THE NEW FALSITY DEBATE: IMPLIED FALSE CERTIFICATION AND SPECIFIC REPRESENTATIONS UNDER THE FALSE CLAIMS ACT

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INTRODUCTION

On February 29, 2020, officials confirmed the first death in the United States from the novel coronavirus.[1] The next day, officials reported a second death[2] and confirmed the first positive case in New York.[3] Over the months that followed, positive cases and Covid-related deaths rose to astronomical levels, the economy went head-first into a downward spiral, thousands were thrust into unemployment, and small businesses nationwide found themselves on the brink of disaster, if not already beyond that point.[4] In response, Congress created, and the President signed into law, a number of programs aimed at saving lives and rescuing the economy via a mas-

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1. Michael Crowley, Mike Baker, and Nicholas Bogel-Burroughs, *Trump Moves to Calm Fears as First U.S. Death from Coronavirus is Reported*, N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/us/politics/trump-coronavirus.html[https://perma.cc/CFA2-897C].

2. *Second Death from Virus is Reported in the U.S.*, N.Y. TIMES (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/world/coronavirus-news.html [https://perma.cc/5QER-Z795].

3. Joseph Goldstein & Jesse McKinley, *Coronavirus in N.Y.: Manhattan Woman is First Confirmed Case in State*, N.Y. TIMES (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/nyregion/new-york-coronvirus-confirmed.html [https://perma.cc/7482-FQ5W].

4. As of October 21, 2021, more than 731,000 Covid-19 deaths had been reported in the United States alone. Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last updated Oct. 21, 2021), https://www.nytimes.com/interactive/2021/us/covid-cases.html [https://perma.cc/DS9E-8XWZ].

sive outlay of taxpayer dollars to businesses and individuals, often subject to numerous conditions.[5]

In the early days of the pandemic and the government's response, commentators and Department of Justice attorneys were well aware of the growing risk of fraud stemming from those stimulus programs.[6] And, in due time, stories of fraud involving misuse of Covid-designated relief began to make headlines.[7] In response, many took up discussions of the role that the False Claims Act (FCA)[8]—the federal government's premier civil anti-fraud tool—could play in stemming those abuses.[9] And they did so with good

5. For example, the Paycheck Protection Program issued over $500 billion in forgivable loans to small businesses over the course of a few months, and HHS distributed billions of dollars to health care providers through the CARES Act's provider relief fund. *See* Ethan P. Davis, Principal Deputy Assistant Attorney General, Dep't of Justice Civil Div., Remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform (June 26, 2020).

6. *See, e.g.*, Stewart Bishop, *COVID Crimes: White Collar Cases to Expect from the Crisis*, LAW360 (May 11, 2020, 9:02 PM), https://www.law360.com/articles/1271105/covid-crimes-white-collar-cases-to-expect-from-the-crisis [https://perma.cc/H3XH-QTQA]; Neil M. Barofsky, Opinion, *Why We Desperately Need Oversight of the Coronavirus Stimulus Spending*, N.Y. TIMES (Apr. 13, 2020), https://www.nytimes.com/2020/04/13/opinion/coronavirus-stimulus-oversight.html [https://perma.cc/3NLR-4BCX].

7. *See* Christina Morales & Christine Hauser, *Americans Have Lost $145 Million to Coronavirus Fraud*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/coronavirus-scams-ftc-reports.html [https://perma.cc/46A7-NVSR]; Azi Paybarah, *Another Man Used Covid Relief Money to Buy a Lamborghini, Prosecutors Say*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/08/04/us/lamborghini-coronavirus-stimulus.html[https://perma.cc/PFC3-3C4X]; Aaron Gregg, *Defense Contractor with Billions in Sales Got Millions in Pandemic Loans Intended for Small Businesses*, WASH. POST (Aug. 3, 2020), https://www.washingtonpost.com/business/2020/08/03/defense-contractor-with-billions-sales-got-millions-pandemic-loans-intended-small-businesses/ [https://perma.cc/ZZN8-HN2R].

8. 31 U.S.C. §§ 3729–33 (2009).

9. *See, e.g.*, Davis, *supra* note 5 (committing to "deploy the False Claims Act against those who commit fraud related to the various COVID-19 stimulus programs"); Holly Drumheller Butler, *How the Gov't is Cracking Down on PPP Fraud*, LAW360 (June 9, 2020, 5:37 PM), https://www.law360.com/articles/1281065/how-the-gov-t-is-cracking-down-on-ppp-fraud[https://perma.cc/R8E8-DGXP] ("[W]histleblowers may bring False Claims Act cases against PPP loan borrowers for making inaccurate certifications or otherwise violating the requirements relating to PPP loans."). January 2021 brought the first of what is sure to be many FCA settlements concerning PPP fraud. *See* Jessica S. Carey et al., *DOJ Announces First False Claims Act Settlement with Borrower and Its CEO for PPP Fraud*, COMPLIANCE & ENFORCEMENT (Jan. 29, 2021), https://wp.nyu.edu/compliance_enforcement/2021/01/29/doj-announces-first-false-claims-act-settlement-with-borrower-and-its-ceo-for-ppp-fraud/ [https://perma.cc/M7RX-FWM2]. For a broader discussion and partial critique of the ways in which the legal system attempted to adapt in the wake of COVID-19, *see* Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice*

reason: over the past three decades, the FCA has proved an incredibly effective tool for combatting fraud against the government, resulting in more than $2.2 billion in settlements and judgments in fiscal year 2020 alone.[10]

The FCA, at its core, is designed to stem fraud against the government by imposing civil monetary penalties and treble damages upon any person who knowingly presents a false claim to the government for payment.[11] The statute's efficacy has been particularly pronounced when addressing fraud that the government would have difficulty discovering on its own, in no small part because of the statute's *qui tam* provision, which allows for suits by private parties on behalf of the government in exchange for a portion of the recovery.[12] That system effectively operationalizes a network of individuals who are incentivized and better situated to detect and report fraudulent conduct that is, by its nature, "hidden from view and would require public enforcers to pay near-infinite information costs" to uncover.[13] Moreover, developments over the last thirty years in judicial decisions explaining what constitutes a "false or fraudulent" claim—a standard not defined by the statute itself—

in the Time of Covid: Emerging Trends and Questions to Ask, 23 N.Y.U. J. Legis. & Pub. Pol'y (forthcoming 2021).

10. DEPT. JUST., FRAUD STATISTICS: OCTOBER 1, 1986 – SEPTEMBER 30, 2020, https://www.justice.gov/opa/press-release/file/1354316/ [https://perma.cc/E2AW-WKR9]; *see also The False Claims Act*, DEPT. JUST. (last updated Jan. 14, 2021), https://www.justice.gov/civil/false-claims-act [HTTPS://PERMA.CC/2SEL-3KSN].

11. 31 U.S.C. § 3729(a)(1)(A). While the so-called presentment provision found in section 3729(a) of the FCA applies to the quintessential false claim, the Act also includes provisions targeting the use of false records, conspiracy to commit fraud, and other means of defrauding the government. *See id.* §§ 3729(a)(1)(A)–(G).

12. *Id.* § 3730(b). "Qui tam" is short for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning he "[w]ho sues on behalf of the king as well as for himself." James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1262 (2013). The device was first utilized in England, *see* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:3 (3d ed. 2016), and qui tam statutes, or at least their functional equivalent, "have been in existence . . . in this country ever since the formation of our government." Marvin v. Trout, 199 U.S. 212, 225 (1905). They were present in the American colonies at least as early as 1692, and individual states enacted them as early as 1785. SYLVIA, *supra* note 12, § 2:5. One of the first laws adopted by the First Congress was a qui tam provision, and the early federal government continued to enact qui tam statutes thereafter. *Id.* Under the FCA's current *qui tam* provisions, the relator's share of the recovery depends upon, *inter alia*, whether the government exercised its right to intervene and the relator's contribution. 31 U.S.C. §§ 3730(d)(1), (2).

13. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1270 n.87 (2012).

have widened the statute's reach and displayed the critical role that the FCA plays in enforcing regulatory standards involving health care, defense, and other major areas of government contracting where such informational disparities tend to arise.

Those judicial developments came to a head in 2016 when the Supreme Court, in *Universal Health Services, Inc. v. United States ex rel. Escobar*, resolved a dispute amongst the circuits about whether a claim for Medicare reimbursement could be considered false—and therefore actionable under the FCA—under what some called the theory of implied false certification.[14] According to that theory, the FCA's falsity requirement may be satisfied when a claim impliedly and falsely certifies compliance with material statutory, regulatory, or contractual requirements notwithstanding any lack of express false assertions or claims. To understand the importance of that theory, imagine a company that contracts with the federal government to supply N95 respirators. And imagine that the contractor provides a shipment of those masks to the government, subsequently submits a claim for payment for "one shipment of N95 respirators," and fails to disclose that the shipped masks were produced in a manner that did not satisfy a Covid-era regulation requiring that all N95 respirators be subject to enhanced quality control measures. Under a traditional theory of falsity, the contractor's claim would not be false because, despite not providing the government with what it intended to pay for—N95 respirators that conform to federal regulatory standards—the contractor did, as a matter of fact, provide the government with a shipment of N95 respirators and made no express assertions about their place of production or compliance with federal regulations. Under a basic theory of implied false certification, however, that same claim would be considered false on the ground that, by seeking payment for "N95 respirators," the claimant implicitly certified that the goods provided were N95 respirators as understood within the context of the contract with the federal government—i.e., that the goods complied with the federal regulations applicable to N95 respirators. Because the respirators were not compliant with those regulations, that implicit certification—and thus the underlying claim—was false and fraudulent.

In *Escobar*, the Court largely sided with the majority of circuits and affirmed the validity of the implied false certification theory in certain contexts.[15] In doing so, however, the Court formulated its

14. 136 S. Ct. 1989 (2016).
15. *See id.* at 1999.

rule in terms that, according to some courts, raised new questions surrounding the reach—rather than the propriety—of implied false certification. The issue at the heart of this new falsity debate is whether and to what extent the claimant must make specific representations about the goods or services provided before the claim will be treated as an implicit certification of compliance with the applicable regulatory, contractual, and statutory provisions. In other words, and to return to the prior example, how should a court treat a claim from a contractor supplying N95 respirators that were not put through enhanced quality control measures if the contractor merely requested payment in reference to a corresponding order number from the government with no additional statements? Is that claim beyond the reach of the FCA given the total lack of representations by the contractor? Or does the submission of the claim itself imply something about either the goods themselves or the contractor's entitlement to payment that, in light of the contractor's noncompliance and failure to disclose that noncompliance, is sufficient to render the claim fraudulent?

What if the contractor requested payment for a "shipment of masks" provided to the government without specifying that these were meant to be "N95 respirators"? Does that lack of specificity shield the contractor from liability despite the fact that they requested payment for inadequately tested medical equipment? Or is the contractor's representation that the claim is for a shipment of masks—when taken in the context of a contract for N95 respirators subject to a federal quality control regulation and combined with the contractor's failure to disclose their noncompliance with that regulation—render the minimal representation sufficiently misleading so as to make the claim as a whole fraudulent? And if something more specific than a "shipment of masks" is required, would a claimant's statement that they are seeking payment for a "shipment of N95 respirators" provide enough of a representation so as to implicitly certify that the masks provided were compliant with the regulations applicable to N95 masks as suggested above, or is an even greater degree of specificity required?

In recent years, a number of district and circuit courts addressing questions of this sort have mistakenly read *Escobar* as endorsing the narrower view of implied false certification—one that limits its reach to situations where the claimant made specific representations about the goods or services provided. As a result, courts have constricted, rather than expanded, the liability of companies that knowingly and falsely imply they are entitled to payment by imposing new limits on a theory of falsity that, before *Escobar*, was viable in almost every circuit without any such restrictions. And, critically, courts imposing those restrictions have done so at a time when the FCA's *qui tam* provision is crucial for the effective enforcement of federal anti-fraud prerogatives.

This Note argues that the lower court trend of decisions on this issue is inconsistent with the text and purpose of the FCA, Supreme Court decisions interpreting the falsity requirement—including *Escobar*—and the statute's inherent regulatory function. In response to that trend and in light of those inconsistencies, this Note urges courts to treat as false any claim for payment that, when presented, was not accompanied by a disclosure of the claimant's known noncompliance with contractual, regulatory, or statutory provisions.[16] It further argues that this reading of falsity maintains a normative edge over the more restrictive view by fostering the FCA's unique ability to ferret out hard-to-find fraud and thus aiding in the enforcement of critical regulations in the healthcare space and elsewhere.

This Note proceeds in three parts. By way of background, Part I begins by tracing the history of the FCA from its inception during the Civil War, its gradual disuse leading up to, during, and after the Second World War, and its subsequent rise and expansion following a set of amendments beginning in the mid-1980s. In surveying that history, this Note pays special attention to shifts in the FCA's area of use and the ways in which legislative amendments and court decisions have fostered its evolution in those new roles. Part I then situates the FCA within the United States regulatory system and the uniquely prominent role that private litigation plays in that system by framing it as both a primary form of regulatory enforcement and a supplement to public enforcement regimes.

Part II begins by examining the endorsement by some lower courts of the theory of implied false certification in the lead-up to *Escobar*, which expanded the FCA's usefulness in a variety of contexts while also generating controversy and debate among courts and commentators. It then turns to the Supreme Court's decision in *Escobar* itself and the way in which courts have interpreted that decision in the years since. Focusing specifically on the standard for

16. It is important to note that even if a claim is "false or fraudulent," the claimant is not exposed to FCA liability unless the plaintiff can also prove that the regulations with which the claimant failed to comply were material and that they submitted the claim with the requisite degree of scienter. A finding of falsity under the proposed standard would thus not result in liability unless the government considered the violation material to its decision to pay the contractor. This Note does not express any view on how courts ought to apply those other standards.

establishing falsity, this Note argues that—contrary to the leading lower-court interpretations of *Escobar*— neither the language in the opinion nor the background against which the case was decided supports the conclusion that the Court strictly limited the implied false certification theory to those cases where the claimant made specific representations.

Finally, having established that neither *Escobar* nor the text of the statute *requires* pleading and proof of specific representations when alleging falsity, Part III makes the normative case against such a requirement. It argues that the heightened burden created by that rule is contrary to the spirit and purpose of the FCA and would foreclose its use in circumstances where its *qui tam* provision is critical for the detection and prosecution of dangerous regulatory and contractual violations.

I.
FRAUD, WHISTLEBLOWERS, AND THE AMERICAN REGULATORY STATE

The history of the False Claims Act has been well catalogued elsewhere.[17] For these purposes, it is necessary only to cover the aspects of that history that may come to bear on our understanding of falsity. In particular, it is critical to outline the aims of the FCA, the law's place within the broader U.S. regulatory regime, and the way in which amendments over the law's history affect our understanding of each. To this end, this Part begins by tracing the development of the FCA and the significant amendments to it. It then draws on that history as well as insights pertaining to the FCA's structure to situate the law within the broader private enforcement framework prevalent in the U.S. regulatory state. By so doing, this Part highlights a central premise and aim of the FCA's presentment provision: the prosecution of hard-to-detect fraud via *qui tam* suits that—as is true for private regulatory enforcement regimes more generally—capitalize on the informational advantages of private parties and fill gaps left by the functional limitations of public enforcement.

A. The False Claims Act: History and Development

The False Claims Act emerged as a direct response to allegations of rampant fraud in government contracting during the Civil

17. *See, e.g.*, John R. Thomas Jr. et al., *The False Claims Act Past, Present, and Future*, 63 FED. LAW. 64 (2016); SYLVIA, *supra* note 12, § 2:1; JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (4th ed. 2016).

War, during which time the government's demand for and spending on a host of supplies had skyrocketed.[18] From substituting sand for gunpowder and sugar,[19] providing dying donkeys instead of horses and mules,[20] gluing together rags to pass off as army uniforms and cardboard to pass off as boots,[21] and selling rifles without triggers,[22] opportunistic contractors seemingly seized every opportunity to take advantage of the Union's newfound need for supplies. After holding hearings on the problem in 1862 and 1863, Congress set out "to curb the 'grossest frauds upon the Government.' "[23]

Substantively, the resulting law created liability for "any person . . . who present[s] . . . for payment . . . [a] claim upon or against the Government of the United States [they know] to be false."[24] Those found liable were subject to double damages and a civil fine of $2,000 per violation.[25] And in order to adequately enforce that law, Congress drew upon the *qui tam* procedural device, allowing private citizens to bring suits on behalf of the government in exchange for half of any recovery obtained.[26]

In its early years, the FCA—then called the "Informer's Act" or the "Lincoln Law"[27]—was successful in prompting private citizens to bring suits against contractors on behalf of the United States, and "[t]he Union Army was thus in part funded by payments made by malefactors to satisfy judgments rendered in favor of the United States in proceedings brought by whistleblowers or to settle such

18. *See* Thomas Jr. et al., *supra* note 17, at 65–66.

19. Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud That "Counts" Under the False Claims Act*, 5 U. ILL. L. REV. 1811, 1815 (2017); Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 339 (2014).

20. Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 365 (2015).

21. Deborah R. Farringer, *From Guns that Do Not Shoot to Foreign Staplers: Has The Supreme Court's Materiality Standard Under* Escobar *Provided Clarity for the Health Care Industry About Fraud Under the False Claims Act?*, 83 BROOK. L. REV. 1227, 1227 (2018).

22. Paul D. Carrington, *Qui Tam: Is False Claims Law a Model For International Law?*, 2012 U. CHI. LEGAL F. 27, 29 (2012).

23. Farringer, *supra* note 21.

24. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 (current version at 31 U.S.C. §§ 3729–33 (2009)).

25. Thomas Jr. et al., *supra* note 17, at 66.

26. *Id.*

27. BOESE, *supra* note 17, at 1–5.

claims."[28] But "[a]fter the Civil War, government spending, and the consequent opportunities for fraud and FCA claims, greatly diminished."[29] So began the first arc of the FCA's history as it shifted from initial enforcement to gradual disuse.[30] And although the New Deal era and World War II brought about a return of heightened government spending, the FCA's role in stemming any consequent fraud was met with far greater skepticism as "[e]nterprising relators began bringing suits based purely on information they obtained from public sources, including indictments, newspaper articles, and congressional investigations."[31] It was commonly believed that these so-called parasitical *qui tam* actions, which frequently arose in the context of defense procurement fraud, "thwart[ed] the spirit of the act" by permitting relators to recover without contributing any meaningful information, while also creating a "race to the courthouse" and "infring[ing] upon the Attorney General's control over criminal and civil fraud actions."[32] Those concerns only heightened after the Supreme Court held in 1943 that nothing in the statute's text or history precluded such suits.[33]

Congress's response was swift: By the end of the year, it had amended the FCA to include a government knowledge defense—precluding *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought based on facts known to government agencies or employees"—and slashed the share of recovery available to relators.[34] Those amendments were

28. Carrington, *supra* note 22. *See also* Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS., 109, 123 ("[N]umerous relators came forward to pursue claims against contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall. . . . It is certain that they did restore some revenue to the Union treasury from those who had raided it.").

29. Thomas Jr. et al., *supra* note 17, at 66.

30. *See* Carrington, *supra* note 22 ("After the Civil War, Lincoln's law fell into disuse. The law was not invoked during the War with Spain, World War I, or, with one exception, World War II.").

31. Thomas Jr. et al., *supra* note 17, at 66.

32. S. Rep. No. 99-345, at 10–11 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5275–76.

33. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), *reh'g denied*, 318 U.S. 799 (1943).

34. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609. The Congressional response was nearly harsher: *Hess* had "prompted then Attorney General Francis Biddle to request that Congress repeal the qui tam provisions of the act." S. Rep. No. 99-345, at 11. The House passed repeal legislation, "but the Senate passed an amendment to the House bill providing for the retention of qui tam suits, with restrictions." *Id.*

undeniably successful in stemming "parasitical" suits, but the combination of the government knowledge defense and decreased financial incentive for relators also significantly lowered the average number of *qui tam* suits brought across the board. As a result, "[t]he FCA was largely irrelevant" between the passage of the 1943 amendments and the next set of amendments to the FCA in 1986,[35] notwithstanding the increase in government spending and thus increased opportunities for fraud resulting from both the military buildup during the Korean, Vietnam, and Cold Wars as well as the expansion of government programs during that period.[36]

After numerous investigations into and reports on the rise in fraud,[37] it became clear to legislators that the existing FCA model was failing.[38] In 1985, Department of Defense officials "testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses."[39] The Department of Justice (DOJ) estimated that in 1986, "between 1 percent and 10 percent of the entire federal budget was lost to fraud."[40] Official estimates of government money lost to fraud "range[d] from hundreds of millions of dollars to more than $50 billion per year," and a 1981 GAO report recognized that the estimated loss of between $150 and $200 million in less than three years "[did] not include . . . the cost of undetected fraud which is probably much higher because weak internal controls allow fraud to flourish."[41]

Recognizing these failures, Congress once again amended the FCA in 1986 so as "to make the False Claims Act a more effective

35. Thomas Jr. et al., *supra* note 17, at 66.

36. *Id.* As Congress noted when amending the law in 1986: "In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982. Similarly, the Department of Health and Human Services ha[d] nearly tripled the number of entitlement program fraud cases referred for prosecution over the past 3 years." S. Rep. No. 99-345, at 3.

37. *See* S. Rep. No. 99-345, at 2-3.

38. Congress itself recognized "that the 1943 amendments and subsequent 'restrictive court interpretations . . . tended to thwart the effectiveness of the statute." Alexander Kristofcak, Note, *FCA v. FDA: The Case Against the Presumption of Immateriality from Agency Action*, 95 N.Y.U. L. REV. 235, 242 (2020) (brackets and internal quotation marks omitted).

39. S. Rep. No. 99-345, at 2.

40. Thomas Jr. et al., *supra* note 17, at 66. Based on that figure, and "[t]aking into account the spending level in 1985 of nearly $1 trillion, fraud against the Government could [have been] costing taxpayers anywhere from $10 to $100 billion annually." S. Rep. No. 99-345, at 3.

41. S. Rep. No. 99-345, at 3.

weapon against Government fraud."[42] First, Congress made a number of alterations to the public-private enforcement relationship[43] and created protections for whistleblowers, "permitting [them] to sue for relief from retaliatory actions 'by his or her employer . . . .'"[44] Second, Congress softened the limitations of the government knowledge defense, shifting from a full bar to a more limited prohibition on *qui tam* suits. Under the revised Act, the defense applied only to *qui tam* suits based on the public disclosure of allegations or transactions in a government proceeding or investigation, or from the news media, unless the person bringing the action was an original source of that information.[45] Finally, Congress raised the cap on relator recovery, creating a contribution-dependent range between fifteen and twenty-five percent when the government intervenes and twenty-five to thirty percent when the government does not.[46]

In more recent years, Congress has taken further action to ensure that the FCA remains a useful tool in the fight against fraud in government contracting and to undo certain court decisions that Congress believed had misinterpreted the statute and undermined the FCA's purpose.[47] In 2009, Congress passed the Fraud Enforcement and Recovery Act ("FERA"), which eliminated the employer condition for whistleblower retaliation suits, eliminated a judicially created "intent to defraud" requirement, and repealed a statutory "direct presentment" requirement that, in Congress's view, had

42. *Id.* at 4.

43. *See* 31 U.S.C. § 3730(c)(1) (allowing relators to participate in the litigation even after government intervention, subject to certain limitations). Under the prior amendments, "once the action was commenced by the relator, no one could interfere with its prosecution. The act contained no provision for the Government to take over the action" and some courts construed "the relator's interest in the action . . . as a property right which could not be divested by the United States if it attempted to settle the dispute with the defendant." S. Rep. No. 99-345, at 10.

44. 14 Charles Alan Wright, Arthur R. Miller & Helen Hershkoff, Federal Practice and Procedure § 3653 (quoting 31 U.S.C.A. § 3730(h)).

45. *See* Sylvia, *supra* note 12, § 2:9. The change was intended to strike the right balance between guarding against parasitic lawsuits and encouraging relators to come forward with valuable information that the government could not otherwise obtain. Thus, "someone bringing a claim on the basis of a newspaper report would be barred, whereas someone coming forward with information they obtained directly—for example, in the course of their employment—could proceed, even if the government had previously become aware of that misconduct." Kristofcak, *supra* note 38, at 243.

46. 31 U.S.C. §§ 3730(d)(1)-(2).

47. *See* Sylvia, *supra* note 12, § 2:2.

been applied too stringently.[48] In 2010, Congress further amended the FCA with the Patient Protection and Affordable Care Act ("PPACA"),[49] which, *inter alia*, redefined "original source" for the purpose of overcoming the public disclosure bar[50] and specified that claims "includ[ing] items or services resulting from a violation of [the Anti-Kickback Statute] constitute[ ] a false or fraudulent claim" under the FCA.[51]

By all accounts, these series of amendments, and the 1986 amendments in particular, have been successful in revitalizing the FCA as a powerful enforcement mechanism.[52] The percentage of new cases initiated by relators rose from eight to eighty percent in the ten years following the 1986 amendments.[53] The total number of new matters brought under the Act rose from 371 in 1987 to 922 in 2020, and total recoveries under the FCA over that same period amounted to over $64 billion, with yearly recoveries near or above $3 billion from 2010 to 2019.[54]

With the expansion of *qui tam* suits came a broadened role for the FCA in enforcing a large swath of regulatory directives in the United States. While that enhanced regulatory role is apparent in a wide range of areas,[55] it is particularly notable in the healthcare

48. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(b), 123 Stat. 1617, 1624–25 (2009); S. REP. NO. 111–10, at 11 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430; 31 U.S.C. §§ 3729(a)(1)–(3).

49. Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111–148, 124 Stat. 119 (2010).

50. As amended, an original source is someone who has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions . . . ." 31 U.S.C. § 3730(e)(4)(B) (2010).

51. 42 U.S.C. § 1320a–7b(g) (2015).

52. *See* David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1915 (2014) ("The [*qui tam*] regime has expanded rapidly since Congress revived the FCA's qui tam provisions in 1986, generating some 3,000 lawsuits and $20 billion in recoveries in the last five years alone . . . .").

53. Kristofcak, *supra* note 38, at 243.

54. DEPT. JUST., FRAUD STATISTICS: OCTOBER 1, 1986 – SEPTEMBER 30, 2020, *https://www.justice.gov/opa/press-release/file/1354316/* [https://perma.cc/E2AW-WKR9]. Total recoveries in 2020 were almost $1 billion lower than in 2019, although many have suggested that the intervening COVID-19 pandemic stymied the rate of settlement and litigation, partially contributing to the fall in recoveries. *See* Jeff Overly & Daniel Wilson, *Raucous 2021 Awaits FCA Litigants After Low-Key Year*, LAW360 (Jan. 22, 2021), https://www.law360.com/articles/1345411 [https://perma.cc/Q78D-Z7NF].

55. *See* Engstrom, *supra* note 52, at 1944–45 ("Qui tam claims now regularly target underpayment of oil and gas royalties owed when defendants extract natural resources from federal lands. They also reach a myriad of other frauds in connection with federally insured education and housing loans, federal research grants,

space.[56] As one commentator has noted, "the statute has evolved into a powerful civil weapon against fraud in the federal health care programs."[57] By way of simple comparison, in fiscal year 1986, there were fifteen new FCA matters concerning "Health and Human Services," amounting to about four percent of FCA claims initiated, investigated, or referred to the federal government in that year.[58] In fiscal year 2020, there were 573 such matters, making up sixty-two percent of the FCA intake that year.[59] The revitalization and reinforcement of the *qui tam* provision appears to have played a significant role in the FCA's prominence in combatting healthcare fraud: 79.5 percent of the new Health and Human Services matters in 2020 were *qui tam*, whereas only twenty percent of the Health and Human Services claims in 1987 were *qui tam*.[60]

In short, after the 1986 amendments, the FCA became an increasingly important tool for combatting not only outright fraud in government contracting, but also substantial regulatory violations in healthcare and other industries. Understanding more precisely how and why the FCA fits within that regulatory scheme is critical to our understanding of the Supreme Court's endorsement in *Escobar* of the theory of implied false certification as a basis for liability and lower courts' responses to that decision.

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and federal funds distributed in connection with Hurricane Katrina relief efforts and the Troubled Asset Relief Program.").

56. *See, e.g.*, Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 281 (2007) ("[A] remarkable body of empirical data demonstrates the expansive role private qui tam relators are playing in enforcing Medicare and Medicaid fraud and abuse laws."); John T. Boese, *When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the Qui Tam Law*, 43 ST. LOUIS U. L.J. 53(1999) (examining the growth of *qui tam* actions brought under the FCA as a mechanism for disgruntled patients to sue managed care organizations for substandard care, underutilization of health care services, and violations of federal regulations).

57. Joan H. Krause, *Holes in the Triple Canopy: What the Fourth Circuit Got Wrong*, 68 S.C. L. REV. 845, 848 (2017). *See also* Engstrom, *supra* note 52, at 1944 ("The 1986 amendments . . . spurred a rich diversity of claim types," the most common of which "assert[ed] fraud in connection with federally funded healthcare services under Medicare, Medicaid, and defense-procurement contracts.").

58. DEPT. JUST., FRAUD STATISTICS: OCTOBER 1, 1986 – SEPTEMBER 30, 2020.

59. Health care claims also made up nearly eighty-five percent of FCA proceeds in 2020. *Id.*

60. *Id.*

B. The FCA as a Regulatory Device

The American administrative state is particularly unique in is its reliance on private enforcement to ensure compliance with its regulatory directives.[61] As one commentator has explained, "the predominant approach to regulation in the United States is ex post rather than ex ante," and the American system "entrusts ex post law enforcement not to a centralized state bureaucracy but rather to a diffuse set of regulators."[62] Chief amongst those regulators are the individuals and classes of litigants who engage in private enforcement via litigation.[63] As detailed below, this reliance on private enforcement is premised in part upon the informational disparities that may stymie public enforcement, as well as the functional limitations imposed on public regulators and general concerns about underenforcement. The FCA, although enacted well before anything resembling the modern administrative state was in existence, builds upon those same premises by creating a "complex public-private hybrid" enforcement scheme[64] to ensure compliance with important contractual and regulatory mandates, particularly in areas of government spending wherein the " 'swamp' of fraud opportunities has grown substantially over the life of the post-1986 regime."[65]

1. Informational Asymmetry

Relative to private parties, public enforcers often suffer informational disadvantages that hinder their ability to detect certain fraudulent conduct or regulatory violations.[66] Reliance on private enforcement via litigation addresses those informational disadvantages by empowering those with greater and more cost-effective access to crucial information about the fraud or violation in

61. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1137 (2012) ("The American regulatory system is unique in that it expressly relies on a diffuse set of regulators, including private parties, rather than on a centralized bureaucracy for the effectuation of its substantive aims."). *See also* Engstrom, *supra* note 52, at 1919–20 ("Across a range of regulatory contexts, private, not public, enforcement now dominates the field.").

62. Glover, *supra* note 61, at 1146.

63. *See id.* at 1146–47, 1154–55 (explaining that private litigants play a leading role as both primary and supplementary regulators).

64. Engstrom, *supra* note 52, at 1976.

65. *Id.* at 1954.

66. *See* Glover, *supra* note 61, at 1154–55.

question.[67] This is particularly true where, as with *qui tam*, the private enforcement scheme empowers and incentivizes insiders with knowledge of the facts giving rise to liability, rather than mere knowledge of the harm's occurrence, to come forward. The FCA fully embodies those basic observations and the consequent intuition, drawn from the history of private regulatory enforcement in the United States, that "enforcement mechanisms should be entrusted and tailored to the needs of the regulator with superior command of information relevant to potential wrongdoing."[68] Indeed, the FCA operates within "the classic whistleblower model in which company insiders surface information about wrongdoing that is prohibitively costly for public regulators to discover or dislodge."[69]

The history surrounding the FCA's enactment further demonstrates that the need to overcome informational disparities that would overwise bar the detection and prosecution of fraud was a driving factor behind the ultimate form that the law took. As one commentator has noted, contractors defrauding the government during the Civil War often "acted with impunity because the scale and complexity of the war effort made identifying the responsible parties and prosecuting frauds too onerous."[70] By incorporating a *qui tam* provision and incentivizing relators with a share of the recovery, Lincoln's Law directly addressed the informational asymmetries that had enabled the fraud in the first instance. Moreover, that Congress responded to the perceived influx of parasitical claims in the 1930s and 1940s by stemming relator's incentives and imposing a government knowledge defense demonstrates the importance of private informational advantages in justifying the FCA's reliance on private litigation. When relators were no longer bringing new information to the table, there was no justification for an expansive private enforcement mechanism.

The legislative history of the 1986 amendments furthers this narrative. At the time, Congress was troubled by a 1981 GAO report

67. *Id.* at 1155. *Cf.* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, at 359, 365 (1984) (noting that information differentials cut in favor of private versus public regulation of injury risk).

68. Glover, *supra* note 61, at 1177–78.

69. Engstrom, *supra* note 52, at 1978.

70. Schwartz & Goldberg, *supra* note 19, at 339–40. *See also* SYLVIA, *supra* note 12, § 1:2 ("Because of the Government's size and the range of programs it funds, the opportunities to defraud the Government are vast. For related reasons, the risk of being caught defrauding the Government historically has remained relatively low.").

finding that "most fraud goes undetected."[71] As Congress recognized in light of that report, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."[72] Given the FCA's inability to foster that cooperation after the 1943 amendments[73] and the Congressional committee's belief that "[i]n the face of sophisticated and widespread fraud, . . . only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds," Congress once again sought to increase the information-generating capacity of *qui tam* suits by softening the government knowledge bar, raising incentives for relators, and reinforcing whistleblower protections.[74] That history demonstrates that the FCA's "overriding theme . . . is virtually to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government," particularly in situations where "[t]he receipt of information from people on the inside is tremendously valuable, as wrongdoing often 'takes place in the shadows and may never be visible to anyone but the immediate actors.' "[75]

2. Functional Limitations in Public Enforcement

Compounding the enforcement dilemmas posed by informational asymmetry is the simple fact that, "for most public regulatory bodies, scarce resources are the rule, not the exception," and those "limited resources . . . are often insufficient to perform the functions with which they are tasked."[76] Private enforcement generally addresses those limitations by "provid[ing] protections against

71. S. Rep. No. 99-345, at 2.

72. *Id.* at 4.

73. *See id.* ("Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute.").

74. *Id.* at 2 ("In order to make the statute a more useful tool against fraud in modern times, the Committee believes the statute should be amended . . . to encourage any individual knowing of government fraud to bring that information forward."). The FCA's growing success in the healthcare space also suggests that its qui tam model is particularly effective at addressing informational asymmetry given that, in the "highly regulated structure of the U.S. health care system, with multiple federal health care programs that provide payment and services to individuals in various forms, identifying fraud has become increasingly challenging." Farringer, *supra* note 21, at 1228.

75. Pacella, *supra* note 20, at 366 (quoting Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 689 (2004)).

76. Glover, *supra* note 61, at 1153.

harm based on the initiative of a few," and "provid[ing] a 'back-up' system of redress."[77] Thus, even where a more robust public enforcement mechanism exists, private parties are often a functional necessity for the meaningful enforcement of regulatory directives.[78] Congress, in enacting the 1986 amendments, recognized that the significant problems posed by those functional limitations were equally applicable to public anti-fraud enforcement: "In addition to detection, investigative and litigative problems which permit fraud to go unaddressed, perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies."[79] And, just as with private enforcement generally, a more expansive *qui tam* regime of the type established by the 1986 and subsequent amendments inherently mitigates those issues in several significant respects.

On the one hand, the FCA's intervention model—in which relators submit claims under seal providing the government with a period of time to decide whether or not to intervene in the case—allows the government to target its resources as necessary without compromising enforcement more generally. Put otherwise, the very nature of the FCA's public-private enforcement regime allows the "resource-constrained and risk-averse" DOJ to "rely upon private enforcers to test the waters in federal court before diving in and spending the agency's reputational capital and resources."[80] As a result, the DOJ (and, indirectly, other regulatory bodies with independent enforcement power) may direct its expertise and resources to those cases where it is most needed without risking underenforcement in those where it is not.

On the other hand, the incentives that drive *qui tam* suits also tend to foster specialization in the form of repeat players and a dedicated relators bar. Although some critics have decried the trend towards specialization as problematic insofar as it encourages

77. *Id.* at 1155.

78. *Id.* at 1160.

79. S. Rep. No. 99-345, at 7. *See also* Thomas Jr. et al., *supra* note 17, at 66 ("The Senate determined that the government was not able to police this fraud effectively, due to federal enforcement agencies' lack of resources."). This same issue appears to have been a leading motivation behind the use of *qui tam* statutes in the American colonies and in the states. SYLVIA, *supra* note 12, § 2:5 ("During the colonial period, regulation was 'cheap in money and men' and the manner of law enforcement was shaped by necessity. Qui tam actions were well-suited to these circumstances because they drew on private sector resources. . . . Qui tam actions [thus] encouraged private enforcement of laws that would otherwise be ineffective because of the lack of government resources.").

80. Engstrom, *supra* note 52, at 1986–87.

a deluge of frivolous and parasitic *qui tam* suits,[81] empirical evidence indicates that those concerns are overblown if not entirely meritless.[82] And, critically, at least some studies suggest that specialization may have the net positive effect of more accurately screening for meritorious cases, generating economies of scale that can minimize enforcement costs, better monitoring the principal-agent relationship between relators and counsel, and producing a closer alignment between private enforcement efforts and public priorities.[83] More generally, there is compelling empirical support for the claim that "more experienced firms bring more successful and larger qui tam cases."[84] Thus, while not entirely without its disadvantages,[85] the specialization prompted by the FCA's *qui tam* system may well result in more effective and efficient litigation than otherwise possible in light of the DOJ's limited enforcement resources.

Along each of the characteristics outlined above, the FCA fits the general model of private enforcement of regulatory actions, and the facts leading up to the 1986 amendments suggest that it was meant to build upon those intuitions about the best means of combating fraud and enforcing regulatory standards in a myriad of contexts. The proliferation of *qui tam* suits and recoveries in the years since strongly suggests that much of the FCA's value stems from its ability to capitalize on those intuitions in order to best reach the most veiled and politically unsavory frauds without drawing an immense sum of taxpayer dollars in an attempt to recover the same.

II
IMPLIED FALSE CERTIFICATION FROM *AB-TECH* TO *ESCOBAR* AND BEYOND

Although the FCA both embodies the spirit of private regulatory enforcement that predominates in the United States and has been, as a matter of fact, an important tool in enforcing a number

81. *See* Engstrom, *supra* note 13, at 1249.

82. *See, e.g.*, Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 580 (2011) ("In sum, the claim that the federal courts are inundated with 'frivolous' lawsuits is unsubstantiated by the available empirical evidence."); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529–30 (1997) (arguing that academic literature attempting to demonstrate frivolous lawsuits tend to use the term without defining it and that, upon further scrutiny, the concept of frivolous lawsuits "is quite slippery.").

83. Engstrom, *supra* note 13, at 1257–59.

84. *Id.* at 1320.

85. *See id.* at 1259–62 (cataloging some of the more nuanced problems posed by specialization amongst relators outside of the traditional frivolous litigation narrative).

of regulatory schemes, it differs from traditional regulatory statutes in a significant way. Many regulatory statutes accord discretion to experts at the agency level to define the precise contours of the regulatory field. The FCA, by contrast, leaves questions about its scope and operation—questions arising largely from definitional gaps in the statute's text—to be sorted out by courts and litigants up and until Congress acts via amendments.[86] Thus, while the FCA bars, amongst other things, the knowing presentment of "false or fraudulent claim[s] for payment" from or "approval" by the government, the statute leaves open what precisely makes a claim for payment or approval sufficiently false or fraudulent so as to trigger liability.[87]

In the vast majority of false presentment claims, courts have relied on two broad conceptions of falsity to resolve that statutory uncertainty.[88] The first, factual falsity, applies to claims that involve "incorrect description[s] of goods or services provided or a request for reimbursement for goods or services never provided."[89] In such cases, the claim is said to be false because its factual basis—the provision of goods or services for which the claimant seeks payment—is itself false. The second, legal falsity, captures claims for which the underlying goods or services were provided but that nonetheless involved "a false representation of compliance with a federal statute or regulation or a prescribed contractual term."[90] Those certifications may be express (express false certification) or implied (implied false certification). Critically, because implied false certification does not depend on any express claim of compliance on the part of the claimant but instead is premised on false certification that are implied by the submission of the claim itself,[91] that

86. Agencies and regulators do have a role to play in the scope of FCA enforcement insofar as they define the regulatory terms themselves, which in turn will often form the basis for assessing both whether a claim was false and whether any such falsity was material. But that link is an indirect one relative to both the relevant agency and the alternative enforcing body—the DOJ—as demonstrated by the proposals to "arm the DOJ . . . with rulemaking authority to define the bounds of FCA liability." Engstrom, *supra* note 52, at 1997–98. For discussion of the democratic implications of agency disinvolvement in "rulemaking" under the FCA, see *id.* at 2002–05.

87. 31 U.S.C. § 3729(a)(1)(A).

88. Though helpful for a more nuanced examination of the falsity standards, it is also worth noting that these categories are, in a sense, artificial and malleable. *See* SYLVIA, *supra* note 12, § 4:34

89. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).

90. *Id.* at 696; *see also* SYLVIA, *supra* note 12, § 4:34.

91. *E.g.*, United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011). In other words, implied false certification applies when,

particular theory of falsity can reach the most concealed forms of fraud which may otherwise be unassailable for want of a showing of falsity.

In 1994, the Court of Federal Claims first recognized implied false certification as a valid theory of falsity in its oft-cited *Ab-Tech* decision.[92] In that case, a contractor was awarded a construction contract under the Small Business Act 8(a) program, which was designed to assist minority-owned small businesses in the government contracting field. Over the course of their performance, however, the contractor violated a regulation requiring any co-management agreement between a contractor and subcontractor to be approved by the Small Business Association and had submitted requests for progress payments while in violation of that regulation. Although the claims for payment did not overstate the amount that the contractor was owed or misrepresent what progress they had made, the court held that "[t]he payment vouchers represented an implied certification by [the contractor] of its continuing adherence to the requirements for participation in the 8(a) program."[93] By failing to disclose the prohibited arrangement, the contractor "dishonored the terms of its agreement with that agency [and], more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program."[94] Consequently, the contractor's claims for payment were false for purposes of FCA liability.

Under this theory of falsity, the government and relators could more easily use the FCA to pursue claims premised on misleading half-truths and, at least under certain constructions of the theory, claims for which omissions alone rendered the claim false.[95] Given the potentially monumental damages that can attach to successful FCA claims, defendants fought to limit its validity and scope, result-

"through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment." United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1169 (10th Cir. 2010) (citing Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 532–33 (10th Cir. 2000)); *cf. Wilkins*, 659 F.3d at 305) ("[I]mplied false certification liability . . . attaches when a claimant seeks and makes a claim for payment from the Government without disclosing that it violated regulations that affected its eligibility for payment."(internal quotation marks omitted)).

92. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994).

93. *Id.*

94. *Id.*

95. *See* United States v. SAIC, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (noting that courts can "infer implied certifications from silence" in certain contexts).

ing in circuit splits around both. This Part begins by cataloging those splits and their implications for our understanding of falsity under the FCA. It then turns to the Supreme Court's decision in *Escobar*, which resolved a number of those splits. Finally, it explores the ways in which *Escobar* has been applied by some lower courts to limit the availability of implied false certification based on a misreading of the Court's language and argues against those trends.

A. *Early Disputes Around Implied False Certification*

After *Ab-Tech*, a number of courts quickly realized that the legal justifications in favor of implied false certification were ample. As the Second Circuit noted in its early and widely cited opinion approving the theory:

> Foundational support for the implied false certification theory may be found in Congress' expressly stated purpose that the Act include at least some kinds of legally false claims and in the Supreme Court's admonition that the Act intends to reach all forms of fraud that might cause financial loss to the government.[96]

Other courts found further support in the legislative history suggesting that Congress intended to create a broad scheme of liability reaching "all fraudulent attempts to cause the Government to pay [out] sums of money or to deliver property or services."[97] And although some courts emphasized the lack of any statutory language speaking to legal, factual, express, or implied falsity,[98] others insisted that "the language and the structure of the FCA support[ed]" implied false certification.[99]

Aside from whether the statute *could* be read to support implied false certification, courts addressing the issue faced a more normative inquiry: whether courts *should* read the FCA to reach claims that are legally false by way of implication absent any statutory language *requiring* such breadth. For the Seventh Circuit—the only court to have strictly disallowed implied false certification[100]—

96. Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001) (first citing S. Rep. No. 99–345, at 9, and then citing United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

97. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 306 (3d Cir. 2011) (alteration in original) (quoting S. Rep. No. 99–345, at 9).

98. *See* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385–86 (1st Cir. 2011).

99. *Wilkins*, 659 F.3d at 306.

100. United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711–12 (7th Cir. 2015) ("Although a number of other circuits have adopted this so-called doctrine

this question remained front and center. Indeed, the court rejected the theory not on any specific legal ground but because, in its view, "[t]he FCA [was] simply not the proper mechanism for government to enforce violations of [regulatory] conditions of participation . . . ."[101]

Even for courts that adopted implied false certification, concerns about the proper scope of FCA liability could not go unaddressed. But while the Seventh Circuit acted on them by foreclosing the theory altogether, a large number of circuits chose instead to constrict its permissible scope. Many did so by restricting the falsity element itself, insisting, for example, that "implied false certification 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."[102] By narrowing the range of claims potentially subject to implied false certification liability,

of implied false certification, we decline to join them . . . ."). For courts that allowed the theory, *see e.g.*, *Mikes*, 274 F.3d at 699; *Wilkins*, 659 F.3d at 306; United States v. Triple Canopy, Inc., 775 F.3d 628, 635–37 (4th Cir. 2015); United States *ex rel.* Augustine v. Century Health Servs., 289 F.3d 409, 415 (6th Cir. 2002); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 996–98 (9th Cir. 2010); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1168–69 (10th Cir. 2010); *SAIC*, 626 F.3d at 1266–67; United States *ex rel.* Bryant v. Williams Bldg. Corp., 158 F. Supp. 2d 1001, 1009–10 (D.S.D. 2001). The First Circuit disclaimed all "formal categories of falsity," but in practice the court allowed would-be implied false certification claims to proceed. *See Hutcheson*, 647 F.3d at 386–88, 392. The Fifth Circuit avoided formally adopting or disallowing the theory. *See* United States *ex rel.* Gage v. Davis S.R. Aviation, L.L.C., 623 Fed. Appx. 622, 625 (5th Cir. 2015). The Eleventh Circuit appeared to have accepted the theory early on, *see* McNutt *ex rel.* United States v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005), but in 2015 the court declined to "express [an] opinion as to the viability of [the] theory," United States *ex rel.* Osheroff v. Humana Inc., 776 F.3d 805, 808 n.1 (11th Cir. 2015).

101. *Sanford-Brown*, 788 F.3d at 712 (citation omitted).

102. *Mikes*, 274 F.3d at 700; *see also Wilkins*, 659 F.3d at 307 (adopting the *Mikes* formulation); *Augustine*, 289 F.3d at 414 (same); *Hutcheson*, 647 F.3d at 386 (adopting the requirement but rejecting the rule that "implied conditions of payment can only be found in statutes and regulations, and that these sources must expressly state the obligation."); United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1218 (10th Cir. 2008) (looking to the underlying statutes, regulations, or contracts to determine whether payment was conditioned on compliance); United States *ex rel.* Lee v. Fairview Health Sys., No. Civ.02–270 RHK/SRN, 2004 WL 1638252, at *3 (D. Minn. July 22, 2004). Without recognizing the validity of the theory, the Fifth Circuit consistently dismissed "false-certification claims (implied or express) when a contractor's compliance with federal statutes, regulations, or contract provisions was not a 'condition' or 'prerequisite' for payment under a contract." United States *ex rel.* Steury v. Cardinal Health, Inc. (*Steury II*), 735 F.3d 202, 205 (5th Cir. 2013).

courts could better control the theory's proliferation and thereby account for the policy concerns that ultimately motivated the Seventh Circuit to reject the theory outright.

As several courts noted, however, there was no textual basis for the condition of payment requirement,[103] and in at least some contexts, such a narrow application of the theory could arguably run against Congress's intent with respect to the FCA's scope.[104] For courts unwilling to adopt the condition of payment requirement as a result, the solution was to shift the gatekeeping burden from the falsity element to the statute's scienter requirement[105] and the judicially imposed materiality requirement[106]:

> [W]ithout clear limits and careful application, the implied certification theory is prone to abuse by the government and *qui tam* relators who . . . may attempt to turn the violation of minor contractual provisions into an FCA action. In our view, however, instead of adopting a circumscribed view of what it means for a claim to be false or fraudulent, this very real concern can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.[107]

Doing so, of course, had the similar effect of permitting a narrower band of prospective implied false certification claims than would have otherwise been available, allaying, at least to some degree, the concerns of those who feared its overly expansive use.

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103. *See* United States v. Triple Canopy, Inc., 775 F.3d 628, 637 n.5 (4th Cir. 2015) (quoting *SAIC*, 626 F.3d at 1268); *Hutcheson*, 647 F.3d at 387 ("[T]he text of the FCA does not exhibit an intent to limit liability in this fashion.").

104. *See SAIC*, 626 F.3d at 1268 ("[A]dopting [a condition of payment requirement] would foreclose FCA liability in situations that Congress intended to fall within the Act's scope.").

105. 31 U.S.C. § 3729(a)(1)(A) (applying to any person who "knowingly presents . . . a false or fraudulent claim for payment or approval"). The standard inquiry is whether the defendant had actual knowledge or acted with deliberate ignorance or in reckless disregard of the truth or falsity of the claim; proof of intent to defraud is not required. *Id.* § 3729(b)(1).

106. Unlike other subsections of the FCA, the presentment provision contains no materiality requirement. Nonetheless, some courts had imposed a materiality standard for all presentment claims, *see e.g.*, United States *ex rel.* Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010) ("[T]he FCA is subject to a judicially-imposed requirement that the allegedly false claim or statement be material."), while others adopted it solely for false certification claims, *see e.g.*, *Conner*, 543 F.3d at 1219 n.6, or not at all, *see e.g.*, *Mikes*, 274 F.3d at 697. United Health Servs. Inc. v. United States *ex rel.* Escobar confirmed that presentment claims are subject to a materiality requirement. 136 S. Ct. 1989, 2002 (2016).

107. *SAIC*, 626 F.3d at 1270.

B. The Road to the Supreme Court

In October 2009, seventeen-year-old Yarushka Rivera died of multiple seizures after she stopped taking the medication that she was prescribed while being treated at Arbour Counseling Services ("Arbour"), a satellite mental health facility owned and operated by a subsidiary of Universal Health Services ("UHS").[108] At the time, Arbour participated in MassHealth, a joint state-federal Medicaid program for low-income and disabled Massachusetts residents. Because it received federal funding through that program, Arbour was subject to various federal regulations regarding qualifications, staffing, and supervision.[109] It was only after their daughter's death that Rivera's parents, Carmen Correa and Julio Escobar, learned of the ways in which Arbour had flagrantly violated those regulations while treating Rivera,[110] leading them to initiate a *qui tam* FCA suit against UHS in 2011.[111]

Their claim was not that Arbour had failed to provide certain services that it purported to provide or even that it had necessarily provided those services in an inadequate manner. Rather, the plaintiffs contended that UHS, through Arbour, had "submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for [those] services."[112] Put otherwise, Arbour allowed Rivera to be treated by unlicensed staff

108. United States *ex rel.* Escobar v. Universal Health Servs., No. 11-11170-DPW, 2014 WL 1271757, at *2–3 (D. Mass. March 26, 2014). Because the plaintiffs—Rivera's parents—did not make any claims on the basis of the quality of care, they made no allegations specifically connecting Rivera's death or final seizure to her treatment at Arbour. *Id.*

109. *See id.* at *2.

110. None of the counselors to which Rivera was assigned were properly licensed, the psychologist that initially diagnosed Rivera was uncertified and had earned a degree from an uncredited internet college, and the nurse practitioner that prescribed her the medication did so without the supervision required by regulation. *Id.* at *5-7. Arbor's only purported supervisor at the time was not, in fact, qualified to provide that supervision, *id.* at *7, and during her time at Arbour, only one of the five professionals that treated Rivera had been licensed to perform that treatment. *Escobar*, 136 S. Ct. at 1997. In total, about 23 unlicensed Arbour employees had counseled patients and prescribed drugs without supervision. *Id.*

111. Rivera's parents also filed complaints with various agencies, resulting in at least two consent decrees and a series of findings related to Arbour's violations of medical care regulations. *Escobar*, 2014 WL 1271757, at *3.

112. *Escobar*, 136 S. Ct. at 1997–98. The specific regulations at issue required satellite facilities to employ certain types of clinicians, meet basic licensing standards, and provide for a certain degree of supervision. *Id.* at 1998.

and without proper supervision while seeking reimbursement in a manner that suggested such licensure and supervisory requirements had been satisfied. As a result, UHS had allegedly "defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff."[113]

The district court dismissed the claim on the ground that the regulations were not conditions of payment,[114] but the First Circuit reversed after rejecting the lower court's standard and noting that statutory, regulatory, and contractual requirements could all be conditions of payment either expressly or, as here, by way of implication.[115] When the Supreme Court granted certiorari in December 2015, the case presented a rare opportunity for the high court to finally opine on the disputes surrounding the viability and scope of implied false certification that had been brewing in the circuits.[116]

C. Escobar *& The New Falsity Debate*

As detailed above, the early falsity debate was two-fold, concerning both the general validity of implied false certification and, through the divide along the condition of payment requirement, the permissible scope of that theory. In *Escobar*, the Supreme Court seemingly resolved both issues by upholding implied false certification as a basis for the plaintiff's claim and disavowing the condition of payment requirement in favor of a "demanding" materiality standard that could mitigate over-expansive use of the theory.[117] But in

113. *Id.*

114. *Escobar*, 2014 WL 1271757, at *7.

115. United States *ex rel.* Escobar v. Universal Health Servs. Inc., 780 F.3d 504, 512, 514 n.14 (1st Cir. 2015) (citing United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385–86 (1st Cir. 2011)).

116. *See Escobar*, 136 S. Ct. at 1998–99 (describing the circuit disagreements on implied false certification).

117. *Id.* at 1995, 2003–04 ("[W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.").

reaching the first of those two conclusions, the Court was less-than-absolute in its language: "We first hold that, at least in some circumstances, the implied false certification theory can be a basis for liability."[118] Elaborating on its qualified acceptance of the theory, the Court wrote:

> [T]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.[119]

Because UHS "submit[ted] claims for payment using payment codes that corresponded to specific counseling services" and "us[ed] National Provider Identification numbers corresponding to specific job titles," they had inaccurately conveyed information about the services provided and qualifications of staff in a manner that clearly constituted misleading half-truths.[120] That being the case, the Court explicitly declined to answer the broader question posed: "whether all claims for payment implicitly represent that the billing party is legally entitled to payment."[121]

Almost immediately, questions emerged around whether plaintiffs were now required to plead and ultimately prove *both* (1) that the request for payment makes specific representations about the goods or services provided, and (2) that the failure to disclose material noncompliance with a statutory, regulatory, or contractual requirement renders the claim an actionable misrepresentation, or if this two-part approach was merely one means of adequately pleading falsity under an implied false certification theory. In effect, the question was again one of scope: Can a claim be impliedly false on the basis of omissions regarding material noncompliance alone, or must there be some specific representation about the goods or services, accompanied by said omissions, rendering that representation a misleading half-truth?[122]

118. *Id.* at 1995.

119. *Id.* at 2001.

120. *Id.* at 2000.

121. *Id.*

122. *See* SYLVIA, *supra* note 12, § 4:34.50 ("Post-Escobar litigation over the Supreme Court's description of implied certification theory has focused primarily on two issues. The first issue is whether the Court's description of the requirements for a viable type of 'implied certification' claim meant that only claims that met those requirements were viable. The second issue is what types of representations meet the 'specific representations' requirement that the Court described.").

This Part begins with a survey of the ways in which the lower courts have answered that question, noting the clear trend in favor of reading *Escobar* to impose a "specific representations" requirement. Then, through careful parsing of the Court's opinion and the relevant background, it argues that the leading construction runs contrary to the best reading of the decision.

1. Post-*Escobar* Trends

On remand in *Escobar*, the First Circuit had no occasion to consider whether the Supreme Court had introduced a specific representation requirement into the falsity framework. But in a number of cases immediately following the decision, the DOJ engaged in a concerted effort to argue against any such requirement. Their position was relatively straightforward: By employing qualifying language, the Supreme Court "affirmed the implied false certification theory in situations" where such representations were present but "did not suggest that this is the only circumstance when the implied false certification theory applies."[123] At least at the outset, that argument saw success, particularly in Ninth Circuit district courts,[124] and some courts have relied on similar reasoning to continue to reject the specific representations requirement.[125]

Other courts took a slightly different approach by effectively answering the question left open in *Escobar* and holding that all or at least most claims for payment implicitly make sufficient representations so as to satisfy the falsity inquiry, even under a more rigid standard requiring the claimant to have made specific representations. The Fourth Circuit's decisions in *United States v. Triple Canopy, Inc.* are illustrative. A security company that contracted to provide

123. Farringer, *supra* note 21, at 1250–51 (quoting Douglas W. Baruch & Jennifer M. Wollenberg, *FCA Implied Certification Cases—Justice Department's Aggressive Post-Escobar Briefing Signals Its Concern Over the Decision's Potential Impact*, 58 GOV'T CONTRACTOR 375 (2016)).

124. *See, e.g.*, Rose v. Stephens Inst., No. 09 Civ. 05966 (PJH), 2016 WL 5076214, at *5 (N.D. Cal. Sept. 20, 2016); United States *ex rel.* Brown v. Celgene Corp., 226 F. Supp. 3d 1032, 1044–45 (C.D. Cal. 2016).

125. *See, e.g.*, United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 406 (D.N.J. 2019) ("*Escobar* held that such specific misrepresentations were *sufficient* to render a claim false under the implied false certification theory—but declined to address whether they were *necessary*."); United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 100 (D.D.C. 2017) ("Because the Supreme Court in *Escobar* held that the implied certification theory was satisfied 'at least' under the conditions it described and did 'not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment,' the D.C. Circuit's broader statement of the implied certification theory remains good law after *Escobar*." (citation omitted)).

qualified security personnel to an airbase in Iraq had requested payment for those services despite knowing that its guards had not satisfied a contractual requirement concerning marksmanship. In a decision predating *Escobar*, the Fourth Circuit held that those claims were false, noting that "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements."[126] Thus, although the company had not specifically represented anything about the service it provided, the company had knowingly presented false claims when it requested payment.[127]

On remand from vacatur by the Supreme Court in light of *Escobar*, the company disputed falsity on the ground that the Supreme Court had "adopted a much narrower view of falsity than [the Fourth Circuit did in *Triple Canopy I*]," and, specifically, that the government must now "show that a contractor ma[de] specific representations about the goods or services provided . . . ."[128] Because, the company argued, "it merely submitted invoices listing the number of guards and hours worked and these invoices contained no falsities on their face," the falsity standard satisfied by the Medicare billing codes in *Escobar* could not be satisfied here.[129]

The Fourth Circuit, in concluding that the falsity requirement was still satisfied after *Escobar*, did not explicitly reject the specific representations requirement. Rather, the court reasoned that although the claimant had only submitted invoices listing the number of guards provided and hours they worked, the submission was not a bare request for payment but instead a half-truth akin to that in *Escobar* given the contractual framework within which the company was operating, as well as the fact that "anyone reviewing Triple Canopy's invoices would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements."[130] Going beyond that analysis, the Fourth Circuit also noted the question left unanswered by the Supreme Court and reaffirmed its pre-*Escobar* position on the matter, writing that "the Gov-

126. United States v. Triple Canopy, Inc. (*Triple Canopy I*), 775 F.3d 628, 636 (4th Cir. 2015) (internal quotation marks omitted).

127. *See id.* at 637.

128. United States v. Triple Canopy, Inc. (*Triple Canopy II*), 857 F.3d 174, 178 (4th Cir. 2017) (internal quotation marks omitted).

129. *Id.*

130. *Id.* (internal quotation marks omitted) (alteration in original) (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2000 (2016)).

ernment pleads a false claim when it alleges a 'request for payment under a contract' where the contractor 'withheld information about its noncompliance with material contractual requirements.' "[131]

In more recent years, however, courts applying the DOJ or *Triple Canopy* approach have fallen into the clear minority as an increasingly large number of courts have either assumed, without discussion, that *Escobar* imposed a two-part falsity framework[132] or omitted the qualifying language relied on by the DOJ when quoting *Escobar*'s two-part formulation.[133] Moreover, some courts that initially rejected the specific representations requirement have since reversed course. In the Ninth Circuit, for example, a series of decisions have walked back the early success of the DOJ's arguments. In 2017, the Ninth Circuit assumed without analysis that a two-part framework followed from *Escobar*[134] and later that year appeared to affirmatively require specific representations.[135] After a district court certified the question to the Ninth Circuit on appeal based on intra-circuit disputes on the matter,[136] the Ninth Circuit confirmed that the applicable standard requires proof of specific representations.[137] In doing so, however, they expressed significant doubt that any such requirement necessarily followed from *Escobar*:

> Were we analyzing *Escobar* anew, we doubt that the Supreme Court's decision would require us to overrule [our pre-*Escobar* falsity standard]. The Court did not state that its two conditions were the only way to establish liability under an implied

131. *Id.* at 178 n.3 (quoting *Triple Canopy I*, 775 F.3d at 636).

132. *See* SYLVIA, *supra* note 12, § 4:34.50 & n.8 ("Some decisions have cited the requirements described in *Escobar* and found them lacking, without addressing whether those are the only circumstances in which implied certification theory is viable and others do not analyze the issue.").

133. *See, e.g.*, United States v. Spectrum Painting Corp., No 19 Civ. 2096 (AT), 2020 WL 5026815, at *11 (S.D.N.Y. Aug. 25, 2020) ("[I]mplied certification theory can be a basis for liability . . . where two conditions are satisfied . . . .") (quoting *Escobar*, 136 S. Ct. at 2001) (alterations in original)); United States *ex rel.* Jefferson v. Roche Holding AG, 489 F. Supp. 3d 418, 432 (D. Md. 2020) (omitting the phrase "at least where" when quoting the relevant language from *Escobar*); United States *ex rel.* Gelman v. Donovan, No. 12 Civ. 5142 (RJD), 2017 WL 4280543, at *4 (E.D.N.Y. Sept. 25, 2017).

134. *See* United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325 (9th Cir. 2017).

135. *See* United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 901 (9th Cir. 2017) ("The Supreme Court held that although the implied certification theory can be a basis for liability, two conditions must be satisfied.").

136. Rose v. Inst., No. 09-cv-05966-PJH, 2016 WL 6393513, at *3 (N.D. Cal. Oct. 28, 2016) (certifying appeal).

137. United States *ex rel.* Rose v. Stephens Inst., 909 F.3d 1012, 1018 (9th Cir. 2018).

> false certification theory. But our post-*Escobar* cases . . . appear to require *Escobar*'s two conditions nonetheless. . . . We conclude, therefore, that Relators must satisfy *Escobar*'s two conditions to prove falsity, unless and until our court, en banc, interprets *Escobar* differently.[138]

Elsewhere, inconsistency and intra-circuit disputes have emerged.[139] In the Eighth Circuit,[140] D.C. Circuit,[141] and Fifth Circuit,[142] for example, courts have reached conflicting results on whether *Escobar* requires specific representations. Although the majority of district court decisions in the Second Circuit appear to re-

138. *Id.*

139. *See* United States *ex rel.* Lorona v. Infilaw Corp., No. 3:15-cv-959-J-34PDB, 2019 WL 3778389, at *17 n.25 (M.D. Fla. Aug. 12, 2019) (detailing splits around whether specific representations are necessary after *Escobar*).

140. *Compare* United States *ex rel.* Johnson v. Golden Gate Nat'l Senior Care, LLC, No. 08-1194 (DWF/HB), 2020 WL 1915612, at *7 (D. Minn. Apr. 20, 2020) ("Although Defendants may not have specifically certified supervision minutes, . . . a reasonable jury could conclude that failing to disclose noncompliance with statutory requirements nonetheless makes their representations misleading."), *with* United States *ex rel.* Benaissa v. Trinity Health, No. 4:15-cv-159, 2018 WL 6843624, at *11 (D.N.D. Dec. 31, 2018) (assuming that *Escobar* requires specific representations and omitting the phrase "at least where" when quoting *Escobar*'s statement on falsity).

141. *See* United States *ex rel.* McBride v. Halliburton Co., 848 F.3d 1027, 1031 n.4 (D.C. Cir. 2017) (declining to reach the issue). *Compare* United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 99 (D.D.C. 2017) (noting that the specific representation requirement "is not the law of the D.C. Circuit"), *and* United States *ex rel.* Landis v. Tailwind Sports Corp., 234 F. Supp. 3d 180, 198 (D.D.C. 2017) (explaining that because *SAIC* remained good law after *Escobar*, specific representations were not required), *with* United States *ex rel.* Hutchins v. DynCorp Int'l, Inc., 342 F. Supp. 3d 32, 42 (D.D.C. 2018) (treating *Escobar*'s falsity framework as mandatory).

142. In a summary opinion, the Fifth Circuit faulted a relator for failing to "provide evidence that would support a finding that the claims included 'specific representations' that were 'misleading half-truths.'" United States *ex rel.* Smith v. Wallace, 723 Fed. Appx. 254, 256 (5th Cir. 2018). Some district courts have since relied on *Smith* for the proposition that *Escobar* requires proof of specific representations. *See, e.g.*, United States *ex rel.* Emerson Park v. Legacy Heart Care, LLC, No. 3:16-CV-0803-S, 2019 WL 4450371, at *5 (N.D. Tex. Sept. 17, 2019); United States *ex rel.* Jamison v. Career Opportunities, Inc., No. 3:16-CV-3248-S, 2020 WL 520590, at *6 (N.D. Tex. Jan. 31, 2020). But at least one court in the circuit has applied the *Triple Canopy* standard instead, noting that *Escobar* left the issue open and that *Smith*'s "passing reference[ ]" to specific representations, "without further explanation," did not resolve the matter. United States *ex rel.* Campbell v. KIC Dev., LLC, No. EP-18-CV-193-KC, 2019 WL 6884485, at *8–9 & n.8–9 (W.D. Tex. Jan. 12, 2019).

quire a showing of specific representations,[143] one judge has taken the opposite approach on the ground that *Escobar* "addressed only one type of [implied false certification] claims—namely, those involving fraudulent half-truths," and thus that pre-*Escobar* Second Circuit case law remained binding "to the extent that it held falsity may arise from the defendant's submission of a claim for payment that does not include a specific representation . . . ."[144]

The Third Circuit's treatment of the matter has failed to produce any greater degree of clarity. The issues began shortly after *Escobar* was decided when the Third Circuit, in dicta, wrote that "implied false certification liability attaches when a claimant 'makes specific representations about the goods or services provided . . . .' "[145] Although the court quoted *Escobar* in that passage, it never assessed the propriety of its conclusion, instead assuming that specific representations were required after *Escobar*. While some district courts in the circuit have recognized the non-precedential nature of the Third Circuit's initial statement and made independent determinations about what *Escobar* requires,[146] others have continued to defer to the Third Circuit's dicta when requiring proof of specific representations.[147]

143. *See, e.g.*, United States *ex rel.* Hussain v. CDM Smith Inc., No. 14-CV-9107 (JPO), 2019 WL 1428360, at *9 (S.D.N.Y. Mar. 29, 2019) (stating that implied false certification framework includes allegation of specific representations); United States *ex rel.* Forcier v. Comput. Sci. Corp., No. 12 Civ. 1750 (DAB), 2017 WL 3616665, at *12 (S.D.N.Y. Aug. 10, 2017) (collecting cases).

144. United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 772, 811 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018).

145. United States *ex rel.* Whatley v. Eastwick Coll., 657 Fed. Appx. 89, 94 (3d Cir. 2016) (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2001 (2016)).

146. United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 408 n.11 (D.N.J. 2019) ("The Third Circuit's mere invocation in [*Eastwick*] of *Escobar*'s language . . . is insufficient for this Court to conclude that the Circuit categorically prohibits FCA liability in the absence of such representations, as the Circuit in that case affirmed dismissal of the complaint on other grounds, and because the panel's disposition of the case was non-precedential."). *See also* United States *ex rel.* Jersey Strong Pediatrics, LLC v. Wanaque Convalescent Ctr., No. 14-6651-SDW-SCM, 2017 WL 4122598, at *3 (D.N.J. Sept. 18, 2017) (permitting implied false certification claims without specific representations); United States *ex rel.* Laporte v. Premiere Educ. Grp., No. 11-3523 (RBK/AMD), 2017 WL 3471163, at *2-3 (D.N.J. Aug. 11, 2017) (same).

147. *See* United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd., No. 11-4607, 2017 WL 1133956, at *6 (E.D. Pa. Mar. 27, 2017) ("[I]nterpret[ing] the language of [*Eastwick*] to mean the Third Circuit intended to present the *Escobar* standard . . . as being the only one available for proving FCA liability for legally false claims under the implied certification theory."); United States *ex rel.* Lampkin v. Pioneer Educ., LLC, No. 16-1817 (RMB/KMW), 2020 WL 4382275, at *2 (D.N.J.

Although the general trend thus appears to favor a narrower conception of falsity after *Escobar*, that result has emerged inconsistently and with little relationship to the analysis in *Escobar* or the cases upon which it built. This Note argues in favor of the position taken by a minority of the courts—that *Escobar* itself does not impose a specific representation requirement on the implied false certification theory. In making that argument, it aims to engage in the sort of exegesis largely lacking in the decisions that have read the case narrowly.

2. Parsing the FCA and *Escobar*

It is worth reiterating at the outset that the False Claims Act does not define "false or fraudulent" as used in the statute. And, as such, the statute itself does not require specific representations. Nor do the legislative history or leading understandings of "false" or "fraudulent" speak of any such limitation. To the contrary, the 1986 amendments explained that the "most common" form of false claim is one "for goods or services . . . provided in violation of contract terms, specification, statute, or regulation."[148] Such claims, even in the absence of specific representations, can be considered legally false in two equally appropriate respects.

The first is under a contractual theory of entitlement, which begins from the premise that when a claimant submits a claim to the government, they necessarily assert that they have a legal entitlement to be paid. If the claimant makes such an assertion with the knowledge that no such entitlement exists—i.e., with the knowledge that they have failed to comply with a material contractual or regulatory requirement such that the government no longer has an obligation to pay the claimant—that implicit assertion, and therefore the claim, is false. Under that theory, the contractor who supplies the government with N95 respirators without subjecting them to enhanced quality control measures as required by regulation would have submitted a false claim regardless of whether they referenced only an order number, a "shipment of masks," or a "shipment of N95 respirators." Irrespective of the language used, the submission of the claim itself would implicitly represent that the contractor was entitled to payment for that shipment of respirators, and that representation is false so long as the government would be

July 31, 2020) (citing *Eastwick* when requiring specific representations); *In re* Plavix Mktg., Sales Practice & Products Liab. Litig., 332 F. Supp. 3d 927, 939 (D.N.J. 2017) (same).

148. S. Rep. No. 99-345, at 9.

entitled as a matter of contract to deny payment for those goods in light of the nonconformity.

Alternatively, the claim may be false under the so-called half-truths theory of fraudulent misrepresentation, according to which "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter" is rendered fraudulent.[149] As noted above, the Supreme Court applied this exact theory of common law fraud in *Escobar* to conclude that UHS's claims were fraudulent: the payment codes and ID numbers used in conjunction with the claim for payment were representations made fraudulent by the company's failure to disclose that the services for which payment was sought did not comply with the regulations necessary to seek payment under those programs.[150]

Despite the need to distinguish between "pure omissions" and half-truths in the ordinary case—the former of which are not actionable in the absence of a duty to disclose—[151] nothing prevents the application of the half-truths theory to claims that do not include any representations about the goods or services provided. By definition, such suits will never involve pure omissions because they necessarily encompass a "claim for payment or approval" that the defendant "present[ed], or caused to be presented," to the government.[152] Such claims will include, at the very least, a number of basic representations: who the claimant is, how much money they seek, and under what contract or government program they seek it. Those representations, taken in concert and in the context of a claim for payment, amount to a "statement that contains . . . favorable matters"[153] from the perspective of the claimant—it is information that is necessary for the receipt of funds, either because it represents that goods or services have been provided or because it represents that the claimant is eligible for the receipt of government funds under the relevant program. When, in reality, the claimant's noncompliance with some regulation or contractual term constitutes an "unfavorable matter" for the purpose of receiving payment from the government, the omission of that noncompli-

149. Restatement (Second) of Torts § 529 (Am. Law Inst. 1977).

150. *Escobar*, 136 S. Ct. at 2000.

151. *In re* Vivendi, S.A., 838 F.3d 223, 239–40 (2d Cir. 2016).

152. *See* 31 U.S.C. § 3729(a)(1)(A).

153. Restatement (Second) of Torts § 529 cmt. a (Am. Law Inst. 1977).

ance makes the statement a false representation.[154] No additional information from the claimant, favorable or otherwise, is necessary to draw that conclusion, and the mere fact that the claimant has not made more specific representations about the goods or services does not render such situations instances of pure omissions.

Yet another return to the N95 example demonstrates this point clearly. When the contractor submits a claim for payment in reference to an order number or a "shipment of masks," they also represent to the government that they are a contractor who provided the government with a good in exchange for a stated sum of money. That assertion, which the contractor makes in order to receive payment from the government, is made materially misleading by the fact that they failed to disclose their noncompliance with the quality control regulation (assuming, *arguendo*, that said regulation would be material in this context).[155] Put otherwise, the contractor would have made a "literally true statement[ ]"—that they provided the goods for which they seek payment—that "create[s] a materially misleading impression"—that those products were subject to the quality control standards required for goods of that sort.[156] And, as a result, the underlying claim for payment would be rendered false under the common law understanding of fraudulent misrepresentations described above.

Regardless of which of the two analytical framings is preferable, there are clear doctrinal bases for treating claims that merely request payment without any specific representations as false in the appropriate contexts. The pre-*Escobar* case law surrounding implied false certification supports that conclusion, as the question of whether or not a claimant had made specific representations was largely irrelevant to the falsity inquiry prior to *Escobar*.[157] Moreover, had the Supreme Court intended to limit implied false certification's applicability to only those circumstances where the claimant made specific representations, it likely would have abrogated the

154. *Id.* ("[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.").

155. This, of course, assumes that the quality control provision would be considered material. As mentioned above, this Note is not concerned with how materiality is determined.

156. S.E.C. v. Gabelli, 653 F.3d 49, 57 (2d Cir. 2011), *rev'd on other grounds*, Gabelli v. S.E.C., 568 U.S. 442 (2013).

157. *See, e.g.*, United States *ex rel.* Wilkins, v. United Health Grp., 659 F.3d 295, 313 (3d Cir. 2011); Mikes v. Strauss, 274 F.3d 687, 699–700 (2d Cir. 2001); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010); United States v. SAIC, 626 F.3d 1257 (D.C. Cir. 2010).

multitude of earlier circuit court opinions extending the theory's reach beyond that scope. Indeed, the Court did precisely that with respect to decisions that had—wrongly, in the Court's view—introduced a condition of payment requirement to the falsity analysis.[158] Given that the Court made no such abrogation with respect to cases that found falsity even in the absence of specific representations, we should assume that the Court left those opinions intact absent some clear suggestion to the contrary.[159] *Escobar* thus ought not to be read as requiring specific representations unless the Court's language clearly evidences an intent to deviate from the status quo and create such a requirement.

Turning, then, to the language of the case, there are three iterations of the Court's holding on falsity worth considering. In both an introductory paragraph and the first paragraph of its falsity analysis, the Court wrote that implied false certification can be a basis for liability "at least in certain [or some] circumstances."[160] In both places, the Court follows that qualifying language with a statement of what is effectively a misleading half-truths standard: "[L]iability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose . . . noncompliance," such that the "omission renders those representations misleading."[161] The same is true of the third iteration, which differs chiefly in its qualifying language—"the implied certification theory can be a basis for liability, at least where two conditions are satisfied"—and in the fact that it states explicitly the application of a "misleading half-truths" standard.[162]

158. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2001-02 (2016).

159. *See* United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 100 (D.D.C. 2017) ("[T]he D.C. Circuit's broader statement of the implied certification theory remains good law after *Escobar*."); United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 407 (D.N.J. 2019) (finding that *Escobar* did not abrogate circuit's previous recognition of "FCA liability under the implied false certification theory arising from claims for payment that did not make the kinds of specific representations . . . that were present in *Escobar*."); United States *ex rel.* Wood v. Allergan, 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017) ("*Mikes* . . . remains good law . . . to the extent that it held that falsity may arise from the defendant's submission of a claim for payment that does not include a specific representation about the goods or services provided, coupled with [material] noncompliance . . . .").

160. *Escobar*, 136 S. Ct. at 1995, 1999.

161. *Id.* at 1995. In the second iteration, the Court writes "representation," rather than "specific representation." *Id.* at 1999.

162. *Id.* at 2001.

All three iterations make clear that falsity is satisfied upon a showing of specific representations about the goods or services provided coupled with omissions that turn those representations into misleading half-truths under an ordinary common law analysis. The only question that remains is the effect of the Court's qualifying language: does the phrase "at least where" operate to constrict the outer bounds of implied false certification or the reach of the Court's opinion?

At first blush, the Court's inclusion of qualifying language itself militates towards the latter view. Had the Court omitted the qualifying phrase entirely and simply held that implied false certification "can be a basis for liability where two conditions are satisfied," the decision would plainly require specific representations. Because the Court instead deliberately qualified its statement, the best reading of that qualifying phrase is one that gives full effect to the Court's choice of words by taking the phrase "at least where" as an indication that the Court was addressing implied false certification only as it applied to the facts before it.[163]

An examination of those facts makes it all the less likely that the Court intended to speak to the whole of implied false certification's validity. It was clear that UHS, in selecting certain billing codes when submitting claims, had made specific representations about the type and quality of services provided. That aspect of the record provided the Court with a ready analogue to the common law backdrop against which it was operating, where misleading half-truths stemming from affirmative statements had long been considered fraudulent. Because the claims at issue fell "squarely within [that] rule,"[164] the Court had no need to turn to or even comment on the legal arguments pertaining to the complete breadth of implied false certification. Indeed, the Court made clear that it was only going as far as was necessary to address the facts before it when it declined to reach the full scope of the relator's construction of falsity, writing that "[w]e need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment."[165] Given that restraint, there is little reason to believe

163. *See* SYLVIA, *supra* note 12, § 4:34 ("[B]y qualifying the holding with the phrase 'at least,' the Court did not limit the viability of implied certification to circumstances in which these conditions were met."). In this respect, it is telling that a number of courts have omitted the qualifying language by alteration or selective quoting, *see supra* note 133, suggesting that including it might obfuscate the proposition for which they cite the opinion.

164. *Escobar*, 136 S. Ct. at 2000.

165. *Id.*

that the Court then intended to impose a sweeping condition that would, in effect, preclude the theory that the Court purported not to address. As one court has explained it: "Neither embracing nor rejecting the relators' broad implied false certification theory, the Court held narrowly that, as pled, the defendant's claims for payment rose to the level of misrepresentations sufficient to trigger FCA liability."[166]

The Supreme Court's opinion in *Escobar* is by no means a model of clarity. Indeed, its ambiguities have also sparked debates about the proper standards for materiality and scienter.[167] Read in context, however, the facts of the case and language of the opinion cast considerable doubt upon the view that the Court intended to restrict the scope of implied false certification to the limited and immediate circumstances with which it was concerned. Instead, the phrase "at least where" seems to indicate only that the Court took a fact-bound approach, approving implied false certification as applied to facts akin to those before it while declining to reach the broader issue of whether demands for payment alone, or implicit representations under the *Triple Canopy* formulation, would suffice. To the extent that any ambiguity remains, the Court's decision to address "concerns about fair notice and open-ended liability" through "strict enforcement of the Act's materiality and scienter requirements" rather than "a circumscribed view of what it means for a claim to be false or fraudulent"[168] makes clear that the narrow reading of *Escobar* adopted by the majority of courts to have addressed the issue is contrary to the broader notion of FCA liability adopted by the Court.

III.
THE NORMATIVE CASE AGAINST THE SPECIFIC REPRESENTATIONS REQUIREMENT

The above analysis posits that neither the FCA's text nor the Supreme Court's decision in *Escobar* requires plaintiffs to plead and prove specific representations when alleging falsity under the implied false certification theory. The question remains, however, whether imposing such a requirement is preferable to a rule that permits proof of falsity in its absence. This Note argues that it is not; that even if such a requirement were justifiable within the text of

166. United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 407 (D.N.J. 2019).

167. *See* Sylvia, *supra* note 12, § 4:34.

168. *Escobar*, 136 S. Ct. at 2002 (quoting United States v. SAIC, 626 F.3d 1257, 1270 (D.C. Cir. 2010)).

the statute, the heightened burden it imposes is not justifiable on any normative grounds. In making that argument, this Part begins by assessing the nature of the claims that a specific representation requirement would likely bar. It then considers how barring those claims and imposing a requirement of this sort more generally runs against the spirit and purpose of the FCA and would stymie its efficacy in circumstances where its *qui tam* provision is particularly critical for the detection and prosecution of dangerous regulatory and contractual violations.

A. Consequences of the Specific Representations Requirement

In order to understand the types of claims that the specific representations requirement will likely bar if adopted on a broad scale, it is useful to reiterate what precisely about UHS's claims led the *Escobar* court to find that such representations had been made there. At the core of *Escobar* were Medicare credentialing requirements and the use of National Provider Identification numbers that corresponded with those credentials. When UHS used those codes to seek reimbursement for services rendered, they represented not only that they had provided the corresponding services but also that appropriately certified professionals had provided them. As one court has framed it, the "inclusion of the provider identification numbers meant that the claims effectively stated: 'for these specific services rendered by this kind of licensed professional, X amount is due.'"[169] Because UHS failed to disclose that those services had been provided by unqualified persons, that implied statement amounted to a fraudulent misrepresentation.

This same reasoning has been used to satisfy the specific representations requirement in the context of other claims that included readily recognizable identifying information.[170] When a company seeks reimbursement for a specific drug identified by its official name, for example, courts may take that identification as an implicit representation that the drug for which reimbursement is sought complied with the FDA-approved formula for that drug.[171]

169. United States *ex rel.* Lisitza v. Par Pharm. Cos., 276 F. Supp. 3d 779, 795–96 (N.D. Ill. 2017) (quoting *Escobar*, 136 S. Ct. at 2000).

170. *See, e.g.*, United States *ex rel.* Emerson Park v. Legacy Heart Care, LLC, No. 3:16-CV-0803-S, 2019 WL 4450371 (N.D. Tex. Sept. 17, 2019); United States *ex rel.* Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770 (7th Cir. 2016); United States *ex rel.* Tessler v. City of New York, No. 14-CV-6455 (JMF), 2016 WL 7335654 (S.D.N.Y. Dec. 16, 2016).

171. *See* United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 902–03 (9th Cir. 2017) ("[D]rug names necessarily refer to specific drugs under the FDA's regulatory regime.").

If, however, the drug deviated from that formula in a material fashion and the claimant had knowledge of that fact, their failure to disclose the deviation would constitute an omission rendering the claim false.

But the extent to which the inclusion of that sort of information can mitigate the impact of a specific representations requirement on a broader scale remains uncertain and depends in large part upon two factors. First, beyond claims including Medicare or other systematized billing codes, the availability of implied false certification in a given case will depend upon what the court can and is willing to infer from the information provided with the claim. Where that information is less readily associated with some contractual or regulatory requirement, a court may well find that reliance on that information to satisfy the specific representations requirement is a bridge too far. Second, the plaintiff must be able to link the information provided in the claim sufficiently to the nature of the fraud alleged. Thus, even if a claim included drug names and identification codes that constitute specific representations about the drugs provided, the inclusion of that information cannot serve as a basis for falsity where the alleged fraud rests on, for example, the existence of a scheme to inflate the cost of drugs by filling prescriptions in a greater dosage than originally prescribed.[172] Both limitations are particularly consequential in areas of government contracting that make use of standardized forms. Because those forms will not typically require disclosure of information pertinent to more nuanced fraudulent schemes, it is unlikely that they will provide a basis for an implied false certification theory, even where that information is all that the government requires upon submission of a claim.[173]

Beyond instances where, as in the examples above, uncertainties arise from the courts' potential inability or unwillingness to infer certain assertions from the information provided with the claim, there is an entire category of claims for which the specific representations requirement is particularly prohibitive. These claims—what one might term bare requests for payment—provide no additional

172. *See Lisitza*, 276 F. Supp. 3d at 796–98.

173. *See id.* at 797 ("In this case, the claim forms, by law, are standardized; the federal and state agencies require the same information and certification on their forms. Notably, that information does not include any affirmation or statement that the claimant has complied with all applicable laws and regulations."); United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325, 332 (9th Cir. 2017) (finding a lack of specific representations for claims submitted via standard forms that provided "the period of performance, total costs incurred during that period, and [the claimant's] fee applicable to that work.").

information pertaining to the claimant's compliance with relevant regulatory or contractual terms. The most straightforward examples arise in the contracting context, where the claimant may do nothing more than seek payment for performance under the contract while knowingly failing to disclose noncompliance with some material portion of the contract or regulation incorporated therein. The same can be said of claims under entitlement or other government programs, where the claimant seeks either reimbursement for the past provision of services or some other outlay of government funds while making omissions about noncompliance that is material to their eligibility for those funds. In the abstract, these claims may be construed as legally false under the entitlement theory or the half-truths theory as outlined above, and there are thus clear doctrinal bases for treating bare requests for payment as false in the appropriate contexts.

When the specific representations requirement is stringently imposed, however, it prevents the application of those theories to bare requests for payment. On the one hand, it seems to entirely foreclose the entitlement theory, which by definition requires no demonstration of misrepresentation to treat a claim as false. On the other, it significantly narrows the scope of the half-truths theory by effectively precluding courts from assuming that a claim for payment constitutes a sufficient representation within common law conceptions of fraud. Unless a court is willing to equate a payment request with a specific representation as used in *Escobar*,[174] that requirement will effectively bar reliance on the implied false certification theory when it comes to bare requests for payment. The most obvious consequence of the specific representations requirement, then, is to insulate from liability a significant class of fraudulent claims that otherwise would have been treated as false.[175]

B. *Spirit, Purpose, and Regulatory Function*

Just as early skeptics of the implied false certification theory alleged that it created an overly expansive liability regime, those arguing in favor of a specific representation requirement may suggest that allowing implied certification to operate unbounded per-

174. *See Triple Canopy II*, 857 F.3d 174, 178 (4th Cir. 2017).

175. *See, e.g.*, United States *ex rel.* Lewis v. Cal. Inst. Tech., No. 2:18-cv-05964-CAS(RAOx), 2019 WL 5595046, at *8 (C.D. Cal. Oct. 28, 2019) (noting that while claims lacking specific representations may have been false under the Ninth Circuit's pre-*Escobar* standard, they no longer satisfied the falsity element). For a non-exhaustive collection of pre-*Escobar* cases finding falsity without consideration of specific representations, see *supra* note 157.

mits a greater degree of liability than was contemplated by Congress. That criticism fails to recognize, however, that "both the Supreme Court and Congress have always treated ['false or fraudulent'] as having a broad scope."[176] In a case decided before the 1986 Amendments, the Supreme Court wrote that Congress intended to "reach all types of fraud, without qualification, that might result in financial loss to the Government."[177] When Congress amended the Act nearly twenty years later, they doubled down on that expansive understanding of falsity rather than repudiating or tempering it, both stating that they "strongly endorse[d]" the Court's interpretation and also adding that "[t]he [FCA] is intended to reach all fraudulent attempts to cause the Government to pay ou[t] sums of money or to deliver property or services."[178] Thus, even if the absence of a specific representation requirement results in more FCA liability, there is no reason to believe that a comprehensive liability regime under the FCA is inconsistent with the spirit or purpose of that act, so long as the focus remains on the fraudulent attainment of government funds.[179]

Historical experience with fraud against the government and the FCA more generally supports that basic proposition. In the context of the Civil War, for example, it can hardly be suggested that Congress's animating concerns would not have applied with equal force to bare requests for payment. Regardless of what the contractors had said, Congress was concerned about the sale of guns that did not shoot and boots that degraded in a matter of hours, both of which resulted in an outlay of government funds for something less than what the government had bargained for. If the FCA is principally concerned with the protection of the federal fisc,[180] then there is no policy basis for distinguishing between a bare request for payment for a gun that does not shoot and that same request when accompanied by a specific representation.

The specific representations requirement is equally inconsistent with the FCA's regulatory function. As noted above, that re-

176. SYLVIA, *supra* note 12, § 4:34.

177. United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

178. S. Rep. No. 99-345, at 9, 19, 1986 U.S.C.C.A.N. 5266, at 5274, 5284.

179. This is particularly noteworthy in light of the fact that the 1986 amendments, which revolutionized the FCA, were explicitly intended to bolster the FCA's scope and strength in response to growing fraud, suggesting that any expansion in liability permitted under those amendments may have "occurred by design." Kristofcak, *supra* note 38, at 260.

180. *See* United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885) ("The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous . . . .").

quirement is most prohibitive of claims that include the least amount of information pertinent to the character of the goods, services, or compliance with contractual or regulatory provisions. Those claims, however, give rise to the exact sort of informational disparity that the FCA is poised to mitigate via its *qui tam* provision. In the context of a bare request for payment, for example, the cost of detecting fraud, let alone uncovering its specifics, are substantial and would require the government to implement expansive screening functions. The FCA ordinarily circumvents this issue by giving enforcement authority and incentives to insiders with greater access to knowledge about fraud that is, by its nature, hidden, without any additional cost to the government. A significant cost of the specific representation requirement is the foreclosure of that information-generating capacity where it is needed the most.

Moreover, by creating a safe-haven from liability where little-to-no information is provided, the specific representation requirement will have the likely effect of encouraging claimants to make as few disclosures as possible under the relevant contractual or regulatory scheme so as to avoid unnecessarily subjecting themselves to liability under the implied false certification theory.[181] The impact of those developments would reach beyond the inability to detect fraud. In *Escobar*, the Court noted that tying falsity to the presence of a condition of payment, as some courts had previously done, would prompt the government to respond by "designating every legal requirement an express condition of payment."[182] So too here, if the government knows that specific representations are necessary for the prosecution of the most difficult to detect fraudulent claims,[183] it will have every incentive to implement regulatory and contractual schemes that will ensure such representations are consistently presented alongside claims for payment.[184] Thus, by pin-

181. *Cf.* United States *ex rel.* Hutchins v. DynCorp Int'l, Inc., 342 F. Supp. 3d 32, 50–51 (D.D.C. 2018) (noting that the claimant's use of generic billing codes, rather than more specific identifiers, may have been a part of a scheme to "conceal" fraudulent double-billing).

182. 136 S. Ct. 1989, 2002 (2016).

183. *Cf.* United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 816 (S.D.N.Y. 2017) ("[T]he implied certification theory helps to ensure that the Government can still recover for fraud . . . in circumstances where the relevant forms do not require explicit verification that the goods or services are free from illegal influence.").

184. *Compare* United States *ex rel.* Jamison v. Career Opportunities, Inc., No. 3:16-CV-3248-S, 2020 WL 520590, at *6 (N.D. Tex. Jan. 31, 2020) (finding a lack of specific representations where any information generating reports completed by the claimant were not "actually submitted . . . as a part of a claim for payment"), *with* United States *ex rel.* Jefferson v. Roche Holdings AG, No. GLR-14-3665, 2020

ning liability to affirmative disclosure, the specific representation requirement and its likely effect on informational disparities would force the government to impose more expansive certification requirements and additional red tape in a litany of contractual and regulatory spaces.

The specific representations requirement would also undermine the FCA's role in mitigating the effect of financial barriers that hinder effective government enforcement of regulatory and anti-fraud schemes. One of the great efficiencies of the FCA's hybrid model of enforcement is that the combination of its *qui tam* and government intervention provision allows the government to target its resources as necessary without risking underenforcement. If, as a result of the specific representations requirement, the government can no longer trust in the FCA's capacity to capture and attach liability to well-concealed fraudulent claims, they may be forced to expend a greater sum of their limited resources exploring alternative routes of prosecuting conduct which, at the end of the day, results in the unwarranted outlay of taxpayer dollars from the government fisc.

In sum, by grafting a specific representation requirement onto the implied false certification theory, a number of courts have restricted the degree to which the FCA may live up to its central premises and serve the critical regulatory function that is inherent in its public-private enforcement mechanism.

CONCLUSION

During the fifteen-plus-year debate around implied false certification that took place between the decisions in *Ab-Tech* and *Escobar*, courts and commentators raised serious questions about the role that the FCA should play in advancing the government's anti-fraud and regulatory prerogatives. For many, implied false certification was a logical and well-justified extension of the broad conception of falsity embodied by the FCA. For others, permitting liability on the basis of implication alone was beyond the pale. And while the arguments in favor of implied false certification ultimately carried the day when the Supreme Court weighed in, that decision was made

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WL 5759779, at *10 (D. Md. Sept. 28, 2020) (finding specific representations where the contract required the claimant to certify compliance with the applicable Federal Acquisition Regulations). The natural consequence, of course, is that law-abiding contractors, the market, or the taxpayers would be forced to shoulder the increased cost of contracting resulting from the new internal recordkeeping and screening procedures that such reporting regimes would likely prompt.

only after reasonable minds had gone on debating and disagreeing about the issue for years prior.

This Note has catalogued a new falsity debate that has emerged since *Escobar* was decided. And while that debate implicates similar questions about the proper role of the FCA, it has quickly taken on a character quite different from that which proceeded *Escobar*. Rather than relying on arguments that engage in reasoned consideration of the FCA's text, history, and purpose, the new falsity debate is being won with assumptions and ellipses. As an increasingly large number of courts require specific representations as a result of an uncritical reading or outright distortion of *Escobar*'s language, the consequent constriction of the FCA's scope goes largely unjustified. This Note has thus attempted to stake out a position on the propriety of specific representations while also engaging in the sort of discussion that has been painfully absent from judicial treatment of the matter thus far.