WHISTLEBLOWERS, TORT FOUNTAINS, AND LINE DRAWING: DETERMINING THE SCOPE OF LIABILITY UNDER THE FALSE CLAIMS ACT

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I. INTRODUCTION

The False Claims Act ("FCA")[2] is meant to "combat fraud against the federal government by persons who provide goods and services to it."[3] It "covers all fraudulent attempts to cause the government to pay out sums of money."[4] This goal is accomplished primarily through deterrence, by establishing civil liability for persons who, *inter alia*, present false claims for payment to the government, or make or cause a false statement "material" to a claim for payment.[5] Suits can be brought under the FCA by the federal government or on behalf of the government in a *qui tam* action by any citizen who suspects the defendant of submitting fraudulent claims for payment to the government; these plaintiffs stand to recover a portion of any damages recovered from the defendant.[6] The stakes are high for defendants in FCA actions, as they could be liable for treble damages, attorneys' fees and costs, and punitive damages ranging as high as $10,000.[7] Military contractors and participants in federal health care programs are the most commonly seen defendants in an FCA claim, with the health care industry only recently

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2. 31 U.S.C § 3729 (Supp. V 2006).

3. United States *ex rel.* Kirk v. Schindler Elevator Corp., 601 F.3d 94, 98–99 (2d Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1885 (2011).

4. United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008) (citation omitted). Numerous courts, including the United States Supreme Court, have noted that the FCA does not apply to all fraud perpetrated against the government. *See, e.g.*, Allison Engine Co., v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008) (criticizing plaintiff for attempting to "transform the FCA into an all-purpose antifraud statute"). This point is a central focus of this note.

5. § 3729 (a)(1)(A)-(B).

6. 31 U.S.C. § 3730 (a)–(d) (2006). Volumes could likely be written on the *qui tam* aspect of the FCA alone. For an in-depth examination and critique of *qui tam* actions brought under the FCA, see Susan A. Mitchell et al., *Implied Certification Liability Under the False Claims Act*, *in* 11-4 BRIEFING PAPERS (2d Series) 1 (2011).

7. § 3729(a).

surpassing the defense industry as the most likely target of an FCA suit.[8] In recent years, legislative acts, including amendments to the FCA passed in 2009, as well as judicial doctrines formulated by the various Federal Circuits, have significantly broadened the scope of potential FCA liability.[9]

During the summer of 2011, in decisions issued only weeks apart, two Federal Circuit Courts split on the scope of FCA liability. Both cases involved the doctrine of implied false certification, or "implied certification theory."[10] In *United States ex rel. Hutcheson v. Blackstone Med., Inc.*,[11] the First Circuit held that conditions material to the government's decision to pay a claim, which if violated subject the defendant to FCA liability, could be implied from any source, even contract terms which are not conditions of payment.[12] The court also held that defendants who cause a third party to file false claims for payment can be subject to FCA liability even though they did not personally submit a claim for payment.[13] In contrast, only a few weeks later in *United States ex rel. Wilkins v. United Health Group, Inc.*,[14] the Third Circuit required that certification, implied or express, of compliance with a statute, regulation, or underlying contract had to be a condition of payment; it also distinguished between conditions of payment and conditions of participation, and noted the need to prevent creating overly expansive liability under the FCA.[15]

Commentators have expressed concern that the First Circuit's holding in *Hutcheson* significantly expands the scope of liability of government contractors and participants in federally funded programs, particularly in the healthcare context.[16] When the defendants in *Hutcheson* filed a petition for *certiorari* with the United States Supreme Court, commentators noted that the case "lay[s] the foundation for Supreme Court review."[17] If the Court had granted writ, it could have provided some much needed guidance to the federal circuits on the scope of FCA liability.[18] However, on December 5, 2011, the Supreme Court

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8. Karen L. Manos, *False Claims Act*, *in* 3 GOVERNMENT CONTRACTS COSTS & PRICING § 91:6 (2d ed. West 2012).

9. Mitchell et al., *supra* note 6, at 2.

10. *See* Manos, *supra* note 8, at 4 ("[u]nder the theory . . . a defendant may be found liable for a False Claims Act violation for having implicitly certified through submission of an invoice that it was in compliance with contract, statutory[,] or regulatory provisions . . . ."). *See also infra* Part II.A (discussing the implied certification theory).

11. 647 F.3d 377 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 815, 816 (2011).

12. *Id.* at 392.

13. *Hutcheson,* 647 F.3d at 391–92.

14. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295 (3d Cir. 2011).

15. *Id.* at 305, 310–11.

16. *See 1st Circuit Ruling Expands Scope of Liability for Drug, Device Manufacturers under False Claims Act*, 20 No. 5 FDA ENFORCEMENT MANUAL NEWSL. 5, (Thompson Publ'g Grp., Inc.) July 2011, at 1; David Douglass, *First Circuit Opinion Firmly Endorses an Expansive Interpretation of the FCA*, COMPLIANCE AND ENFORCEMENT REG. (June 2, 2011, 3:24 PM), http://www.complianceandenforcementregister.blogspot.com/2011/06/first-circuit-opinion-firmly-endorse.html.

17. Douglass, *supra* note 16.

18. Thomas S. Crane & Brian P. Dunphy, *United States: Will the Supreme Court Weigh In? Implied Certification Theory Under The False Claims Act,* MONDAQ (Oct. 26, 2011),

denied the petition for writ.[19] A petition filed in the successor case to *Hutcheson*, *New York ex rel. Westmoreland v. Amgen*, *Inc.*,[20] was likewise dismissed on December 27, 2011.[21] As discussed below, this case arguably expanded the scope of FCA liability in the First Circuit even further.[22] The denial of petition for writ of *certiorari* in both cases leaves the exact scope of FCA liability uncertain among the circuits.

This note analyzes the contrast between *Hutcheson* and *Wilkins*, and addresses which circuit's reasoning should have guided the Court if it had granted writ in the First Circuit cases. First, this note examines the mechanics of FCA liability and the various doctrines of liability created by and adopted among the various circuits. Second, it describes the background of FCA liability. Third, is a look at the split among the circuits over how broad the scope of FCA liability should be, with a particular focus on "conditions of payment" as distinguished from "conditions of participation." Fourth, this note analyzes the district court and circuit court opinions in *Hutcheson* and *Wilkins*, and examines which represents the better line of reasoning. This note concludes by adopting *Wilkins* as representing the better line of reasoning, by noting that the Third Circuit's focus on avoiding the creation of over-expansive liability is preferable to the dangerously broad liability created by the First Circuit. If the Supreme Court ever grants writ in a future FCA case, the reasoning of *Wilkins* could help the Court reach a decision to adopt a less expansive approach to FCA liability that focuses on distinguishing between conditions of payment and conditions of participation.

II. BACKGROUND

A. The False Claims Act and Certification Theory

The FCA establishes multiple bases of liability for submitting a false claim for payment to the government. This note focuses primarily on §3729(a)(1)(A)-(B), which subjects anyone to FCA liability who "(A) knowingly presents, or causes to be presented, a false . . . claim for payment or approval" by the government; or "(B) knowingly makes, uses, or causes . . . a false record or statement, material to a false or fraudulent claim" for payment by the government.[23]

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http://www.mondaq.com/unitedstates/x/149842/Healthcare+Medical/Will+The+Supreme+Court+Weigh+In+Implied+Certification+Theory+Under+The+False+Claims+Act.

19. Blackstone Med., Inc. v. United States *ex rel.* Hutcheson, 132 S. Ct. 815, 816 (2011).

20. 652 F.3d 103 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 993 (2011).

21. Amgen, Inc. v. New York *ex rel.* Westmoreland, 132 S. Ct. 993 (2011).

22. *Westmoreland* expanded the First Circuit's holding in *Hutcheson* to state FCA claims and state Medicaid claims, and rejected distinguishing between conditions of payment and conditions of participation. *Westmoreland*, 652 F.3d at 115. As this note describes below, this distinction is critical in many circuits.

23. 31 U.S.C. § 3729(a)(1)(A)–(B) (Supp. V 2006).

Congress originally enacted the FCA during the American Civil War in response to widespread fraud perpetrated by government contractors against the Union government.[24] Defense contractors were submitting inflated invoices, billing for nonexistent or worthless goods, charging exorbitant prices, and otherwise taking advantage of the government via fraudulent means.[25]

To that end, the FCA is viewed by most courts and commentators as intended by Congress to be a punitive statute, deterrent in nature, both in effect and by its very purpose.[26] This is evidenced by the remedies provided for in the statute, which include punitive damages, treble damages, and attorneys' fees.[27] Additionally, a claim under the FCA can be "bootstrapped" with other statutory violations, such as in the healthcare industry, in which FCA claims are often brought in conjunction with Stark Law and Anti-Kickback Statute violations.[28] The deterrent nature of the statute is also evidenced by how easily an FCA claim can be brought; any person may bring a civil action under the FCA on behalf of the federal government in a *qui tam* action.[29] This kind of plaintiff is technically known as a "relator."[30] Colloquially, they are known as "whistleblowers."[31]

The Second Circuit's opinion in *Mikes v. Straus* defines a number of judicial doctrines that have come to be adopted by a majority of the circuits.[32] These terms collectively are known as the "certification theory" of FCA liability.[33] Under this theory, FCA liability arises from a false representation of compliance with a federal statute or regulation (or a prescribed contractual term, depending on the circuit), made in a claim for payment submitted by a participant in a federal government program or contract with the federal government.[34]

There are two types of false claims for payment: legally false claims and factually false claims.[35] The Second Circuit explained that factually false claims

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24. Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 995 (9th Cir. 2010) (citation omitted); Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001).

25. *Mikes*, 274 F.3d at 692.

26. United States *ex rel.* Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d. 747, 758 (S.D. Ohio 2009); *see also* United States *ex rel.* Kirk v. Schindler Elevator Corp., 601 F.3d 94, 99 (2d Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1885 (2011) (stating the FCA contains a number of measures, such as treble damages and *qui tam* provisions "designed to enhance deterrence and enforcement"); Mitchell et al., *supra* note 6, at 1 (calling the FCA "a powerful weapon in the Government's arsenal against contractor fraud").

27. 31 U.S.C. § 3729(a)(1)(G).

28. T. Mills Fleming, *New Government Scrutiny Demands New Strategies for Health Care Clients*, HEALTH CARE LAW ENFORCEMENT AND COMPLIANCE 125 (Aspatore 2011).

29. 31 U.S.C. § 3730(b) (2006).

30. Mitchell et al., *supra* note 6, at 1.

31. Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001); *see infra* section II.B (discussing relators in greater detail).

32. *Mikes*, 274 F.3d at 696–97. The First Circuit rejected the use of these terms in its recent decisions. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 388, 391 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 815, 816 (2011).

33. *Mikes*, 274 F.3d at 696.

34. *Id.*

35. *Id.* at 696–97.

are those that simply involve an inaccurate or incorrect description of goods or services provided to the government, or a request for reimbursement for such goods and services, which in reality, were never provided in the first place.[36] It described legally false claims, in contrast, as part of general certification theory, and defined them as false representations of compliance with a federal statute or regulation or a prescribed contractual term.[37]

A legally false claim is further classified under one of two certification theories of liability: express false certification and implied false certification.[38] Express false certification applies whenever a defendant receiving payments from the federal government falsely certifies, through an "invoice[] or any other express means," compliance with a particular statute, regulation, or contractual term.[39] Under implied false certification, the contractor's actual statements do not matter.[40] Rather, the analysis focuses on the underlying contract, regulation, or statute to determine whether the applicable law makes compliance with it a prerequisite to payment.[41] Implied certification theory originated in the Court of Federal Claims in the context of federal construction contracts.[42]

Since the *Ab-Tech* decision, the doctrine has proliferated in FCA suits, including those involving federal health care programs.[43] The circuits have diverged on where these conditions can be found, and a number of circuits, including most recently the First Circuit, have differed on whether it must be distinguished as a condition of payment at all.[44] This note focuses on legally false claims, and particularly implied false certification.[45]

B. Qui tam Relators and FERA

Under the FCA, a relator is entitled to a portion of whatever the federal government recovers from the defendant, though this amount varies depending on whether the government decides to intervene on the relator's behalf after he files his complaint.[46] The *qui tam* provisions of § 3730 have

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36. *Mikes*, 274 F.3d at 697.

37. *Id.* at 696–97.

38. *See id.* at 697–99.

39. United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008).

40. *Id.* at 1218.

41. *Id.*

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

43. *E.g.*, *Mikes*, 274 F.3d at 699 (applying implied certification theory to Medicare despite noting that "[t]he *Ab-Tech* rationale . . . does not fit comfortably into the health care context").

44. *See generally* Crane & Dunphy, *supra* note 18 (classifying the standards employed by various circuits by looking to whether the circuit requires compliance as a prerequisite to payment).

45. The author uses the terms condition of payment, precondition of payment, and prerequisite of payment interchangeably.

46. 31 U.S.C. § 3730(d) (2006).

been viewed as a means of encouraging and incentivizing citizens who know of fraud being perpetrated against the government to "bring that fraud to light and assist in enforcement."[47] Both courts and commentators have questioned whether the motive of relators in filing an FCA action is obtaining justice or seeking pecuniary gain, the latter of which may encourage hastily brought suits that may not otherwise be filed.[48] In previous years, a provision of the FCA known as the "public disclosure bar" was used to remove a court's jurisdiction over a relator's FCA claim, if he brought the suit based on public disclosure of the defendant's fraud in the news media or some other medium, and only allowed a relator to file suit if he was an "original source" of the information.[49] However, in what has been called one in a series of "sweeping laws,"[50] Congress enacted the Patient Protection and Affordable Care Act ("PPACA") in 2010, which effectively removed the public disclosure bar by "eas[ing] the ability of 'whistleblowers' to report the [healthcare] provider for alleged wrongdoing . . . ."[51] The threshold for a relator to bring an FCA suit was lowered to the extent that a relator no longer needs to be the original source of information, but just needs independent knowledge that materially adds to publicly disclosed information.[52] According to the Department of Justice's website, in the 2010 Fiscal Year, *qui tam* filings rose 75% from the 2009 Fiscal Year level.[53] In 2010, relators recovered over $386 million in judgment and settlement.[54] According to the Medicare Fraud Strike Force, by the latter part of the 2011 Fiscal Year, over $225 million had been recovered by the Strike Force in false billings in health-care related schemes.[55] Between 1987 and 2010, of the 5,000 FCA suits filed in that time, almost 4,000 of them were filed by *qui tam* relators.[56] More recently, in November of 2012, President Obama signed into law the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), which according to commentators will, *inter alia*, provide enhanced

47. *In re* Natural Gas Royalties Qui Tam Litig., 566 F.3d 956, 960 (10th Cir. 2009).

48. *Id.* at 960 (observing that FCA's allowance for *qui tam* actions "carries with it the risk of parasitic suits brought by relators who add little in value but siphon off part of the government's recovery . . . ."); *see also* Mitchell et al., *supra* note 6, at 1 (calling the FCA "a beacon not only for whistleblowers seeking justice, but for those seeking quick settlements from companies unable or unwilling to incur the enormous litigation costs entailed in FCA actions").

49. *Id.* at 961 ("The public disclosure bar is . . . chiefly designed to separate the opportunistic relator from the relator who has genuine, useful information that the government lacks.").

50. Fleming, *supra* note 28, at 126.

51. *Id.* at 127.

52. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, 901 (2010); *see also* Fleming, *supra* note 28, at 128, 131 (observing that the PPACA replaced the jurisdictional bar "with a more lenient, discretionary option to be exercised by the government"); Mitchell et al., *supra* note 6, at 5 (stating that as a result of the PPACA, "whistleblowers now have greater latitude to mine public records for evidence of potential wrongdoing . . . .").

53. Mitchell et al., *supra* note 6, at 1 (citations omitted).

54. *Id.*

55. Fleming, *supra* note 28, at 124.

56. *Fraud Statistics – Overview,* U.S. DEP'T OF JUST. (Oct. 24, 2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

protection to government workers who disclose evidence of fraud and abuse discovered in the course of their employment.[57]

The PPACA and WPEA were not the only "sweeping law[s]" passed that had (or in WPEA's case, will likely prove to have) a profound impact on the FCA; in 2009, Congress passed the Fraud Enforcement Recovery Act ("FERA").[58] In order to properly appreciate the impact the amendments of FERA had on FCA liability, and its critical importance to the discussion of *Hutcheson* and *Wilkins*, the context of pre-FERA liability under the FCA must first be discussed.

Before FERA, the FCA was last amended in 1986 to specifically respond to prevalent fraudulent payments in the military contracting and healthcare industries.[59] Under the 1986 version of the statute, the predecessor to § 3729(a)(1)(A) did not merely require presentation of a false claim, but also modified the provision by adding "to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval."[60] Additionally, the earlier version of § 3729(a)(1)(B) did not contain a "materiality" aspect; the statute established liability for any person who knowingly made a false record or statement "to get" a false claim paid by the government.[61]

The Supreme Court interpreted the inclusion of this language narrowly, particularly "to get," which was interpreted as denoting purpose and requiring specific intent by the defendant in order to establish a successful FCA claim.[62] In the Court's unanimous opinion in *Allison Engine Co.,* Justice Alito cautioned against "[e]liminating this element of intent."[63] To do so, he stated, would be to "expand the FCA well beyond its intended role of combating 'fraud against the Government.'"[64] Justice Alito reasoned that § 3729(a)(2) of the 1986 version of the FCA does not demand causation of a false record or statement to be presented to the government; rather, it requires that the defendant make a false statement for the purpose of getting a false claim paid.[65] The Court concluded that a purpose requirement prevents the FCA from becoming an all-purpose anti-fraud statute, and that it "ensures that a 'defendant is not answerable for anything beyond the natural, ordinary[,] and reasonable consequences of his conduct.'"[66]

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57. *False Claims Act: 2012 in Review,* WILMERHALE 3 (Jan. 2, 2013), http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/FCA%20YearInReview%202012.pdf.

58. Fleming, *supra* note 28, at 126.

59. Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001).

60. 31 U.S.C. § 3729(a)(1) (1988).

61. *Id.* at (a)(2).

62. Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 668–69 (2008).

63. *Id.* at 669.

64. *Id.* (quoting Rainwater v. United States, 356 U.S. 590, 592 (1958)) (emphasis omitted).

65. *Id.* at 671.

66. *Id.* (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 470 (2006)).

The Supreme Court entered its decision in *Allison Engine Co.* on June 9, 2008.[67] Congress' amendments to the FCA in FERA took effect on May 20, 2009.[68] However, FERA contained a retroactivity provision, which stated that all amendments to § 3729(a)(1) take effect "as if enacted on June 7, 2008, and apply to all claims" under the FCA.[69] In other words, the retroactivity provision applied to two days before the Supreme Court's decision. Commentators interpret the retroactivity provision as a signal of Congress' specific intent to use FERA to "effectively reverse the unanimous decision" of *Allison Engine Co.*[70] Some commentators and courts have split on whether the provision is even constitutional.[71] However, a full discussion on the constitutionality of the provision is outside the scope of this note.

The FERA amendments made several changes to the FCA that commentators have argued dramatically increased the scope of liability as compared to the 1986 version.[72] It removed the presentment requirement of § 3729(a)(1), meaning that the claim no longer has to be presented directly to the federal government.[73] It significantly broadened the definitions of terms such as "claim," "false statement," and "materiality" when compared to the 1986 version of the statute.[74] Finally, FERA effectively repudiated *Allison Engine Co.* by particularly stating that specific intent is not required for liability; only a "knowing" standard is required after FERA.[75] The removal of specific intent and the imposition of a materiality standard has been criticized as a "dangerously subjective standard."[76]

C. The Circuit Split on "Condition of Payment"

As noted above, in addition to legislative action broadening liability under the FCA, a number of judicially created doctrines such as "legally false claims" and "implied certification theory" have broadened the expansive scope of FCA liability.[77] These terms were specifically rejected by the First Circuit in

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67. *Allison Engine Co.*, 553 U.S. at 662.

68. 31 U.S.C. § 3729 (Supp. V 2006).

69. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1625 (2009).

70. Fleming, *supra* note 28, at 126.

71. *See* Mitchell et al., *supra* note 6, at 3–4.

72. *Id.* at 3.

73. *Id.*

74. *Id.* at 3–4; Manos, *supra* note 8, at 1, 8 n.1. Materiality was already a factor in FCA analysis in several jurisdictions before FERA, and the adopted standard was the "natural tendency test," which asks whether the false statement makes it likely that the government will decide not to pay the defendant had it known of the falsity. Mitchell et al., *supra* note 6, at 3 (internal quotations omitted). This is a "reduced threshold for materiality" as compared to pre-FERA case law in other jurisdictions. *Id.*

75. 31 U.S.C. § 3729(b)(1)(B) (Supp. V 2006).

76. Mitchell et al., *supra* note 6, at 8.

77. *Id.* at 2.

Hutcheson.[78] Conversely, this terminology was specifically adopted by the Third Circuit in *Wilkins*.[79] Of particular importance to these theories is whether compliance with an underlying statute, regulation, or relevant contract provision is a condition of payment, or mere condition of participation in federal programs. It is from this focus that this note characterizes the split among the circuits before *Hutcheson* and *Wilkins*.[80]

1. Circuits Which Distinguish Between Conditions of Payment and Conditions of Participation

While they may differ in where a condition of payment can be found, the majority of circuits require that an applicable statute, regulation, or contract provision allegedly violated by a FCA defendant be a condition of payment by the government, rather than a condition of participation in the federal program.

In *Mikes*, the Second Circuit ruled that a claim for payment made by a participant in a federal program is only legally false under implied certification theory when the underlying statute or regulation, upon which the plaintiff relies, expressly states that the defendant must comply with it in order to be paid by the government.[81] Despite endorsing implied certification theory, the Second Circuit cautioned not to "read this theory expansively and out of context."[82] The court reasoned that the FCA was "not designed for use as a blunt instrument to enforce compliance with all medical regulations," but only those which are expressly stated to be preconditions to payment by an underlying statute or regulation.[83] The Second Circuit did not include underlying contractual provisions as a source where conditions of payment may be found.

The opinion went on to state that the task of determining whether compliance is material to the government's decision to pay is a "related

78. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 386 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 815, 816 (2011).

79. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 306–07 (3d Cir. 2011).

80. Two sources in particular were drawn upon in characterizing the circuit split based on condition of payment. Firstly, in examining two contrasting approaches applied by the Fifth Circuit and D.C. Circuit—in decisions issued only weeks apart, much like the focus cases of this note—Karen Manos employed the terms "prerequisite requirement" and "material to payment" standards. Manos, *supra* note 8, at 5. Secondly, Thomas Crane and Brian Dunphy, in an article on their firm's website, characterizes the split as being between three different standards: (1) a false claim must violate an express prerequisite of payment; (2) the statute, regulation or contract violated does not need to be a condition of payment; and (3) a false claim "must misrepresent compliance with a material condition for payment." Crane & Dunphy, *supra* note 18. The author's characterization of the circuit split is influenced heavily by these two sources, with some variations of the author's own making.

81. Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001).

82. *Id.*

83. *Id.* at 699–700.

concept," but noted that its holding of requiring the statute or regulation to be an express condition of payment is distinct from requiring that the false statement be material to the government's funding decision.[84] It distinguished between materiality and conditions of payment because "not all instances of regulatory noncompliance will cause a claim to become false."[85] The court reiterated this distinction by noting the difference between conditions of payment, which serve as prerequisites to the government reimbursing claims for payment, and conditions of participation in the federal program itself.[86] If the "ultimate sanction" provided for by an applicable regulatory scheme is an alternative remedy to recovering previously paid claims, such as exclusion of a healthcare provider from eligibility in Medicare programs, then the regulation or statute is "quite plainly a condition of participation" which does not give rise to FCA liability.[87]

The Fourth Circuit does not recognize implied certification theory.[88] However, it extends FCA liability to underlying contractual provisions, with the requirement that FCA liability arises out of violation of the provision only if the government program required compliance with it as a prerequisite to payment by the government.[89] This circuit has applied cautionary logic to making contractual provisions the basis for conditions of payment actionable under the FCA analogous to that which the Second Circuit in *Mikes* applied to administrative regulations, stating that the "normal run of contractual disputes are not cognizable under the False Claims Act."[90] In *Wilson*, the court called the relators' attempt to "shoehorn . . . a breach of contract action" into an FCA suit a "misguided journey."[91] The court warned that if every alleged breach of contract by a participant in a federal program were to be made the basis for *qui tam* FCA actions, "the prospect of litigation in government contracting would literally have no end."[92]

The Fifth Circuit does not officially recognize implied certification theory.[93] In *Steury*, the court stated that it had "repeatedly" upheld dismissal of implied and express false certification claims under the FCA when the defendant's compliance with applicable statutes, regulations, or contract provisions was not a prerequisite to payment by the government.[94] It noted the "crucial distinction" between "punitive . . . liability [under the FCA] and ordinary

84. *Mikes*, 274 F.3d at 697.

85. *Id.*

86. *Id.* at 701–02.

87. *Id.* at 702.

88. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 786–87 n.8 (4th Cir. 1999).

89. United States *ex rel.* Godfrey v. KBR, Inc., 360 Fed. App'x 407, 411–12 (4th Cir. 2010) (citing *Harrison*, 176 F.3d at 786).

90. United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 383 (4th Cir. 2008).

91. *Id.* at 373.

92. *Id.*.

93. United States *ex rel.* Steury v. Cardinal Health, Inc.*,* 625 F.3d 262, 268 (5th Cir. 2010).

94. *Id.*

breaches of contract."[95] The Fifth Circuit, much like the Second Circuit did in *Mikes*, noted the need to distinguish the "prerequisite requirement" from a materiality requirement—which it noted was an element of FCA liability substantially broadened by FERA—because whether certification of compliance is a prerequisite for payment "has to do with more than just the materiality of a false certification; it ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place."[96] The court held that a false certification of compliance with a statute, regulation or contractual provision, "without more, does not give rise to a false claim for payment unless payment is conditioned on compliance."[97]

In *Steury,* the court also noted that in determining whether compliance is a condition of payment, a court should look at "the Government's ability to seek a range of remedies" when a participant in a federal program is in noncompliance with a statute, regulation, or contractual provision.[98] It warned that if private litigants were able to sue participants in federal programs under the FCA whenever the participant was in noncompliance with applicable authority, and a range of remedies existed for the government to pursue in the event of such noncompliance, the government's "ability to pursue the range of [contemplated] remedies . . . would be substantially compromised."[99] Commentator Marcia Madsen cites *Steury* as standing for what she calls the "range of remedies doctrine."[100] Calling the Fifth Circuit's "pioneer[ing]" reasoning a "common sense approach" to determining whether underlying contractual provisions or regulations are a condition of payment, Madsen notes that the range of remedies approach is consistent with the plain language of the FCA.[101] Madsen expresses hope that other circuits will adopt this reasoning, and employ the practice of determining that if other remedies besides withholding payment exist for the government in the event of noncompliance by a participant, compliance will be found to not be a condition of payment.[102]

The Sixth Circuit employs certification theory.[103] Like the Second Circuit, the Sixth Circuit requires that compliance with an applicable regulation constitutes a condition of payment in order for noncompliance to be

95. *Steury*, 625 F.3d at 268 (citations omitted).

96. *Id.* at 269.

97. *Id.*

98. *Id.* at 270.

99. *Id.*

100. Marcia G. Madsen, *False Claims Act: What Government Contractors Should Know About the Implied Certification Theory of Liability*, *in* GOVERNMENT CONTRACTS 471, 481 (Practising Law Inst. 2011).

101. *Id.* at 481. While Madsen states the Fifth Circuit pioneered this approach, readers may note that its reasoning is nearly identical to that of the Second Circuit in its opinion issued nearly a decade earlier in *Mikes*. *See* Mikes v. Straus, 274 F.3d 687, 701–02 (2nd Cir. 2001).

102. *Madsen*, *supra* note 100, at 482.

103. United States *ex rel.* Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002).

actionable under the FCA.[104] In *Chesbrough*, the court held that violation of any regulation is not enough to create a cause of action under the FCA.[105] Rather, the relator must allege that "compliance with the standard was required to obtain payment."[106]

The Eighth Circuit has made a point to distinguish between conditions of participation and conditions of payment.[107] In an attempt to limit the scope of the FCA, the Eighth Circuit, in *Vigil*, stated that "[t]he FCA is not concerned with regulatory compliance."[108] Rather, the FCA is meant to serve "a more specific function, . . . by imposing severe penalties on those whose false or fraudulent claims cause the government to pay money."[109] In determining whether the defendant made such a false claim under § 3729(a)(2) of the FCA, the court held that a relator must prove that the allegedly false certification was a condition of payment, rather than a mere regulatory violation of a condition of participation.[110] Much like the Second Circuit in *Mikes*, and the Fifth Circuit in *Steury*, the court found it "significant" that the applicable statutes and regulations argued by the relator (dealing with federal education loan programs to higher learning institutions) provided the government with detailed remedies for noncompliant participants that did not include "wholesale recovery" of previously paid claims to those participants.[111] Citing *Conner*, the Eighth Circuit concluded that the lower court properly dismissed the relator's complaint because the statute created a "complex monitoring and remedial scheme that ends [ ] payments only as a last resort," and to use the FCA to provide for recovery contrary to that scheme would "undermine the government's own regulatory procedures."[112]

The Ninth Circuit has expressly adopted the Second Circuit's reasoning of *Mikes* for FCA claims in the context of Medicare payments to health care providers.[113] In *Ebeid*, the Ninth Circuit adopted the condition of participation and condition of payment distinction payment of *Mikes*, but otherwise departed from the Second Circuit's reasoning in several ways.[114] First, the court noted that the Ninth Circuit's materiality analysis—determining whether the false statement was material to the government's decision to pay the claimant-defendant—was broad in that it "merely" asks whether the false certification was relevant to the decision to pay.[115] Additionally, the *Ebeid* court limited the distinction between conditions of

104. Chesbrough v. VPA, P.C., 655 F.3d 461, 468 (6th Cir. 2011).

105. *Id.*

106. *Id.*

107. United States *ex rel.* Vigil v. Nelnet, Inc., 639 F.3d 791, 799 (8th Cir. 2011).

108. *Id.* at 795.

109. *Id.* at 796.

110. *Id.* at 799 (citing United States *ex rel.* Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211, 1220 (10th Cir. 2008)).

111. *Id.* at 798–99.

112. *Id.* at 799 (quoting *Conner*, 543 F.3d at 1222).

113. Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 996, 998 (9th Cir. 2010).

114. *Id.* at 997–98 (citations omitted).

115. *Id.* at 997 (citing United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1173 (9th Cir. 2006)).

payment and conditions of participation to the context of Medicare claims, citing from its own precedent that the distinction did not apply to federal educational loan programs.[116] Unlike the Eighth Circuit in *Vigil*, the court held that, in the education context, to find that conditions of participation were not conditions of payment "would [result in finding] no conditions of payment at all."[117] Thus, while proclaiming to follow its "sister circuits" who adopted implied certification theory, the *Ebeid* court seemed to rely on its own precedent to create loopholes allowing for a broader scope of FCA liability than that of the Second and Eighth Circuits, by limiting the condition of payment distinction to Medicare.[118]

In FCA suits based on implied false certifications, the Tenth Circuit requires looking at the underlying contracts, statutes, or regulations to determine whether compliance is a prerequisite to payment.[119] Unlike the Second and Ninth Circuits, the Tenth Circuit examines underlying contractual provisions in addition to statutes and regulations, and holds that conditions can be explicitly or implicitly contained in the contract, statute, or regulation.[120] The Tenth Circuit recognizes a materiality requirement similar to that of the Ninth Circuit's.[121] In *Conner*, the Tenth Circuit carefully analyzed the distinction between conditions of payment and conditions of participation.[122] It held that general sweeping language in underlying applicable authority is not enough if it does not contain language that "payment is conditioned on perfect compliance," nor is it enough if the underlying authority does not "provide that payment is so conditioned."[123] It concluded that to hold the failure to perfectly comply with any underlying statute, regulation, or contract as resulting in FCA liability would be an overly expansive theory of liability.[124]

Like other circuits, the *Conner* court focused on the "administrative mechanisms" and "ultimate sanctions" in place to provide the government with remedies in the event of noncompliance by a participant in federal programs such as Medicare.[125] Conditions of participation, the court explained, are for those which the ultimate sanction for violation is removal from the government program; where, in contrast, conditions of payment are for those which, if the government knew they were not being followed, might

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116. *Ebeid*, 616 F.3d at 997–98 (citations omitted).

117. *Id.* at 998.

118. *Id.* at 996.

119. United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1168–69 (10th Cir. 2010) (citing United States *ex rel.* Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211, 1218 (10th Cir. 2008)).

120. *Conner*, 543 F.3d at 1217–18.

121. *Lemmon*, 614 F.3d at 1169 (citing *Conner*, 543 F.3d at 1218).

122. *Conner,* 543 F.3d at 1219–20.

123. *Id.* at 1219.

124. *Id.* at 1218.

125. *Id.* at 1220.

cause the government to actually refuse payment.[126] If the regulation or other applicable authority does not condition government payment on perfect compliance with all underlying authority, but rather seeks assurances that the participant continues to comply with originally agreed upon conditions of participation, then it is not a condition of payment.[127] The court reasoned that to read the FCA to apply to all conditions without distinguishing between those of participation and those of payment would be to "undermine the government's own administrative scheme for ensuring that [participants] remain in compliance and for bringing them back into compliance when they fall short of what the . . . regulations and statutes require."[128]

2. Circuits That Do Not Distinguish Between Conditions of Payment and Conditions of Participation

As illustrated above, the aforementioned circuits may differ in exactly what context or to what extent conditions of payment are required. Nonetheless, they all still require a showing of violation of a precondition of payment in addition to other elements, such as materiality, and distinguish in some way between conditions of payment and conditions of participation. The following circuits have diverged from them by not distinguishing between conditions of payment and conditions of participation. In some cases, some of these circuits do not even require a violation of a precondition of payment.

The Seventh Circuit does not recognize implied certification theory; instead, it requires an initial express false certification in order to give rise to FCA liability.[129] In the context of federal educational loan programs, the Seventh Circuit adopted a contractual approach to FCA suits with a focus on causation that is based on theories of fraudulent inducement.[130] In *Main*, the Seventh Circuit held that all that is needed for FCA liability is an express false statement by a participant in a federal program "integral to a causal chain leading to payment."[131] The court did not distinguish nor mention conditions of payment, simply stating "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork."[132] In addressing the defendant's argument that such a theory would "treat any violation of federal regulations in a funding program as actionable fraud," the court stated that a participant has "broken a contract" when the participant accepts federal funds that are contingent on following a regulation.[133]

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126. *Conner,* 543 F.3d at 1220.
127. *Id.* at 1220–21.
128. *Id.* at 1220.
129. United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999).
130. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005).
131. *Id.* at 916.
132. *Id.*
133. *Id.* at 917.

The Eleventh Circuit has held that violation of conditions of participation can result in FCA liability.[134] In a succinct holding in which the court ruled that the plaintiffs had sufficiently alleged false claims in violation of the Anti-Kickback Statute, the Eleventh Circuit rejected the defendant's argument that merely alleging false certification of compliance with a statute is not enough for FCA liability.[135] The court declined to draw a line between conditions of participation and conditions of payment for FCA liability.[136] Instead, it reasoned that when an FCA defendant is "ineligible to participate in a government program" (i.e., violating a condition of participation) and it persists in presenting claims for payment it knows the government does not owe it, the defendant is liable under the FCA.[137]

In a decision issued only a few weeks after the Fifth Circuit's decision in *Steury*, the D.C. Circuit in *United States v. Science Applications Int'l Corp. (SAIC)* adopted a far different approach from the precondition of payment test.[138] After expressly adopting implied certification theory in the context of the defendant's technical support contract with the government, the court rejected the express precondition test of the Second Circuit.[139] It found nothing in the language of the FCA indicating that liability had to be contingent on the violation of an express precondition of payment, and to read a requirement into it would be "counterintuitive" and go against Congress' intent of creating a broad scope of liability under the statute.[140] The D.C. Circuit distinguished *Mikes* as being decided in the "substantially different" context of Medicare, in that it did not involve contractual requirements, and therefore held that *Mikes* had no application in the case before the court.[141] Instead, the D.C. Circuit held that all that is required to establish that the defendant submitted a false claim is a showing of materiality; that is, that the defendant withheld information about its noncompliance with "material contractual requirements."[142] The court found materiality could be established in other ways besides looking at the language of the underlying contract, including after-the-fact testimony at trial that both parties understood that payment was conditional on compliance with contractual requirements.[143] The D.C. Circuit stated that this was the same materiality standard which the Ninth and Tenth Circuits had adopted.[144] The court recognized the dangers behind an "excessively broad" interpretation of the FCA, and that its decision could

134. McNutt v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005).
135. *Id.* at 1259–60.
136. *See id.* at 1260.
137. *Id.* at 1259.
138. United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010).
139. *Id.* at 1269–70.
140. *Id.* at 1268–69.
141. *Id.* at 1270.
142. *Id.* at 1269.
143. *Id.*
144. *Sci. Applications Int'l Corp.*, 626 F.3d at 1269–70.

result in abuse by relators "seeking to take advantage of the FCA's generous remedial scheme" by attempting to "turn the violation of minor contractual provisions into an FCA action."[145] It held that this concern was sufficiently resolved via "strict enforcement of the [FCA's] materiality and scienter requirements."[146]

In an article for *Government Contractor*, Andy Liu and Jonathan Cone describe *SAIC* as "one of the most important cases of 2010."[147] The article depicts *SAIC* as expanding the scope of liability under the FCA by requiring that FCA plaintiffs only have to show that a defendant withheld information about noncompliance with a material contractual requirement "regardless of whether that requirement was an express condition precedent to payment."[148] Under *SAIC*, Liu and Cone claim, the FCA "continues to be a trap for the unwary" by turning what "seems to be a simple contractual breach" into fraud perpetrated against the government.[149] Yet the pair applauds other aspects of the D.C. Circuit's decision, namely it's heightened scienter requirements, as adding "important safeguards to protect defendants from the quasi-criminal nature of FCA liability for what are more properly breach of contract matters."[150]

Other commentators have been less forthcoming with praise for *SAIC*. Susan A. Mitchell et al., call the *SAIC* approach a "broad and subjective test" subjecting parties who contract with the federal government to far greater risks of FCA liability than in other circuits.[151] Noting the D.C. Circuit's failure to distinguish what constitutes a material contract provision from a minor or ancillary one, Mitchell states that a FCA plaintiff or relator may allege FCA liability by a defendant for any noncompliance, with potentially any provision of a contract, so long as it is found to be material.[152] Furthermore, because "materiality can be, and often is, an issue of fact, not law," the result is that juries "with limited knowledge of the contract" will have to determine whether compliance was material to the government's decision to pay.[153] Mitchell concludes that, when coupled with the "relaxed statutory standard for materiality" under the FERA amendments, the D.C. Circuit's dangerously subjective materiality test "not only increases litigation risk, but reduces opportunities for obtaining judicial dismissal of the case before trial."[154]

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145. *Sci. Applications Int'l Corp.*, 626 F.3d at 1270.

146. *Id.*

147. Andy Liu & Jonathan Cone, *Feature Comment: Two Steps Forward One Step Back: The D.C. Circuit Expands The False Claims Act's Reach But Not For Mere Mistakes*, 54 THE GOV'T CONTRACTOR, no. 4, (Thomson Reuters) Jan. 26, 2011, at 1.

148. *Id.*

149. *Id.* at 5.

150. *Id.* at 1.

151. Mitchell et al., *supra* note 6, at 7.

152. *Id.* at 8.

153. *Id.*

154. *Id.*

III. FIRST CIRCUIT'S MATERIAL CONDITION APPROACH VERSUS THE THIRD CIRCUIT'S CAUTIONARY APPLICATION OF IMPLIED CERTIFICATION THEORY

It is against this backdrop that *Hutcheson* and *Wilkins* were decided. Much like the Fifth Circuit in *Steury* and the D.C. Circuit in *SAIC* just less than a year earlier, the two decisions were issued just weeks apart. Also, like those two cases, the contrast between the reasoning of the two circuits encapsulates the pre-existing difficulty of circuits in determining the proper scope of FCA liability.

A. First Circuit: Hutcheson and Westmoreland

In *Hutcheson*, the relators filed an FCA suit in the District of Massachusetts against defendant Blackstone Medical, alleging that Blackstone perpetrated a nation-wide scheme of offering kickbacks to hospitals and doctors for using the Blackstone's medical devices, in violation of the Anti-Kickback Statute.[155] The relators were not alleging that Blackstone was submitting fraudulent claims for payment to the government, but that Blackstone was liable under the FCA for "causing" the hospitals and doctors to submit false claims for payment in federally funded healthcare programs such as Medicare and Medicaid.[156] The relators alleged these submitted claims were false because they were in violation of the Anti-Kickback Statute, compliance with which was a condition of payment under the underlying provider agreements and hospital cost reports.[157]

The district court employed the terminology of certification theory in analyzing whether the relators had sufficiently alleged a complaint under the FCA.[158] The court agreed with the reasoning of the Second Circuit in *Mikes* that "materiality is a separate element" of an FCA claim, and that analysis of whether a claim for payment is false or not "ought not be based on the materiality of the false statement."[159] Not only did the district court opt for the precondition of payment test over a materiality test, but it adopted the more restrictive condition of payment analysis of *Mikes* in limiting FCA liability to noncompliance with "expressly stated preconditions of payment found in the relevant statute or regulations."[160] In turning to whether compliance with the Anti-Kickback Statute was a precondition of payment to the hospitals' and doctors' Medicare claims, the district court reasoned that "such a precondition cannot be hidden in an enrollment form."[161] The district court found that the complaint did not sufficiently allege enough under the

155. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 694 F. Supp. 2d 48, 51 (D. Mass. 2010).
156. *Id.*
157. *Id.* at 52.
158. *Id.* at 62–63.
159. *Id.* at 63.
160. *Id.*
161. *Hutcheson,* 694 F. Supp. 2d at 66.

FCA, because the Medicare statutes and regulations did not expressly contain a precondition of compliance with the Anti-Kickback Statute, and the relators failed to allege that the hospitals themselves received kickbacks or knew about the alleged kickbacks received by the doctors.[162]

The First Circuit reversed the district court's ruling, denouncing the district court's use of "categorical rules" such as certification theory, and decided to "not adopt the judicially created conceptual framework employed by the district court."[163] The circuit court chastised the district court for use of terms such as "legally false" and "express" and "implied" certification, reasoning that "the FCA itself does not contain [these] distinctions" and that the terms were not adopted by the First Circuit or Supreme Court.[164] The court noted that the case before it was unique from others because it involved "the possibility of imposing FCA liability on a defendant who had caused another entity" to present a false claim to the government.[165] The court declined to employ certification theory terms because it was not bound by the case law of other circuits and it found "the text of the FCA does not exhibit an intent to limit liability in this fashion."[166]

Instead, the First Circuit adopted the materiality approach of the D.C. Circuit.[167] It rejected the district court's reasoning that a precondition of payment (which it refers to as "implied conditions of payment" throughout its opinion) must be found in a statute or regulation, citing *Conner*, which held that preconditions of payment could be found in underlying contracts as well as statutes or regulations.[168] The First Circuit, in concluding that the D.C. Circuit's opinion in *SAIC* was more persuasive than the Second Circuit's opinion in *Mikes*, also rejected the argument that preconditions of payment must be "expressly designated as such" in order to give rise to FCA liability.[169] The court focused on the D.C. Circuit's reasoning that non-compliance with contractual provisions can give rise to FCA liability even if the contract does not specify that compliance is a condition of payment.[170] It found that other means exist "to cabin the breadth of the phrase[s] 'false or fraudulent' as used in the FCA . . . "[171] such as "strict enforcement of the [FCA]'s materiality and scienter requirements."[172]

In addition to adopting the broad materiality standard of *SAIC*, the First Circuit read § 3729(a)(1) of the FCA to extend FCA liability to third-party

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162. *Hutcheson,* 694 F. Supp. 2d at 66–67.

163. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 380 (1st Cir. 2011), *cert. denied* 132 S. Ct. 815, 816 (2011).

164. *Id.* at 382–83, 385.

165. *Id.* at 385.

166. *Id.* at 385–87.

167. *Id.* at 387–88.

168. *Id.* at 386–87 (citing United States *ex rel.* Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211, 1218 (10th Cir. 2008)).

169. *Hutcheson,* 647 F.3d at 387–88.

170. *Id.* at 387.

171. *Id.* at 388.

172. *Id.* (quoting United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1270 (D.C. Cir. 2010)) (internal quotation marks omitted).

"non-submitting entities."[173] The court rejected Blackstone's argument that extending liability to unlawful third party actions would go beyond Congress' intended scope of the FCA.[174] It reasoned that the FCA does not distinguish between how non-submitting entities (a third party involved in transactions with the submitting entity) and submitting entities (the party actually participating in the federal program submitting the claim for payment to the government) may render a claim or statement false.[175] The court stated that it "cannot rewrite statutes" and that Blackstone's "policy concerns are overblown."[176] Applying its newly adopted stances on materiality and causation to the case before it, the court found compliance with the Anti-Kickback Statute to be a material implied precondition of payment under the provider agreements and hospital cost reports.[177] Accordingly, the First Circuit found Blackstone liable under the FCA for causing the doctors and hospitals to submit false claims to the government.[178]

The First Circuit elaborated on *Hutcheson* only two months later in *New York ex rel. Westmoreland v. Amgen, Inc.* Calling the *Hutcheson* rule "fact-intensive and context-specific[,]" the court described its holding in *Hutcheson* as requiring (1) a showing by the plaintiff that the defendant "misrepresented compliance with a material precondition of . . . payment[,]" and (2) "the defendant[ ] knowingly caused the submission of" false claims, whether or not the defendant is the submitting entity.[179] Like in *Hutcheson*, the First Circuit was presented with an FCA case involving healthcare, the Anti-Kickback Statute, and third parties as defendants whom the relator alleged induced health care providers to present false Medicaid claims.[180] Once again, the district court had dismissed the complaints via application of implied certification theory; once again, the First Circuit reversed.[181] It found that the false claims statutes of six of the states where the alleged kickbacks occurred were violated by the defendants, because compliance with the Anti-Kickback statute was an implied precondition of payment under those states' Medicaid programs.[182] In two of the states, the court relied upon healthcare provider agreements as the source of preconditions of payment, without even examining those states' Medicaid statutes and regulations, because the provider agreements were "more than sufficient."[183] The court noted that it was "of no moment" that the provider agreements spoke to the compliance of the actual healthcare providers

173. *Hutcheson,* 647 F.3d at 389–90 (quoting 31 U.S.C. § 3729(a)(1) (2006)).
174. *Id.* at 389.
175. *Id.*
176. *Id.* at 391.
177. *Id.* at 394–95.
178. *Id.*
179. New York *ex rel.* Westmoreland v. Amgen, Inc., 652 F.3d 103, 110–11 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 993 (2011).
180. *Id.* at 108.
181. *Id.*
182. *Id.* at 109, 113, 116.
183. *Id.* at 114.

participating in the Medicaid programs, rather than third parties such as the defendants.[184] The defendants argued that "this conclusion ignores a distinction between conditions of Medicaid payment and conditions of Medicaid participation."[185] The court responded: "[w]e . . . do not agree that [the] distinction is relevant."[186]

The Supreme Court has denied petitions for writ of *certiorari* in both *Hutcheson* and *Westmoreland*.[187]

B. Third Circuit: Wilkins

In a decision issued only a few weeks after the First Circuit's holding in *Hutcheson*, the Third Circuit expressly adopted implied certification theory for FCA cases in *Wilkins,* but applied a cautionary approach that relied heavily upon the reasoning of the Second and Tenth Circuits in distinguishing between conditions of payment and conditions of participation.[188]

In *Wilkins*, the relators filed an FCA complaint with the District Court of New Jersey against their former employers, United Healthcare Group, and its subsidiaries.[189] In their complaint, the relators alleged, *inter alia*, that under an implied certification theory of liability, the defendants were in violation of marketing regulations enforced by the Centers of Medicare and Medicaid Services.[190] The relators also alleged that the defendants were violating the Anti-Kickback Statute, and that compliance with both the marketing regulations and the Anti-Kickback Statutes were conditions of payment, violation of which gave rise to FCA liability.[191] Noting that the Third Circuit had not yet expressly adopted certification theory, the District Court applied the reasoning of *Mikes* and *Conner* and dismissed the complaint.[192] It dismissed the relators' allegations in regards to the Anti-Kickback Statute because it failed to find a connection between the alleged violations of the statute and the government's decision to pay.[193] In addressing the relators' claims concerning the marketing regulations, the court stated that the theory "confuses conditions of participation with conditions of payment[,]" and that the plaintiffs' theory was a "breathtakingly expansive view of liability."[194] While United Health's compliance with the marketing regulations was necessary to maintain its status as a prescription drug plan sponsor, the court observed, it

184. *Westmoreland,* 652 F.3d at 114–15.

185. *Id.* at 115.

186. *Id.*

187. Amgen, Inc. v. New York *ex rel.* Westmoreland, 132 S. Ct. 993 (2011); Blackstone Med., Inc. v. United States *ex rel.* Hutcheson, 132 S. Ct. 815, 816 (2011).

188. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 306, 309 (3d Cir. 2011).

189. United States *ex rel.* Wilkins v. United Health Grp., Inc., No. 08-3425, 2010 WL 1931134, at *1–2 (D.N.J. May 13, 2010).

190. *Id.* at *5–6.

191. *Id.*

192. *Id.* at *4, 7.

193. *Id.* at *6.

194. *Id.* at *5 (internal quotation marks omitted) (emphasis omitted).

was not relevant to payment of its claims to the government.[195] If the relators' theory was right, and every marketing regulation "violation was actionable under the FCA, [it] would become precisely the type of blunt instrument" multiple circuits, including the Third Circuit in past decisions, "feared."[196] The district court concluded that if the relators' theory was correct, "the FCA would become a federal tort fountain, flowing claims for every trivial violation of . . . regulations. This is not the state of the law."[197]

The Third Circuit, officially adopting implied certification theory for the first time, affirmed the district court's dismissal of the allegations concerning the marketing regulations, but reversed the district court's dismissal of the Anti-Kickback Statute claim.[198] The court adopted the doctrine because the FCA's language and structure supported the theory, and it was consistent with Congress' intent behind the FCA of reaching false claims for payment submitted to the government "even in the absence of a false certification of compliance . . . ."[199] However, the court added that the theory "should not be applied expansively, particularly when advanced on the basis of FCA allegations arising from the [g]overnment's payment of claims under federally funded health care programs."[200]

Relying heavily upon *Mikes* and *Conner*, the court tempered its adoption of the implied certification theory by stating that, whether express or implied certification theory applies, an FCA plaintiff "must show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the [g]overnment."[201] It adopted the Tenth Circuit's approach in *Conner* of examining "the underlying contracts, statutes, or regulations themselves" to ascertain whether compliance with them is a prerequisite to payment by the government.[202] It also relied upon *Conner*'s distinction between conditions of payment and conditions of participation. It stated that conditions of participation are enforced through administrative mechanisms which if violated can subject the participant to the ultimate sanction of removal from the federal program, whereas conditions of payment, if violated, may lead the government to refuse payment to the participant.[203]

Applying this reasoning to the district court's holding, the Third Circuit reversed the dismissal of the Anti-Kickback Statute claim, because it found compliance with the statute to be "an express condition of payment" under

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195. *Wilkins*, 2010 WL 1931134 at *5.

196. *Id.*

197. *Id.*

198. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 306, 315 (3rd Cir. 2011).

199. *Id.* at 306.

200. *Id.* at 307.

201. *Id.* at 309.

202. *Id.* at 313 (quoting United States *ex rel.* Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211, 1218 (10th Cir. 2008)).

203. *Id.* at 309.

the Medicare regulations.[204] In addressing United Health's arguments that this ruling "transform[s] the FCA into a strict liability statute," the court stated that under federal health care programs such as Medicare, compliance which avoids FCA liability "does not require perfect adherence to regulations which are not prerequisites to payment from the [g]overnment."[205] Such compliance does, however, require a participant in federal health care programs to refrain from making or entering into payment arrangements that violate the Anti-Kickback Statute.[206]

The Third Circuit affirmed the district court's dismissal of the marketing regulation claims.[207] In examining the applicable Medicare regulations, it found that compliance with the marketing regulations was "clearly . . . a condition of participation and not a condition of payment."[208] The court reasoned that "the [Medicare] regulations draw a line between the type of violations[,] which are correctible . . . and the type of violations[,] which lead to immediate termination of a . . . contract."[209] Observing that the government "has established an administrative mechanism for managing and correcting Medicare marketing violations, which includes remedies for violations other than the withholding of payment otherwise due," the court found that compliance with the marketing regulations was a condition of participation, rather than a condition of payment.[210]

In addressing conditions of participation in the specific context of Medicare, the court in dicta stated "we think that anyone examining Medicare regulations would conclude that they are so complicated that the best intentioned plan participant could make errors in attempting to comply with them."[211] It added that it would be "ironical" if it allowed relators "ostensibly acting on behalf of the [g]overnment" to bring an FCA suit for violations of marketing regulations, which "would short-circuit the very remedial process the [g]overnment has established to address non-compliance with those regulations."[212] It also noted the ramifications of adopting the relators' "broad theory of FCA liability," finding that the result would be "every violation of a Medicare regulation [becoming] a basis for a *qui tam* suit;" in turn, courts would "unwisely . . . shift the burden of enforcing the Medicare regulations to themselves even though the administration of the vast and complicated Medicare program is best left to the administrators."[213] Based on this reasoning, the Third Circuit concluded that the district court properly dismissed the marketing regulations claims, because compliance with them "is

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204. *Wilkins*, 659 F.3d at 313.

205. *Id.* at 314.

206. *Id.*

207. *Id.* at 311.

208. *Id.* at 309.

209. *Id.*

210. *Wilkins*, 659 F.3d at 310. Madsen cites this reasoning as "a similar approach" to her so-called Range of Remedies doctrine. Madsen, *supra* note 100, at 482.

211. *Wilkins*, 659 F.3d at 310.

212. *Id.*

213. *Id.* at 310–11.

not a condition for [g]overnment payment under the federal health insurance programs."[214]

C. The More Restrained Reasoning of Wilkins is Consistent with the Majority of Other Circuits, and the Sounder Rule of Law for Curbing Expansive Liability Under the False Claims Act

As commentators have stated, the petitions for writ of *certiorari* in *Hutcheson* and *Westmoreland* were an opportunity for the Supreme Court to provide much needed clarification on the scope of FCA liability among the circuits.[215] With no clarification from the Supreme Court forthcoming, the contrast of the broad, materiality-focused approach of the First Circuit and the narrower, condition of payment-focused approach of the Third Circuit serves only to exacerbate the confusion and uncertainty among the circuits as to the exact breadth of FCA liability. Had the Supreme Court granted writ in *Hutcheson* or *Westmoreland*, the Court should have employed the Third Circuit's cautionary reasoning over the far-reaching *Hutcheson* rule. The Third Circuit's opinion in *Wilkins* is the superior line of legal reasoning because it is consistent with the majority of the other circuits' approaches in distinguishing between conditions of payment and conditions of participation; it is the more practical approach, in that it focuses on preventing frustration of the range of remedies available to the government for regulatory violations by not turning every instance of noncompliance into a FCA claim. Further, it draws a line for FCA liability while still honoring Congress' intent behind the statute of having broad liability for participants in federal programs who defraud the government.

The First Circuit's employment of the subjective materiality approach of the D.C. Circuit in *SAIC* represents the minority approach among the circuits, while the Third Circuit's employment of the condition of payment test is the majority approach.[216] Despite employing the term "implied condition of payment," the First Circuit's approach looks not at whether compliance with an underlying statute, regulation, or contract is an express precondition of payment, but at whether compliance is merely material to the government's decision to pay the claim.[217] Materiality can be established not just by looking at the underlying statute, contract, or regulation, but through other means such as after-the-fact testimony at trial by the parties.[218] The D.C. Circuit even admitted that its materiality standard was prone to potential abuse by relators eager to bring FCA suits in an attempt to potentially win a share of the high-stakes awards in FCA actions.[219] Commentators have likewise described the

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214. *Wilkins*, 659 F.3d at 311.

215. *See* sources cited *supra* note 16.

216. *See supra* section II.C.

217. *See* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 388, 391 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 815, 816 (2011).

218. *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010).

219. *See id.*

materiality standard of *SAIC* to be overly subjective, broad, and prone to misuse.[220] Not only did the First Circuit adopt this subjective standard; it also applied it to third parties whose conduct "caused" those participating entities to submit false claims, rather than the actual submitting entities themselves, a concept that had not been expressly seen among the circuits before *Hutcheson*.[221] This far-reaching theory was expanded upon in *Westmoreland* when the First Circuit expressly rejected distinguishing between conditions of participation and conditions of payment, much like the Eleventh Circuit did in *McNutt*.[222]

Yet the vast majority of circuits, even those such as the Ninth and Tenth, which *SAIC* cited as supporting the same materiality standard,[223] distinguish in some way between conditions of payment and conditions of participation. The Second Circuit requires a condition of payment to be expressly spelled out in a statute or regulation, and while the Ninth Circuit likewise limits conditions of payment to statutes and regulations, it only employs the distinction in the Medicare context.[224] The Fourth, Fifth, Eighth, and Tenth Circuits, while not containing the same limitation to express conditions like the Second Circuit, and applying the condition test to underlying contracts as well as statutes and regulations, all distinguish between conditions of payment and conditions of participation, and require that a FCA claim arise out of violation of a condition of payment.[225] The Third Circuit did not focus on whether the condition had to be express, but joined these other circuits in requiring that a condition of payment, rather than a condition of participation, be violated in order for FCA liability to arise.[226] Particularly, the Second and Fifth Circuits have specifically distinguished between a condition of payment analysis and a materiality analysis, while the Ninth and Tenth Circuits have also treated the two analyses differently.[227] This is a distinction that seems to have been lost on the First Circuit.

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220. *See Sci. Applications Int'l Corp.*, 626 F.3d at 1257. *See also* Mitchell, *supra* note 6.

221. *See Hutcheson*, 647 F.3d at 377.

222. *See* New York *ex rel.* Westmoreland v. Amgen, Inc., 652 F.3d 103, 110–11 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 993 (2011). *See also* United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914 (7th Cir. 2005); McNutt v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005).

223. *See Sci. Applications Int'l Corp.*, 626 F.3d at 1257.

224. *See* Manos, *supra* note 8. *See also* United States *ex rel.* Vigil v. Nelnet, Inc., 639 F.3d 791 (8th Cir. 2011).

225. *See* Chesbrough v. VPA, P.C., 655 F.3d 461 (6th Cir. 2011); United States *ex rel.* Vigil v. Nelnet, Inc., 639 F.3d 791, 799 (8th Cir. 2011); United States *ex rel.* Godfrey v. KBR, Inc., 360 Fed. App'x 407 (4th Cir. 2010); United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262 (5th Cir. 2010); United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370 (4th Cir. 2008); United States *ex rel.* Augustine v. Century Health Serv., Inc., 289 F.3d 409 (6th Cir. 2002); Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999). *See also* Madsen, *supra* note 100.

226. *See* United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295 (3d Cir. 2011).

227. *See* Manos, *supra* note 8. *See also Mikes,* 274 F.3d at 687; *Wilson,* 525 F.3d at 370; *Vigil,* 639 F.3d at 791; Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 996, 998 (9th Cir. 2010).

In addition to adopting the majority approach to FCA liability, the Third Circuit also adopted the more practical approach, in the contexts of both administration at the government level and ease of determining FCA liability in the courts. Commentator Marcia Madsen has noted that the Third Circuit's reasoning in *Wilkins* is similar to the so-called range of remedies doctrine she associates with the Fifth Circuit's opinion in *Steury*, though it has essentially been applied in the Second, Eighth, and Tenth Circuits as well.[228] As articulated by the Third Circuit in *Wilkins*, this approach looks at the "administrative mechanisms" and "ultimate sanction" in place for violations of a particular condition to determine whether it is a condition of payment or condition of participation.[229] Violation of the former can result in FCA liability and recovery by the government (and in turn the relators bringing the suit) of previously paid claims, whereas violation of the latter can be remedied by other means, with the ultimate sanction being removal from the government program.[230] The Second, Eighth, and Tenth Circuits have applied this reasoning in the context of noncompliance with a regulation; the Fifth Circuit applied it in the context of conditions found in underlying contractual provisions.[231]

Regardless of whether the condition is located in a statute or regulation, or in an underlying contractual provision, the range of remedies reasoning employed by the Third Circuit and others is a more practical approach than the materiality standard of the D.C. Circuit and First Circuit in several ways. First, as the Third Circuit and other circuits have noted, awarding FCA damages for noncompliance with a condition of participation when other remedies exist for the government to pursue would frustrate the government's purpose in implementing these administrative mechanisms in the first place.[232] Second, looking at the administrative mechanisms in place for the government in the event of noncompliance alleviates the burden on the courts, by making it easier to determine whether compliance is a condition of participation or condition of payment. In turn, by looking at the ultimate sanction in place, it is also easier for the court to determine whether it is faced with a FCA case, or another case such as an administrative violation or breach of contract.

The Third Circuit observed that without this distinction, the court would be burdened with enforcing all regulations whenever a participant in a government program is in noncompliance.[233] This is particularly important in the context of programs such as Medicare, which are "so complicated" even the "best intentioned" participant could easily violate a regulation that is a

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228. *See Steury,* 625 F.3d at 262. *See also* discussion, *infra* Part II.C(1).

229. *See Wilkins*, 659 F.3d at 295.

230. *See id.*

231. *See id.* at 306, 315; United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010); *Steury,* 625 F.3d at 262; United States *ex rel.* Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211 (10th Cir. 2008); *Mikes,* 274 F.3d at 687.

232. *See Wilkins*, 659 F.3d at 295.

233. *See id.*

condition of participation.[234] By looking at the administrative mechanisms and ultimate sanctions available to the government in the event of noncompliance to determine if compliance with the statute, regulation, or underlying contract is a condition of payment, this approach acts as a bright-line test of sorts. If the ultimate sanction is removal of the defendant from participating in the government program, then compliance is a condition of participation and does not give rise to FCA liability. If the ultimate sanction is recovery of previously paid claims, then it is a condition of payment, and thus gives rise to FCA liability.

This is a more easily applied test than the materiality approach adopted by the First Circuit. As the D.C. Circuit stated when it formulated the approach in *SAIC*, materiality could be established in ways other than by looking at the underlying statutes, regulations, or contracts, such as trial testimony.[235] This subjective approach was broadened further by the First Circuit in *Hutcheson,* when the court expanded it to the conduct of third persons whose conduct "caused" false claims to be submitted to the government.[236] Thus, because it is a more easily applied bright-line test for courts to employ and prevents frustration of remedial administrative mechanisms in place by the government, the Third Circuit's "range of remedies" reasoning in *Wilkins* is a key rationale for why it is the superior line of reasoning for FCA liability. Employing this approach aids in preventing the FCA from being turned into a "fountain," as the district court in *Wilkins* eloquently stated, "flowing claims for every trivial . . . violation" of a statute, regulation, or contract.[237]

Implied certification theory is a broad theory of liability on its own merits; when coupled with the broad amendments of FERA to the FCA in 2009, implied certification theory is even more potentially far-reaching.[238] The reasoning of *Wilkins* is consistent with this trend of broadened liability under the FCA, while still effectively drawing a line that prevents all instances of regulatory noncompliance and breach of contract from becoming the basis for high-stakes FCA claims a relator can exploit. FERA focused mainly on removing a specific intent requirement from FCA claims and broadening the definitions of terms already existing in the statute, and took effect retroactively to repudiate the Supreme Court's decision in *Allison Engine Co.* This indicates that while Congress intended for the FCA to have a broad reach over those who would defraud the government, it was more concerned with the intent aspect of the FCA, and less with drawing a line for where FCA liability ends.[239]

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234. *Wilkins*, 659 F.3d at 295.

235. *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010).

236. *See* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 388, 391 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 815, 816 (2011).

237. *See* United States *ex rel.* Wilkins v. United Health Grp., Inc., No. 08-3425, 2010 WL 1931134, at *5 (D.N.J. May 13, 2010).

238. *See supra* Parts II.A, II.B.

239. *See* 31 U.S.C. § 3729(a)(1)(A)–(B) (Supp. V. 2006). *See also* Allison Engine Co., v. United States *ex rel.* Sanders, 553 U.S. 662 (2008); Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001); *False Claims Act: 2012 Year in Review supra* note 57; Fleming, *supra* note 28.

IV. CONCLUSION

In the time that has passed since *Hutcheson* and *Wilkins* were decided, FCA actions continue to be enforced more frequently than ever. The upward-trend in FCA suit filings continued from 2011 through 2012.[240] By the end of the 2012 Fiscal Year, the Department of Justice had secured $4.9 billion from FCA settlements and judgments.[241] FCA recoveries since January 2009 through 2012 total $13.3 billion—the largest four-year-total in the Department's history.[242] One can only guess as to whether—or rather how drastically—these numbers would be different had the Supreme Court taken the opportunity to seize upon *Hutcheson* to clarify the extent and scope of FCA liability.

It is true that the distinction of conditions of payment and conditions of participation does not appear in the FCA, as the First Circuit pointed out in *Hutcheson*. Additionally, the removal of the presentment requirement in FERA seems to provide support for the First Circuit's "causation" reasoning in expanding liability to third persons.[243] Still, without some kind of boundary in place, such as that provided by the distinction between conditions of payment and conditions of participation, the far-reaching theories of the D.C. and First Circuits could easily be exploited by opportunistic relators. Both courts and commentators alike have observed that the motives of relators may be more pecuniary than justice-seeking,[244] and statistics from the Department of Justice indicate that *qui tam* suits will continue to increase in frequency.[245]

The approach formulated by the Third Circuit in *Wilkins*, adopting the broad doctrine of implied certification theory, but distinguishing between conditions of payment and conditions of participation in a way consistent with the majority of appellate circuits, effectively honors Congress' intent of the FCA being a fraud deterrent statute. At the same time, it implements a practical approach that will prevent opportunistic relators from gaming a system that already leans towards liability. The "range of remedies" reasoning of the *Wilkins* opinion is consistent with reasoning from the Second, Fifth, Eighth, and Tenth Circuits, and is an effective way of providing for a bright-line test for FCA liability.

The denial of the petitions for *certiorari* in the First Circuit cases was a colossal missed opportunity for clarification from the Supreme Court. Given its warning against expansive liability in *Allison Engine Co.* only a few years ago,[246] there was a chance that the Supreme Court would curtail the First

240. *False Claims Act: 2012 Year in Review, supra* note 57, at 2.

241. *Id.*

242. *Id.*

243. *See Allison Engine Co.,* 533 U.S. at 662; *Mikes,* 274 F.3d at 687. *See also* 31 U.S.C. § 3729(a)(1)(A)–(B).

244. *See* Crane & Dunphy, *supra* note 18.

245. *See In re* Natural Gas Royalties Qui Tam Litig., 566 F.3d 956, 960 (10th Cir. 2009).

246. *See Allison Engine Co.*, 553 U.S. at 662.

Circuit's expansive theory of liability and take steps towards a uniform approach to FCA liability among the circuits. In the current legal landscape, those who contract with the government and participate in federal programs such as educational loans and healthcare, face uncertain liability depending on which circuit they are located in. This could be a positive thing, in the sense that such parties will take care to enter contracts with the government and follow regulations more cautiously.[247] Indeed, this goes to the deterrent nature of the statute.

But given the ease with which pecuniary-motivated relators can bring FCA suits, especially in circuits such as the D.C. and First Circuits, the statute could very well end up becoming a fountain flowing FCA claims for all breaches of contract, all regulatory violations, and all tort claims involving the government. Until that leaky fountain is plugged by the Supreme Court, regardless of how cautiously a party contracting with the government operates, it could find itself the victim of a legal framework which strays from the original purpose of the statute, and fails to guard against an opportunistic relator's greed.

247. For more information on steps government contractors have taken or can take to attempt to avoid FCA liability, see Mitchell et al., *supra* note 6, at 9–11. For guidelines aimed at assisting potential FCA defendants in the healthcare industry in mitigating the risk of FCA liability, see Fleming, *supra* note 28, at 135–38.