision, the underlying claim for payment is not ‘false’ within the meaning of the FCA if the contractor is not required to certify compliance in order to receive payment.”).
evidence that Congress intended to abandon the distinction between fraud and breach of contract or fraud and ordinary regulatory violations when it enacted the False Claims Act. Further, that the statute is remedial does not justify an interpretation of “false or fraudulent” that expands the meaning of fraud beyond recognition. In the absence of clear congressional intent to abandon this distinction, courts should read the False Claims Act in a way that gives effect both to Congress’s desire to enact a broad remedial statute and its intention to preserve the traditional boundaries of fraud.

The Mikes rule achieves both of these ends. Under Mikes, a claim is “false or fraudulent” when a contractor submits a claim that is “aimed at extracting money the government otherwise would not have paid.”²¹² The express condition-of-payment requirement enforces this definition by limiting the implied certification theory to cases where a court could readily conclude that (1) the government would not have paid the claim (because it is barred from doing so) and (2) the contractor knows or should know that the government would not pay the claim (because the contract, statute, or regulation contains express language to this effect, putting the contractor on notice). The Mikes rule underwrites Congress’s desire to create a broad remedial scheme because it recognizes that a contractor can extract money the government would not have paid without making an affirmative misstatement. But it also respects the outer limits of the phrase “false or fraudulent” by holding that the submission of a claim for payment while in knowing violation of a contractual, statutory, or regulatory provision, without more, does not necessarily mean that a contractor has attempted to extract money from the government that it does not owe.²¹³ This is so because a contractor that submits a claim, even when it knows that it has violated a provision that could influence the government’s decision to pay, might nonetheless believe that the government will pay the claim. For instance, the government may still pay because it has made a point in the past not to enforce a particular provision or because it has paid claims while pursuing violations through an administrative system. At bottom, the Mikes rule does not mechanically punish failures to disclose knowing violations because a contractor could still be seeking payment in good faith.

A fair criticism of the Mikes default is that, in setting a bright-line test for “false or fraudulent claims,” it ultimately allows contractors to escape antifraud liability for claims that are potentially “false or fraudulent.” For example, one could argue that a contractor that submits a claim while in knowing violation of any part of its contract should be forced to disclose that violation or risk

²¹³. Mikes, 274 F.3d at 700 (concluding that there is fraud only when the defendant submitted the claim “while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant”); Steury, 625 F.3d at 269 (“In short, a false certification of compliance, without more, does not give rise to a false claim for payment unless payment is conditioned on compliance.”).
punitive antifraud liability.²¹⁴ However, this position exaggerates the danger of the Mikes rule. Even if the government cannot pursue a False Claims Act case because compliance with the provision at issue was not an express condition of payment, the government can still sue the contractor for breach of contract or bring an action under the statute or regulation. Furthermore, while public policy may support imposing liability on contractors for all undisclosed violations of material provisions, courts cannot ignore the historical boundaries of fraud. The Mikes interpretation of “false or fraudulent,” though narrower than the Blackstone interpretation, prevents the Act from being used outside of the antifraud context.

In sum, while the statutory language of the False Claims Act spells out in great detail a number of the elements that the government or a relator must prove to establish liability under subsection (a)(1)(A), it does not define the key phrase “false or fraudulent.” While it is uncontroversial to suggest that a claim for payment based on an affirmative misrepresentation defies the Act, it is far less clear what “false or fraudulent” means in the context of undisclosed violations of contractual, statutory, or regulatory provisions. The Mikes and Blackstone rules resolve this ambiguity in radically different ways. The Mikes rule limits the duty to disclose with an express condition-of-payment requirement, and consequently, limits the number of potential “false or fraudulent” claims. Blackstone draws the duty to disclose much more broadly, seeking to limit “false or fraudulent claims” ex post by relying on the low bar set by the materiality requirement. The Court should adopt the express condition-of-payment requirement because it more properly balances Congress’s intent to establish a broad remedial regime while maintaining the distinction between actions that sound in fraud and those that do not.

2. The Mikes Rule Promotes Fairness in the Procurement Process

The Supreme Court should adopt the Mikes express condition-of-payment requirement because it establishes a regime of transparency that promotes fair enforcement of the False Claims Act. Far from being merely a compensatory statute designed to make the government whole after a contractual, statutory, or regulatory violation by a contractor, the Act punishes violators with statutory penalties and treble damages.²¹⁵ The Supreme Court has called the Act’s remedial scheme “essentially punitive in nature.”²¹⁶


²¹⁶ Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 785 (2000); see also United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 734 (10th Cir. 2006) (Hartz, J., concurring and dissenting) (pointing out that the False Claims Act is punitive because it imposes treble damages and also because it imposes statutory penalties regardless of actual damages).
Traditionally, our legal system has stressed the importance of giving fair notice of conduct that will subject a person to a punitive sanction. The need for this type of fair notice is heightened in the context of the False Claims Act for at least two reasons. First, as countless courts and commentators have observed, government contractors operate within a staggeringly complex regulatory system that subjects them to thousands of regulations covering disparate areas of law. Because perfect compliance with every regulation is practically impossible, knowing which undisclosed violations will result in punitive liability—as opposed to compensatory damages or a regulatory fine—becomes imperative.

Second, fair notice is particularly important in the context of the False Claims Act because of the statute’s private enforcement mechanism. Ordinarily, the government can exercise a considerable amount of discretion in the enforcement of statutes and regulations. For example, a federal agency may choose not to bring a legal action against a company that has violated one or more regulations. An agency may issue a warning against a noncompliant company instead of exacting a fine. By contrast, the False Claims Act deputizes private citizens—who have no interest in exercising discretion—to enforce the statute. Once a “false claim” is proved, courts must, at a minimum, assess statutory penalties of at least $5000 per claim.

The express condition-of-payment requirement provides fair notice by giving contractors ex ante warning of the contract breaches and statutory and regulatory violations that could give rise to False Claims Act liability. It

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217. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”).

218. See Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1, 66 n.350 (2002) (“[T]here are so many thousands of applicable rules and regulations applicable to government contractors that chaos would result if violation of any one or a few would render claims submitted by the contractor false.”); Richard Doan, The False Claims Act and the Eroding Scienter in Healthcare Fraud Litigation, 20 ANNALS HEALTH L. 49, 74 (2011) (“The federal government cannot reasonably expect unsophisticated healthcare providers to navigate the maze of 15,000 Medicare regulations, 400 pages of Medicare laws, thousands of pages of CMS literature, 7,000 CPT codes, and 51 idiosyncratic state Medicaid programs.”).

219. See Sci. Applications Int’l Corp., 626 F.3d at 1270 (observing that “the implied certification theory is prone to abuse by the government and qui tam relators who, seeking to take advantage of the [False Claims Act’s] generous remedial scheme, may attempt to turn the violation of minor contractual provisions into [a False Claims Act] action”); Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997) (“Qui tam relators are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.”).


221. For example, in Steury, the relator brought claims under the False Claims Act against a health care company for supplying defective medical equipment in violation of the warranty of merchantability implied in all federal acquisition contracts by regulation. The Fifth Circuit rejected the claims, holding that the federal acquisition regulations conditioned payment on acceptance by the
achieves this end by requiring the government to explain in advance of the contractor’s work which undisclosed violations it will treat as fraud and which undisclosed violations it will treat as ordinary contract breaches or regulatory violations. Advance notice of this kind is at the core of “[e]lementary notions of fairness.”

In addition to serving a notice function, the express condition-of-payment requirement serves the related fairness purpose of limiting the application of the statute to the kind of conduct that contracting parties would expect to fall within the ambit of the Act. It achieves this end by punishing only claims for payment that would be widely recognized as fraudulent: claims made even though the contractor knows that the government is under no obligation to pay them. Both contractors and the government can agree that knowingly submitting a claim while in violation of a provision that the government has expressly identified as a prerequisite to payment is fraudulent because the claim attempts to extract money that is not owed. By limiting liability to those cases, the Mikes rule assures that punitive liability covers only what the parties understood would be subject to the Act at the time of contracting.

The Blackstone default, which imposes liability for any undisclosed material contractual, statutory, or regulatory violation, achieves neither of these fairness objectives. First, unlike the Mikes rule, the Blackstone rule does not provide contractors with advance notice as to which violations will result in the application of punitive antifraud liability. While perhaps an effective means of forcing disclosure, the Blackstone rule is fundamentally unfair because it deprives contractors of information that would allow them to change their conduct and avoid a punitive sanction.

Blackstone compounds the fair notice problem by enforcing the Act in a way that runs counter to general expectations about what kind of conduct is fraudulent. Without an express condition-of-payment requirement, the government or a relator could bring a claim under the Act for a garden-variety breach of contract or statutory or regulatory violation, even if the contractor submitted the claim for payment believing that the government would pay the government, not compliance with the warranty of merchantability. The court observed that the regulations gave the government “a range of remedies in the event” of noncompliance, including acceptance, price reduction, or replacement. See United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 269 (5th Cir. 2010).

222. BMW, 517 U.S. at 574.
223. Steury, 625 F.3d at 269 (“The prerequisite requirement . . . ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place.”).
224. Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001) (false claims are “aimed at extracting money the government otherwise would not have paid”); id. at 700 (concluding that there is fraud only when the defendant submitted the claim “while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant”).
225. Steury, 625 F.3d at 269 (“In short, a false certification of compliance, without more, does not give rise to a false claim for payment unless payment is conditioned on compliance.”).
226. See BMW, 517 U.S. at 574.
claim if it knew about the breach or violation. That is, in the absence of an express condition-of-payment requirement, the implied certification theory can be used to punish not only actual lies, but also claims submitted by a contractor who has failed to disclose all violations—before knowing which violations the government believes must be disclosed. Contractors entering into procurement agreements with the government would not reasonably expect the latter claim to result in punitive antifraud liability. That the Blackstone default results in punitive antifraud liability in cases where the contracting parties would not reasonably expect it is another mark against it.

The Supreme Court has explained that lack of notice of a punitive sanction is unfair—particularly where enforcement of the statute runs contrary to the parties’ expectations—because it deprives “citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.”227 The Court should be especially attuned to these fairness considerations in light of the False Claims Act’s enforcement mechanism. Even if the government believed that the application of a punitive sanction would be contrary to its interests, it could not stop a qui tam relator from pursuing the case and seeking treble damages and mandatory statutory penalties.228

In sum, the Supreme Court should adopt the Mikes express condition-of-payment requirement because it provides fair notice of the kind of conduct that will result in a punitive sanction, and because it results in the application of that sanction in a manner consistent with the reasonable expectations of the contracting parties. The Blackstone default undermines both of these fairness considerations by eliminating advance notice and applying a punitive sanction in a way that runs contrary to the reasonable expectations of the contracting parties. The qui tam provision of the False Claims Act magnifies the harm of the Blackstone approach because the government cannot exercise its enforcement discretion to insulate contractors from unanticipated punitive liability even when doing so would be in the government’s interest.

3. The Mikes Rule Limits the Costs of the Implied Certification Theory

The implied certification theory exacts two costs from contractors that are ultimately borne by taxpayers: the cost associated with disclosing violations of contracts, statutes, and regulations that may be material to the government’s decision to pay; and the cost of litigation if a contractor is sued after failing to disclose knowing noncompliance. The Mikes rule sharply limits both of these costs. First, it reduces the cost of due diligence by relieving contractors of the burden of monitoring compliance with every contract, statute, and regulation

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227. Id. at 587 (Breyer, J., concurring).
228. See United States ex rel. Conner v. Salina Reg’l Health Ctr., 543 F.3d 1211, 1222 (10th Cir. 2008) (“It would . . . be curious to read the [False Claims Act], a statute intended to protect the government’s fiscal interests, to undermine the government’s own regulatory procedures.”).
that a court could later decide was material to the government’s decision to pay. Second, it reduces the cost of litigating cases under the False Claims Act by replacing the factually intensive “materiality” inquiry—and to a lesser extent, the scienter requirement—with a bright-line test for an express condition of payment. The Blackstone rule, by sharp contrast, encourages excessive and costly monitoring for perfect compliance with all of the contractual, statutory, and regulatory provisions that a court could later deem material. Furthermore, it prevents quick resolution of lawsuits under the implied certification theory because it relies on difficult-to-prove elements like scienter and materiality.

a. The Mikes Rule Limits the Costs of Due Diligence

To avoid liability under the implied certification theory, contractors must disclose knowing violations of material contractual, statutory, and regulatory provisions. The theory naturally creates a due diligence burden because contractors must monitor their own compliance to know whether a provision has been violated, and therefore, whether a disclosure must be made. Because the intensity of the due diligence burden is directly related to the scope of the disclosure obligation, the cost of monitoring compliance depends, in large part, on when a contractor is required to speak. When a contractor need only disclose select instances of noncompliance to avoid liability, the burden and cost of due diligence are low; however, an obligation to disclose all contractual, statutory, and regulatory violations pushes the burden of due diligence to its zenith.

The Mikes rule sharply limits the disclosure burden by providing contractors ex ante knowledge about which violations of contractual, statutory, and regulatory provisions could result in liability under the implied certification theory. With this advance knowledge, contractors can implement carefully crafted due diligence programs that focus compliance efforts on the limited subset of provisions on which the government has expressly conditioned payment. In contrast, under Blackstone, contractors must conduct due diligence to comply with a far broader set of contractual, statutory, and regulatory provisions that a court may later deem material to the government’s decision to pay.

The gap between the two due diligence burdens may be even starker upon further inspection. Under Blackstone, the only meaningful limit on the due diligence burden is the materiality requirement. However, because a court determines the materiality of a provision ex post, a prudent contractor seeking to minimize the risk of statutory penalties and treble damages must monitor compliance with all contracts, statutes, and regulations.229 Additionally, a contractor operating under Blackstone must perform due diligence with the aim of perfect compliance with this massive universe of contracts, statutes, and

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229. This is particularly true in light of the fact that failure to develop sufficient due diligence systems could prove that the contractor acted “recklessly,” satisfying the scienter requirement.
regulations, because it cannot count on the exercise of any enforcement discretion by the government. Even if the government chose not to bring or intervene in a False Claims Act case against a contractor that had substantially complied with its contractual, statutory, and regulatory obligations, a qui tam plaintiff could still file a suit and, if she proved that the violation had the potential to influence the government’s decision to pay, be entitled to civil penalties—even in the absence of harm to the government.

By promoting targeted due diligence based on key provisions of contracts, statutes, and regulations, the Mikes default rule recognizes the reality of the modern administrative state: that perfect compliance with every provision of a voluminous contract and every provision of a Byzantine regulatory scheme is impossible. Even technically adept and well-intentioned contractors fall short of perfect compliance with their obligations to the government. Recognizing this, federal agencies often require less-than-perfect compliance with contractual, statutory, and regulatory mandates. The Mikes express condition-of-payment requirement brings a contractor’s due diligence burden in line with the actual expectations and practices of federal enforcement agencies because it allows procurement officers to condition payment on compliance with the contractual, statutory, and regulatory provisions that the government has the greatest interest in enforcing.

The contractor, whose overriding interest is avoiding treble damages and penalties, will turn its monitoring and compliance attention to the provisions on which the government has expressly conditioned payment. The government can continue to enforce provisions that it has not designated as conditions of payment through a breach of contract action or a regulatory enforcement action. With respect to these provisions, contractors essentially conduct an efficient breach analysis by assessing whether the cost of the due diligence required to detect and disclose a breach or violation is worth the risk that an undisclosed breach or violation will be discovered and pursued.

230. Government contracts, such as LOGCAP agreements governing some military contractors, can be “hundreds of pages” long. See Brief of Appellant at 37, United States ex rel. Godfrey v. KBR, Inc., No. 08-1423 (4th Cir. Aug. 11, 2008), 2008 WL 3883530.

231. See, e.g., United States ex rel. Wilkins v. United Health Grp., 659 F.3d 295, 310 (3d Cir. 2011) (“[W]e think that anyone examining Medicare regulations would conclude that they are so complicated that the best intentioned plan participant could make errors in attempting to comply with them.”). For this very reason, the government establishes administrative remedies for violators.

232. A common example of this is the “substantial compliance” standard, which is used in Medicare regulations. See, e.g., Malcolm J. Harkins, III, The Ubiquitous False Claims Act: The Incongruous Relationship Between a Civil War Era Fraud Statute and the Modern Administrative State, 1 ST. LOUIS U. J. HEALTH L. & POL’Y 131, 160–61 (2007) (pointing out that under Medicare and Medicaid regulations, payments continue to nursing home providers if there is substantial compliance).

233. Of course, if the procurement officers determine that the government has an interest in strengthening contractor monitoring and compliance with a particular contract term, statute, or regulation, it can expressly designate the provision a condition of payment.
In comparison, the *Blackstone* rule incentivizes contractors to monitor compliance with every contractual, statutory, and regulatory provision material to the government’s decision to pay—which, because of the weakness of the materiality requirement and the possibility of private enforcement, effectively means ensuring perfect compliance with all contractual, statutory, and regulatory provisions. As a result, the *Blackstone* position imposes on contractors an obligation to perform resource-intensive due diligence to ensure compliance with contractual, statutory, and regulatory provisions that the government may have no interest in enforcing at all, no interest in enforcing strictly, or, at the very least, no interest in enforcing via a punitive antifraud statute. This is a peculiar outcome given that the False Claims Act was enacted to protect the federal government from fraud. For this reason, *Blackstone* not only imposes a far more burdensome due diligence requirement on contractors than *Mikes*, but it is also completely at odds with the realities of government contracting.

At bottom, the *Mikes* express condition-of-payment requirement limits contractors’ due diligence burden by imposing constraints on their obligation to disclose noncompliance with contractual terms, statutes, and regulations. *Mikes* relieves contractors from the extraordinary obligation of monitoring compliance with myriad provisions, and brings the due-diligence burden created by the implied certification theory in line with the efficient administration of the modern regulatory state. By imposing on contractors a duty to disclose all instances of noncompliance, *Blackstone* has the opposite effect: it forces due diligence in dozens of areas of the law and runs contrary to the generally accepted view that compliance with every contractual, statutory, and regulatory provision is impossible.

b. *The Mikes Rule Limits the Cost of Litigation*

A second cost of implied certification—litigation—presents itself after a contractor submits a claim and does not disclose its violation of a contractual, statutory, or regulatory violation, and the government or a *qui tam* relator files suit. In actions under the implied certification theory, the crucial litigation question is whether the contractor’s failure to disclose makes the claim it has submitted “false or fraudulent.” *Blackstone* approaches this question in a costly, fact-intensive way by relying on juries to decide whether the provision violated by the contractor was material to the government’s decision to pay. The *Mikes* default rule, by contrast, when fully implemented by the parties, streamlines the litigation process by substituting a bright-line limitation on liability for a detailed inquiry into the materiality of the provision that was violated.

The *Mikes* requirement eliminates the need to examine the materiality of the contractual, statutory, or regulatory violation at issue because it cuts off liability when contractors do not violate a provision on which the government has expressly conditioned payment. The *Mikes* rule effectively substitutes the
express condition-of-payment requirement for the materiality requirement because the act of conditioning payment on compliance with a contractual, statutory, or regulatory provision is powerful evidence that compliance with the provision is material to the government’s decision to pay.\textsuperscript{234}

The \textit{Mikes} rule encourages the parties to specify in advance which contractual, statutory, and regulatory provisions are material by making them express conditions of payment. During the course of negotiations—to the extent there are any—the government can push for as many express conditions of payment as it can get out of the contractor. When the contract is executed, both the government and the contractor know which omissions will result in liability under the implied certification theory. In effect, \textit{Mikes} opts for a rule-based ex ante approach over a fact-dependent ex post inquiry. This scheme translates into significant savings of litigation costs for a number of reasons.

The rule-based ex ante approach most dramatically minimizes transaction costs in the event of a dispute about whether the contractual, statutory, or regulatory provision at issue is material. If the Supreme Court adopted the express condition-of-payment requirement, a district court could quickly dispose of suits alleging violations of contractual, statutory, or regulatory provisions that the government did not make an express condition of payment.\textsuperscript{235} In many cases, the rule could eliminate these transaction costs altogether because neither the government nor relators will go to the trouble and expense of bringing a suit that will inevitably be dismissed.

The express condition-of-payment requirement results in litigation-cost savings even when there is no dispute as to whether an undisclosed violation is material. A concern frequently raised about the implied certification theory is that it incentivizes plaintiffs to use the statute as a “blunt instrument” for the enforcement of minor contract terms or statutory or regulatory provisions.\textsuperscript{236} Under the \textit{Mikes} rule, however, such cases cannot be pursued because the express condition-of-payment requirement prophylactically excludes them.


\textsuperscript{235} \textit{See Wilkins}, 659 F.3d at 309 (“[T]o plead a claim upon which relief could be granted under a false certification theory, either express or implied, a plaintiff must show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government.”); Chesbrough v. VPA, P.C., 655 F.3d 461, 468 (6th Cir. 2011) (holding that “a relator cannot merely allege that a defendant failed a standard—he or she must allege that compliance with the standard was required to obtain payment”).

\textsuperscript{236} \textit{Mikes v. Straus}, 274 F.3d 687, 699 (2d Cir. 2001) (noting that the False Claims Act was never intended to be a “blunt instrument” to enforce regulations).
The *Blackstone* rule provides for none of these litigation-cost savings. In a clear dispute between the parties about whether a violation is material, the parties must litigate the question. Because these issues raise questions of fact that cannot easily be resolved on a motion to dismiss, they will almost certainly result in lengthy, and consequently costly, litigation. Furthermore, the *Blackstone* rule will not deter opportunistic litigants from attempting to use the implied certification theory to enforce routine contractual breaches and statutory and regulatory violations. That is because such a litigant likely could make a colorable claim that the violated contract term, statute, or regulation could potentially influence the government’s decision to pay. Contractors may be forced to settle questionable claims because a settlement saves significant costs over litigating to trial.

A number of courts adopting the *Blackstone* rule have defended their decisions on the ground that the False Claims Act’s scienter and materiality elements already reduce transaction costs associated with litigating false claims and effectively stymie opportunistic suits. However, the Act’s scienter and materiality requirements neither reduce transaction costs in the same manner as the express condition-of-payment requirement nor discourage opportunistic litigation. Under the Act’s scienter requirement, a plaintiff must show that the defendant contractor “knew, or recklessly disregarded a risk, that its implied certification of compliance was false.” A finding of reckless disregard “does not require any proof of an intentional, deliberate, or willful act.” Courts have found liability under this standard when a defendant was merely “familiar” with violations underlying False Claims Act liability.

The scienter requirement is an inadequate check on the phrase “false or fraudulent” for a number of reasons. Under *Blackstone*, the requirement limits liability by requiring a plaintiff to show that the contractor knew or recklessly disregarded the fact that it had violated a contractual, statutory, or regulatory provision material to the government’s decision to pay. But as explained above, the bare act of submitting a claim and failing to disclose a knowing violation does not mean that the contractor has defrauded the government. Even if scienter does provide a reasonable limitation on liability under the implied certification theory, it can rarely be resolved on a motion to dismiss because it

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237. See, e.g., *Sci. Applications Int’l Corp.*, 626 F.3d at 1270 (observing that opportunistic *qui tam* suits “can be effectively addressed through strict enforcement of the Act’s materiality and scienter requirements”).

238. *Shaw v. AAA Eng’g & Drafting, Inc.*, 213 F.3d 519, 533 (10th Cir. 2000).


240. See, e.g., *United States ex rel. Augustine v. Century Health Servs.*, 289 F.3d 409, 416 (6th Cir. 2002) (finding liability under the False Claims Act where defendants “both testified that they were familiar with the regulations governing Medicare reimbursement”).
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raises a question of fact. 241 As a result, if scienter is the only meaningful check on liability, contractors will be forced to absorb substantial discovery and litigation costs if the government or a relator brings a claim based on a relatively minor contractual, statutory, or regulatory violation. Ultimately, taxpayers may bear these costs, as the risk of litigation is priced into procurement contracts with the government.

Additionally, because the scienter requirement has a low threshold, it does not guard effectively against opportunistic lawsuits. Qui tam plaintiffs can persuade a court to impute the knowledge of one employee to an entire corporation. A court can therefore find liability if just one employee knew or recklessly disregarded the falsity of an implied certification of compliance submitted by the company. 242 New scienter theories also threaten to transform the element into a toothless check on claims. In SAIC II, the district court relied heavily on the government’s collective corporate knowledge theory, which holds that fraudulent intent can be imputed to the corporation on the basis of the collective knowledge of multiple employees. 243 Under this theory, “knowledge [of a corporation] is the sum of the knowledge of all of the employees.” 244 As the Fourth Circuit pointed out, this doctrine “would allow a plaintiff to prove scienter by piecing together scraps of ‘innocent’ knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds.” 245

As with the scienter requirement, the judicially created materiality requirement is often cited as a limitation on False Claims Act liability. 246 For

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241. See United States ex rel. Taylor-Vick v. Smith, 513 F.3d 228, 231 (5th Cir. 2008) (noting, in the context of a False Claims Act case, that “[i]t is indeed well-settled . . . that we hesitate to grant summary judgment when a case turns on a state of mind determination,” before concluding that the plaintiff had failed to satisfy this burden).


246. See United States ex rel. Jones v. Brigham & Women’s Hosp., 678 F.3d 72, 85–86 (1st Cir. 2012) (“Taking this broad view does not, however, create limitless liability. Indeed, FCA liability continues to be circumscribed by ‘strict enforcement of the Act’s materiality and scienter requirements.’”) (citation omitted); United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 388 (1st Cir. 2011) (“[O]ther means exist to cabin the breadth of the phrase ‘false or fraudulent’
example, the D.C. Circuit in *SAIC II* explained that “[b]y enforcing [the materiality] requirement rigorously, courts will ensure that government contractors will not face ‘onerous and unforeseen FCA liability’ as a result of noncompliance with any of ‘potentially hundreds of legal requirements’ established by contract.” However, the materiality requirement fails to reduce transaction costs for the same reason that the scienter requirement fails to do so: courts can rarely resolve it on a motion to dismiss. The practical effect of this is that *qui tam* plaintiffs can, subject to the procedural hurdle imposed by Rule 9(b), fairly effortlessly move to discovery in False Claim Act suits against contractors for minor or technical breaches of contracts, statutes, or regulations.

In addition to being a procedurally weak limit on implied certification liability, materiality is also a substantively weak limit on liability because it requires only a showing that the violation of a contract provision, statute, or regulation has a “natural tendency” to influence or is “capable” of influencing the payment of a claim by the government. There need be no demonstration “that the government actually relied on the false statements at issue.” Plaintiffs can establish this “natural tendency” by adducing witness testimony showing that the government would not have paid the claim had it known about the breach or violation, or that “both parties to the contract understood that payment was conditional on compliance with the requirement at issue.”

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248. Courts rarely resolve the materiality requirement on a motion for summary judgment, for that matter. Several courts that have adopted the certification default have also concluded that materiality, while resolvable as a matter of law on a motion for summary judgment, is ordinarily a question for the finder of fact. See *United States ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 308 (1st Cir. 2010) (“As in the securities fraud arena, materiality in the FCA context involves a factual determination of the weight that the decisionmaker would have given particular information.”); *Sci. Applications Int’l Corp.*, 626 F.3d at 1269 (holding that materiality can be established through testimony at trial that the parties understood that a payment was conditional on compliance with the contract provision, statute, or regulation at issue). A number of courts have reserved the materiality element for juries. See, e.g., *United States ex rel. Purcell v. MWI Corp.*, 824 F. Supp. 2d 12, 29 (D.D.C. 2011) (describing question of natural tendency to influence action as an “essentially factual question”); *United States ex rel. Feldman v. Van Gorp*, No. 03 Civ. 8135(WHP), 2010 WL 5094402 (S.D.N.Y. Dec. 9, 2010) (discussing jury’s consideration of materiality).

249. Courts have suggested that the hurdle erected by 9(b) is not high in the context of the False Claims Act. See, e.g., *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (holding that, in the context of the False Claims Act, “[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts”); *United States v. Kellogg Brown & Root Servs.*, 800 F. Supp. 2d 143, 154 (D.D.C. 2011) (“The D.C. Circuit has taken a generous approach to pleadings in the FCA context, finding that a complaint is not deficient even if it fails to set out a prima facie case as an initial matter.”)

250. *Purcell*, 824 F. Supp. 2d at 28 n.7.

251. *Id* at 29.
Contrary to the belief of the D.C. Circuit, this materiality standard in no way meaningfully limits the use of the implied certification theory to enforce “minor contractual provisions that are merely ancillary to the parties’ bargain.” The government or a relator could survive a motion to dismiss merely by alleging that the contracting agency may not have paid the claim had it known about the breach or violation.

In sum, the *Mikes* express condition-of-payment requirement, when implemented by the parties, dramatically lowers litigation costs by allowing a court to resolve quickly disputes between contracting parties about whether a violation is material. It also discourages opportunistic suits that attempt to use the False Claims Act to recover for technical breaches or violations of regulations. The *Blackstone* rule, by contrast, does not minimize these costs because the scienter and materiality elements cannot easily be resolved on a motion to dismiss.

**CONCLUSION**

Once a dormant Civil War era statute, the False Claims Act has emerged in the past twenty-five years as the most effective civil litigation weapon against fraud by government contractors, generating hundreds of millions of dollars in annual settlements and recoveries. In this era of heightened enforcement, the implied certification theory is at the center of an ever-deepening debate about the outer limits of liability under the Act.

Despite broad acceptance of the theory, federal courts of appeals have failed to establish uniform rules governing the extent of a contractor’s duty to disclose noncompliance with contract terms, statutes, and regulations material to the government’s decision to pay a claim. While the government and contractors can contractually define the scope of the disclosure obligation, as a practical matter, such agreements often are not made. Because of this reality, and in light of the Act’s punitive remedial scheme and *qui tam* enforcement provision, there is great need to establish a sensible default rule.

The two primary default rules governing implied certification are clearly at odds with one another. The Second Circuit default rule established in *Mikes* finds liability when a contractor submits a claim for payment to the government and fails to disclose the breach of a material contract provision or violation of a material statute or regulation on which the government has expressly conditioned payment. The First Circuit’s *Blackstone* rule rejects the *Mikes* requirement as an unwarranted judicial invention and finds liability when a contractor submits a claim for payment and fails to disclose any material breach.

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253. *Id.*
254. United States *ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008).
255. See *Holt & Klass*, *supra* note 18, at 3 (“The certification default lowers the pleading bar, making it easier for a frivolous *qui tam* lawsuit to survive a motion to dismiss.”).
of contract or statutory or regulatory violation. The Supreme Court should adopt the *Mikes* default rule because it preserves the distinction between fraudulent conduct and nonfraudulent contractual breaches and statutory and regulatory violations, and also because it offers two clear advantages over the rule set forth in *Blackstone*.

First, by giving contractors ex ante notice of the breaches and violations that may give rise to liability, the *Mikes* rule provides fair notice of the type of conduct subject to a punitive antifraud statute. It serves an additional fairness function by ensuring that courts will enforce the Act in a manner consistent with the general understanding of the contracting parties. The *Blackstone* default works against these fairness considerations by exposing contractors to treble damages and penalties for conduct that they are not certain will result in a penal sanction and by enforcing the statute against contractors in a manner inconsistent with their general expectations.

Second, the *Mikes* rule reduces the two costs imposed on contractors and ultimately taxpayers by the implied certification theory: the cost of due diligence and the cost of litigating cases under the False Claims Act. *Mikes* reduces the cost of due diligence by sharply limiting the number of contractual terms, statutes, and regulations that contractors must monitor to ensure compliance. The rule also brings the due diligence demands of the implied certification theory in line with the widely held view that contractors cannot, as a practical matter, comply with all regulations all the time. *Blackstone*, by contrast, requires contractors to monitor and ensure compliance with every conceivable contractual term, statute, and regulation, because prudent contractors will not gamble on the favorable determination of materiality in the event of a suit. And, contrary to the nature of modern regulatory enforcement, the *Blackstone* rule requires contractors to monitor and ensure compliance with contracts, statutes, and regulations that the government may have no interest in enforcing.

Finally, the *Mikes* default reduces the cost of litigating implied certification cases because it obviates the need to rely on the fact-intensive materiality requirement. Courts can prophylactically dispose of suits in a motion to dismiss if the government or a relator fails to allege that the contractual term or statutory or regulatory provision at issue was an express condition of payment. The *Blackstone* default provides no mechanism for the early disposition of some claims, because the only limits on its view of the implied certification theory are the statute’s scienter element and the judicially imposed materiality requirement. Because both involve fact-intensive inquiries, a pretrial disposition of claims is rarely possible, even when claims involve technical breaches or violations instead of clear attempts to defraud the government.

Ultimately, the *Mikes* position represents a pragmatic middle ground between a total rejection of the implied certification theory, which disregards
Congress’s desire for broad enforcement of the False Claims Act, and the *Blackstone* rule, which takes the statute outside of its antifraud context. Accordingly, the Supreme Court should adopt the implied certification theory and the *Mikes* express condition-of-payment requirement.