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Implied Certification under the False Claims Act

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Georgetown Business, Economics and Regulatory Law Research Paper No. 11-03

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41 Pub. Cont. L.J. 1-55 (2011)

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IMPLIED CERTIFICATION UNDER THE FALSE CLAIMS ACT

Michael Holt and Gregory Klass

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I. INTRODUCTION

Among the core doctrines of U.S. contract law is that there are no punitive damages for a mere breach of contract.[1] In fact, in many jurisdictions, a party can lie about or cover up a breach without risking punitive damages in fraud, under the rule that a breach cannot support an action for fraud.[2] But government contracts are different. The False Claims Act (FCA)[3] expressly prohibits government contractors from submitting "a false record or state-

1. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

2. Florida, for example, permits liability for fraud in the performance only for "acts … independent from acts that breached the contract." HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239 (Fla. 1996); *see also* Gregory Klass, *Contracting for Cooperation in Recovery*, 117 YALE L.J. 2, 45–49 (2007) [hereinafter Klass, *Contracting for Cooperation*].

3. 31 U.S.C. §§ 3729–3733 (2006 & Supp. III 2009).

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ment" material to a claim for payment.[4] And under the judicially created doctrine of implied certification, a mere request for payment implicitly represents material compliance with the contract, as well as relevant statutes and regulations. As a result, a government contractor who requests payment without disclosing a known material breach can violate the FCA, triggering treble damages and fines of between $5,000 and $10,000 for each payment request.[5] Whereas between private parties even an express lie about performance will often go unpunished, the mere request for payment by a noncompliant government contractor can result in significant legal liability.

Although the implied certification doctrine is radical from the perspective of "normal" contract law, contract scholars have to date paid scant attention to it.[6] The neglect is all the more remarkable given the dollar amounts at stake. The Department of Justice reports that *qui tam* plaintiffs alone filed over 300 False Claims Act actions per year in each of the past fifteen years.[7] In all but one of the last ten years, settlements and judgments under the FCA have totaled over $1 billion.[8] In 2010, the Government initiated 138 cases and recovered over $620 million, while *qui tam* plaintiffs filed 574 suits and recovered nearly $2.5 billion in settlements and judgments.[9] While the Department of Justice does not disaggregate claims of implied certification, individual implied-certification cases have resulted in awards upwards of $99 million.[10] Twenty-seven states, the District of Columbia, and many cities have analogous statutes.[11] And the Securities and Exchange Commission, in response to high-profile frauds by members of the securities industry, has recently implemented enhanced whistleblower provisions modeled after the FCA.[12] The scholarly inattention to the implied certification doctrine is also

4. *Id.* § 3729(a)(1)(B) (Supp. III 2009).

5. *Id.* § 3729(a)(1) (Supp. III 2009).

6. The only sustained discussion of the doctrine is Susan C. Levy et al., *The Implied Certification Theory: When Should the False Claims Act Reach Statements Never Spoken or Communicated, but Only Implied?*, 38 Pub. Cont. L.J. 131 (2008). The circuit split on implied certification is also discussed in Michael Murray, Note, *Seeking More Scienter: The Effect of False Claims Act Interpretations*, 117 Yale L.J. 981, 982–84 (2008).

7. Civil Div., U.S. Dep't of Justice, Fraud Statistics Overview: October 1, 1987–September 30, 2010, at 1–2, *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

8. *Id.*

9. *Id.* at 2.

10. United States *ex rel.* Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 742 (N.D. Ill. 2007).

11. *See State False Claims Acts*, Taxpayers Against Fraud Educ. Fund, http://www.taf.org/statefca.htm (last visited July 30, 2011).

12. *See* Press Release, SEC, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2011), *available at* http://www.sec.gov/news/press/2011/2011-116.htm; Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70491 n.14 (Nov. 17, 2010) ("Because the qui tam provisions of the False Claims Act have played a significant role in the development of whistleblower law generally, and because some of the terminology used by Congress in Section 21F has antecedents in the False Claims Act, precedent under the False Claims Act can provide helpful guidance in the interpretation of Section 21F of the Exchange Act.").

remarkable given the confusion in the case law. Circuits are today split on implied certification.[13] Several have expressly declined to recognize the doctrine.[14] Those that have allowed claims of implied certification differ on the scope of the rule.[15]

This Article aims to develop a theory of implied certification under the False Claims Act and to recommend a way forward for both courts and contracting agencies. Our theory has two parts. First, we argue that the FCA as a whole is designed to enable the Government to contract for information about performance—information for which the Government has a special need.[16] This locates the FCA within the broader theory of contractual duties to cooperate in recovery for breach.[17] Second, we argue that the implied certification rule is best understood as a dual interpretive default.[18] Most obviously, the rule establishes a default interpretation of government contractors' claims for payment: absent a statement to the contrary, the request represents material compliance with the contract and with relevant statutes and regulations. Because parties could contract around that claim default, the implied certification rule is also a contractual default: claims for payment are interpreted in accordance with the first default only if the parties have not provided otherwise in their contract.

This theoretical framework allows us to systematically identify and evaluate the costs and benefits of the implied certification rule. Applying Ian Ayres and Robert Gertner's theory of interpretive defaults,[19] we argue that the default interpretation of a claim as representing material compliance is both majoritarian and information forcing. It is majoritarian because, one hopes, most government contractors who request payment are in material compliance and so would want to make the representation. It is information forcing because the rule gives contractors in breach a new reason to share that fact. We also argue that the certification default is separately justified by the special ethical obligations of government contractors.[20] Contractors who have knowingly and materially breached their contract with the Government or violated relevant statutes and regulations should disclose that fact before requesting payment.

But implied certification also has its costs. The certification default lowers the pleading bar, making it easier for a frivolous *qui tam* lawsuit to survive a motion to dismiss.[21] And it threatens to extend FCA liability to contractor

13. *See infra* Part III.A.
14. *See infra* note 147.
15. *See infra* Part III.A.
16. *See infra* Part II.B.
17. Klass, *Contracting for Cooperation*, *supra* note 2, at 44.
18. *See infra* Part IV.B.
19. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989) [hereinafter Ayers & Gertner, *Filling Gaps*]; Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1608 (1999).
20. *See infra* notes 255–58 and accompanying text.
21. See *infra* notes 138–41 and accompanying text.

duties that are more effectively monitored and enforced in other ways. These costs suggest some advantage of forcing the Government to expressly contract for implied certification. Without implied certification as the contractual default, contracting agencies might be more likely to evaluate where FCA liability is beneficial and to craft express certification requirements accordingly. The last advantage, however, assumes a certain level of care and competence in contracting agencies. A more jaundiced view suggests an institutional-competence argument for the contractual default: the implied certification rule extends the FCA's protections to reach transactions in which the contracting agency has erroneously failed to require express certifications of compliance.

Our dual-default theory of the implied certification rule results in practical recommendations for both courts and contracting agencies.[22] Courts that have not yet recognized implied certification should do so, and we propose a new rule for deciding implied certification cases. Under this rule, the fact that a contract, statute, or regulation conditions either participation in or payment for a contract on compliance with it creates a prima facie case that a claim for payment represented such compliance, shifting the burden to the defendant to show that FCA liability would interfere with other regulatory monitoring and enforcement mechanisms. This rule balances the competing costs and benefits of implied certification and resolves several open questions in the implied certification jurisprudence. While it has yet to be articulated by any court, the rule finds support in the FCA case law.

In a first-best world, there would be no need for implied certification. Agencies at the time of contracting would weigh the costs and benefits of certification backed by the FCA, and require that contractors expressly certify compliance with only those duties where FCA certification would be advantageous. But even with implied certification, contracting agencies can take steps to approximate first-best results. Herein lies the benefit of identifying the rule as a contractual default. Agencies can and should write their contracts to require express certification of compliance with those duties for which FCA liability makes sense. And they should expressly contract out of implied certification of compliance with duties that are better enforced by other regulatory mechanisms.

In balancing the theoretical and practical aspects of our discussion, we have found it necessary to limit our treatment of some topics that a more one-sided discussion might address. Two bear special mention. First, we largely take for granted results from the scholarship on government processes about the special hurdles that the Government faces in monitoring and enforcing contractual compliance.[23] Although we say a few new things about how the content of government contracts can exacerbate these problems, we largely take for granted phenomena like limited monitoring

22. *See infra* Part IV.C.
23. *See infra* notes 89–94 and accompanying text.

resources,[24] agency capture,[25] and various forms of corruption.[26] Second, we provide only the briefest of discussions of the special ethical duties of those who contract with the Government. The existing scholarship on this question is thin, so our claims here rest on appeals to intuition rather than to authority. The ethical obligations of government contractors deserve a more detailed study. We hope that our examination of the implied certification rule might provide useful materials for such a project.

Part II of this Article describes the False Claims Act as a whole and provides a theoretical explanation of why the Act's extracompensatory remedies make good sense in the context of government contracting. Parts III and IV are about the judicially created doctrines of implied certification. Because there has been relatively little scholarship on implied certification under the FCA, we think it helpful to reconstruct the rule's history and examine the current doctrine in some detail. This is the project of Part III, which among other things distinguishes between implied certification of no pre-formation fraud in the inducement and implied certification of post-formation performance, examines the statutory authority for the implied certification rules, and diagnoses a judicial confusion about the legal effect of contractually required certification. Readers who are more interested in our theoretical conclusions might want to skim Part III, or can skip it entirely. Part IV develops our theory of implied certification. A brief discussion of the rule for fraud in the inducement sets the stage for our central argument, which concerns the rule for implied certification of post-formation compliance. After providing a general account of the costs and benefits of implied certification, we apply these lessons to suggest where courts and contracting agencies should take the rule.

II. THE FALSE CLAIMS ACT

One cannot explain or evaluate the judicially created rules for implied certification under the False Claims Act without first understanding the purpose of the Act as a whole. This Part provides an account of the function of FCA liability within the broader law of government contracting. The first section gives an overview of the False Claims Act. The second develops a theoretical account of the Act's positive function within government contracting.

A. *A False Claims Act Primer*

The False Claims Act was first enacted in 1863 in response to reports of widespread fraud by government contractors during the early years of the Civil War.[27] The original Act contained both civil and criminal penal-

24. *See infra* note 91.
25. *See infra* note 90.
26. *See infra* note 89.
27. False Claims Act, ch. 67, 12 Stat. 696 (1863); CONG. GLOBE, 36TH CONG., 3d SESS. 952 (1863) ("The country, as we know, has been full of complaints respecting the frauds and corrup-

ties.[28] These provisions were separately codified in 1874 and have since evolved independently.[29] This Article examines the Act's civil provisions.[30]

The FCA targets false or fraudulent claims against the Federal Government.[31] While courts divide up the elements in different ways, there is broad agreement that in order to succeed in an FCA action, a plaintiff must show by a preponderance of the evidence that the defendant "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury."[32] There is no requirement that the Government have suffered damages as a result of the fraud.[33] This Article focuses on the third element, that the claim was false or fraudulent, which is discussed in greater detail in the next Part. Here we provide a more general description of the elements as a whole, including recent changes to the FCA's materiality requirement, remedies for FCA violations, and the Act's *qui tam* provisions.

A "claim" under the FCA is a request for money or property from the Government.[34] The request might be made directly to the Government, or it might be made to a third party that is supplying money or property on the Government's behalf or to advance a government program or interest, where those funds or that property has been or will be provided by the Government.[35] Claims include not only claims for payments due, but also claims for favorable actions by the Government, such as in a loan application.[36] The Act also prohibits the use of false records, false statements, or acts of

tions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil; and I suppose there can be no doubt that these complaints are, in the main, well founded."); *see also* James B. Helmer Jr. & Robert Clark Neff Jr., *War Stories: A History of the* Qui Tam *Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the* United States ex rel. Gravitt v. General Electric Co. *Litigation*, 18 OHIO N.U. L. REV. 35, 35 (1991).

28. False Claims Act, ch. 67, 12 Stat. at 697–98.

29. U.S. REV. STAT. tit. 36, § 3490; U.S. REV. STAT. tit. 70, § 5438 (1875). The civil version of the Act is currently codified at 31 U.S.C. §§ 3729–3733 (2006 & Supp. III 2009). The criminal version of the Act is codified at 18 U.S.C. §§ 287 (2006).

30. For a general discussion of the criminal provisions of the FCA, see Brendan Gallagher & Stacey N. Kime, *False Statements and False Claims*, 47 AM. CRIM. L. REV. 527, 545–58 (2010).

31. 31 U.S.C. § 3729(a)(1)(A) (Supp. III 2009).

32. Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001) (discussing elements of a claim under § 3729(a)(1)(A)). The preponderance-of-the-evidence standard is a result of the 1986 amendments to the Act. *See* S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272 (discussing with concern the clear-and-convincing-evidence standard that had been adopted by some courts).

33. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 n.7 (4th Cir. 1999); United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548, 568 (S.D.N.Y. 2009); United States *ex rel.* Joslin v. Cmty. Home Health of Md., Inc., 984 F. Supp. 374, 383 (D. Md. 1997); United States *ex rel.* Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507, 1513 (M.D. Tenn. 1995).

34. 31 U.S.C. § 3729(b)(2)(A) (Supp. III 2009).

35. *Id.* § 3739(b)(2); United States v. President & Fellows of Harvard Coll., 323 F. Supp. 2d 151, 187 (D. Mass. 2004) ("[A] defendant may be liable if it operates under a policy that causes others to present false claims to the government.").

36. United States v. Neifert-White Co., 390 U.S. 228, 230–33 (1968).

concealment to avoid or decrease an obligation to pay or transmit money or property to the Government.[37] Suits to recover for the avoidance of payments are termed "reverse" FCA actions.[38] Courts are unanimous in holding that the FCA does not reach all forms of deception, but only that which targets the government fisc.[39] As the First Circuit has explained, the Act "attaches liability, not to underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.' "[40]

As we discuss in much greater detail in Part III.A, a claim can be false or fraudulent for the purposes of FCA liability in three different ways.[41] First, a claim is false or fraudulent if it is for goods or services that have not been rendered.[42] Courts term these "factually false" claims.[43] Second, a claim is false or fraudulent if the contractor expressly certifies compliance with a contract term, statute, or regulation despite a breach or violation.[44] These are "legally false" claims based on an express certification.[45] Third, some courts have held that a claim for payment itself implicitly represents material compliance with contract terms, statutes, or regulations.[46] Where that implied representation is false, the claim is again termed "legally false," but now by virtue of an implied certification.[47]

The False Claims Act imposes liability only on false claims made knowingly.[48] "Knowingly" is defined to include actual knowledge of the falsehood, "deliberate ignorance of the truth or falsity of the information," or reckless indifference to it.[49] While the plaintiff must show that the defendant knew in this sense that the information provided was false, the plaintiff is not required to prove that the defendant specifically intended to defraud the Government.[50]

37. 31 U.S.C. § 3729(a)(1)(G) (Supp. III 2009).

38. United States *ex rel.* Bain v. Ga. Gulf Corp., 386 F.3d 648, 653 (5th Cir. 2004).

39. *Neifert-White Co.*, 390 U.S. at 232; United States v. McNinch, 356 U.S. 595, 599 (1958); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999); United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995).

40. *Rivera*, 55 F.3d at 709.

41. *See* Mikes v. Straus, 274 F.3d 687, 696–97, 699–700 (2d Cir. 2001); United States *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 64 (D.D.C. 2007). *See also* Levy et al., *supra* note 6, at 134.

42. *See, e.g.*, *Mikes*, 274 F.3d at 697.

43. United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008); *Mikes*, 274 F.3d at 697.

44. *See* 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009).

45. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., No. 10-1505, 2011 WL 2150191, at *4 (1st Cir. June 1, 2011); *Conner*, 543 F.3d at 1217; *Mikes*, 274 F.3d at 696–97.

46. *Mikes*, 274 F.3d at 700; Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994).

47. *Conner*, 543 F.3d at 1218; *Mikes*, 274 F.3d at 699.

48. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).

49. *Id.* § 3729(b)(1)(A).

50. Congress added the definition of "knowing" and "knowingly" to the FCA in 1986 in response to judicial constructions of the Act as requiring proof of specific intent to defraud. *See* S. Rep. No. 99-345, at 6–7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5271–72 ("As a civil remedy designed to make the Government whole for fraud losses, the civil False Claims Act currently provides that the Government need only prove that the defendant knowingly submitted

In 2009, Congress amended the FCA to expressly include a materiality requirement for allegations of false certification (legal falsehoods).[51] Prior to the amendments, several circuits had declined to read a materiality requirement into the statute.[52] Others required that plaintiffs show that the falsehood was material to the Government's decision to pay,[53] though those circuits disagreed as to the proper test for materiality.[54] Resolving a circuit split, the 2009 amendment added an express materiality requirement and defined the term "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[55]

A contractor that violates the False Claims Act is liable for treble damages, for civil penalties of between $5,000 and $10,000 for each false claim submitted, and for the plaintiff's costs.[56] Except where the defendant has cooperated with the discovery and investigation of the offense,[57] courts have no discretion to award less than treble damages or to reduce the per-claim

a false claim. However, this standard has been construed by some courts to require that the Government prove the defendant had actual knowledge of fraud, and even to establish that the defendant had specific intent to submit the false claim. … The Committee believes this standard is inappropriate in a civil remedy and presently prohibits the filing of many civil actions to recover taxpayer funds lost to fraud.").

51. *Compare* 31 U.S.C. § 3729(a)(1)(B) (2006) ("knowingly makes, uses, or causes to be made or used, a false record or statement *to get false or fraudulent claim paid or approved by government*") *with id.* § 3729(a)(1)(B) (2010) ("knowingly makes, uses, or causes to be made or used, a false record or statement *material to a false or fraudulent claim*") (emphasis added).

Unlike section 3729(a)(1)(B), section 3729(a)(1)(A), which prohibits factually false claims, does not mention materiality. One court has explained the difference as follows: "[W]here the allegation is a factually false claim, any 'materiality' requirement would seem to be easily met in that the government paid a claim in a factually wrong amount, paid for a service that was not actually provided, or paid an amount greater than it should have based on the service actually provided." United States *ex rel.* Sharp v. E. Okla. Orthopedic Ctr., No. 05-CV-572-TCK-TLW, 2009 WL 499375, at *6 n.8 (N.D. Okla. Feb. 27, 2009).

52. *Mikes*, 274 F.3d at 697; United States *ex rel.* Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999).

53. United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1219 (10th Cir. 2008); United States v. Bourseau, 531 F.3d 1159, 1170–71 (9th Cir. 2008); United States *ex rel.* A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 443–44 (6th Cir. 2005); United States v. Southland Mgmt. Corp., 326 F.3d 669, 679 (5th Cir. 2003) (en banc) (Jones, J., concurring); United States *ex rel.* Costner v. URS Consultants, Inc., 317 F.3d 883, 887 (8th Cir. 2003); Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732–33 (7th Cir. 1999); United States *ex rel.* Berge v. Bd. of Trs., 104 F.3d 1453, 1459 (4th Cir. 1997); United States v. TDC Mgmt. Corp., 24 F.3d 292, 298 (D.C. Cir. 1994); United States v. Data Translation, Inc., 984 F.2d 1256, 1267 (1st Cir. 1992); Tyger Constr. Co. v. United States, 28 Fed. Cl. 35, 55 (1993).

54. *A+ Homecare*, 400 F.3d at 445 ("The circuits which have addressed the issue of materiality are inconsistent on the standard to be used."). In the Fourth Circuit, for example, a plaintiff was required to show that the false claim had a "natural tendency" to cause the Government to pay, *Berge*, 104 F.3d at 1460–61, while in the Eighth Circuit, a plaintiff had to demonstrate "outcome materiality," or that knowledge of the false claim would have caused the Government to act differently, Rabushka *ex rel.* United States v. Crane Co., 122 F.3d 559, 563 (8th Cir. 1997). *See also A+ Homecare*, 400 F.3d at 445–46 (discussing different standards and adopting the "natural tendency" test).

55. 31 U.S.C. § 3729(b)(4) (Supp. III 2009).

56. *Id.* § 3729(a)(1)–(3).

57. *Id.* § 3729(a)(2).

penalty below the $5,000 minimum.[58] The impact of the per-claim penalties cannot be overstated. Depending on a contractor's billing practices, they can total tens of millions of dollars.[59] Nor are the per-claim penalties conditioned on a showing of actual harm to the Government.[60] The Supreme Court has characterized the FCA's imposition of treble damages and civil penalties as "essentially punitive in nature,"[61] but has also stressed that the high measures assure that "the Government is fully compensated for the costs of corruption," which often goes undetected.[62]

Since its inception, the False Claims Act has provided for enforcement through *qui tam* actions, in which a private party, or "relator," brings suit on behalf of the Government.[63] The Act establishes as a jurisdictional requirement that a *qui tam* plaintiff be the original source of information about the fraud: she must have "direct and independent knowledge of the information on which the allegations are based, and [have] voluntarily provided such information to the Government before filing an action."[64] Thus, a private party cannot sue under the FCA based only on information that is already publicly known.[65] After a *qui tam* suit is filed, the Government can choose whether or not to intervene.[66] If the Government decides not to intervene, the successful relator receives between twenty-five and thirty percent of the proceeds of the action, unless she was involved in the planning and execution of the fraud, in which case the court may reduce the award.[67] If the Government intervenes, the relator receives between fifteen and twenty-five percent

58. *See* United States *ex rel.* Tyson v. Amerigroup Ill. Inc., 488 F. Supp. 2d 719, 741–42 (N.D. Ill. 2007); United States v. Lorenzo, 768 F. Supp. 1127, 1133 (E.D. Pa. 1991).

59. *See, e.g.*, *Tyson*, 488 F. Supp. 2d at 741–42 (upholding a jury's finding of 18,130 false claims and imposing the minimum $5,000 penalty per claim).

60. *See, e.g.*, Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994) (awarding statutory per-claim penalties despite the fact that "no proof has been offered to show that the Government suffered any detriment to its contract interest because of Ab-Tech's falsehoods").

61. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784 (2000).

62. United States v. Halper, 490 U.S. 435, 450 (1989).

63. 31 U.S.C. § 3730(b)(1) (2006) ("A person may bring a civil action for a violation of [the FCA] for the person and for the United States Government."); False Claims Act, ch. 67, 12 Stat. 696, 698 (1863) ("Such suit may be brought and carried on by any person, as well for himself as for the United States."); *see also* CONG. GLOBE, 37TH CONG., 3D SESS. 955–56 (1863) (statement by Sen. Howard) ("The effect of [the *qui tam* provisions] is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator. … I have based the … sections upon the old-fashion idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."). These incentives for private parties to bring suit under the FCA have wavered drastically over the years. *See* Helmer & Neff, *supra* note 27, at 36–44.

64. 31 U.S.C. § 3730(e)(4)(A)–(B) (2006).

65. *See, e.g.*, Schindler Elevator Corp. v. United States *ex rel.* Kirk, 131 S. Ct. 1885, 1894 (2011). *See generally* Zachary A. Kitts, *Public Trust and the Role of Qui Tam Relators in the Regulatory Framework*, 7 J.L. ECON. & POL'Y 1, 16–20 (2010); Robert L. Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 PUB. CONT. L.J. 477, 513–14 (1995).

66. *See* 31 U.S.C. § 3730(b)(2) (2006).

67. *Id.* § 3730(d)(2)–(3).

of the amount recovered, "depending upon the extent to which the person substantially contributed to the prosecution of the action."[68] These amounts can be quite significant. In a recent case, a relator received a $56 million share of the settlement.[69]

The FCA's *qui tam* provisions were originally needed because the Federal Government did not have the infrastructure to investigate and prosecute fraud against it.[70] In 1863, neither the Department of Justice nor the Federal Bureau of Investigation existed.[71] And there was a perception that officials tasked with enforcement had shirked their duty.[72] Today the *qui tam* provisions are commonly understood as addressing the difficulty of detecting fraud against the Government.[73] Many FCA cases are brought by current or former employees of government contractors who have inside knowledge of fraudulent acts.[74]

The Act's *qui tam* provisions have arguably influenced judicial interpretation of the Act's substantive provisions. Many FCA claims are brought by aggrieved employees, and one often finds such claims appended to or filed after employment claims.[75] As the employment bar has adapted the FCA to its own purposes, courts have responded with strategies to sort out and dismiss more frivolous claims at an early stage of litigation.[76] The results, we

68. *Id.* § 3730(d)(1).

69. *See* Press Release, Dep't of Justice, Amerigroup to End Appeal and Pay $225 Million to United States and Illinois to Settle Pregnancy Discrimination Case 3 (Aug. 14, 2008), *available at* http://www.justice.gov/usao/iln/pr/chicago/2008/pr0814_01.pdf; *see also* United States *ex rel.* Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 737–42 (N.D. Ill. 2007).

70. *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).

71. *Id.* at 44.

72. *See, e.g.*, H.R. REP. NO. 37-50, at 47 (1863) ("[I]t is a matter of regret that punishment has not been meted out to the basest class of transgressors. They to whom this duty belonged seemed sadly to have neglected it .... The leniency of the government towards these men is a marvel which the present cannot appreciate and history never explain.").

73. *See* S. REP. NO. 99-345, at 3–4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268–69 ("[M]ost fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors .... Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."); U.S. GOV'T ACCOUNTABILITY OFFICE, AFMD-81-57, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? 46–47 (1981) (concluding that fraud against government programs was pervasive yet seldom detected and rarely prosecuted due to the difficulty of obtaining information and weaknesses in both investigative and litigative tools); SEC v. Kearns, 691 F. Supp. 2d 601, 613 (D.N.J. 2010) ("The government's resources, even assuming they are massive as compared to a private person, cannot be unleashed against a fraudulent party until the government is able, with due diligence, to detect the fraud.").

74. Jeffrey A. Lovitky, *Qui Tam Litigation: A Practical Primer*, TRIAL, Jan. 1999, at 68, 69.

75. *See, e.g.*, United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 375 (4th Cir. 2008); United States *ex rel.* Mathews v. HealthSouth Corp., 332 F.3d 293, 294 (5th Cir. 2003); United States *ex rel.* Lujan v. Hughes Aircraft Co., 67 F.3d 242, 244 (9th Cir. 1995).

76. The FCA is structured so that the Department of Justice can also play such a gatekeeping role. The Act requires that the complaint be served on the DOJ, after which the DOJ can, *inter alia*, move to have it dismissed. 31 U.S.C. § 3730(b)(2), (c)(2)(A) (2006). Based on information gathered in 1996, William Kovacic concluded that the DOJ had largely abdicated that role.

will argue, have not always been happy. In their efforts to deal with marginal FCA claims, courts have occasionally announced rules that make little or no sense in the context of the FCA as a whole.[77] While one rarely finds these rules applied to dismiss more meritorious FCA claims, they have led to doctrinal confusion.

B. *A Theory of the False Claims Act*

As we observed in the Introduction, the False Claims Act is of theoretical interest as an exception to the rule that punitive damages are generally not available for a breach of contract, even where that breach involves fraud in the performance.[78] The best explanation for this exception lies in the theory of contractual duties to cooperate in recovery.[79]

Contracts impose on parties both first-order duties and second-order duties.[80] A party's first-order contractual duty is her legal duty to perform—her obligation to provide the goods or services or to perform the acts or forbearances to which she has agreed. Her second-order duties are those she incurs if she breaches a first-order duty, such as the obligation to pay damages. Contracts sometimes impose duties on a party that are designed to make it easier for the other side to learn of and recover for the other's first-order breaches.[81] Examples include a contractual duty to produce and preserve records of performance, a duty to permit audits or share information about performance, and a duty not to hide breach or otherwise obstruct recovery. These are contractual duties to cooperate in recovery, or "duties to cooperate" for short. In a contract between *A* and *B*, *A*'s contractual duty to cooperate is a contractual duty whose purpose is to make it easier, in case of *A*'s first-order breach, for *B* to enforce *A*'s second-order duties.

When a government contract requires a private party to expressly certify its compliance with the contract or with relevant statutes or regulations, that duty is a duty to cooperate. By certifying compliance, the contractor effectively tells the Government that the Government need not resort to any remedies it might have for breach, such as withholding payments. The certification, when honestly made, lowers the Government's monitoring costs and increases the chances that the Government will discover any failure to perform.

The DOJ appears, in effect, to have adopted a policy of seeking dismissal of a *qui tam* suit only where there is a jurisdictional flaw in the relator's suit—for example, reliance on publicly available information. There has been only a single reported instance in which the DOJ has sought to dismiss a *qui tam* suit on the ground that the suit lacked substantive merit or otherwise contradicted the interests of the United States.

William Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799, 1818 (1996).

77. *See infra* Part IV.

78. *See* Restatement (Second) of Contracts § 355 (1981).

79. This theory is more fully described in Klass, *Contracting for Cooperation*, *supra* note 2.

80. *See id.* at 5–8.

81. *See id.* at 10–13, 31–32.

The False Claims Act is needed because contract remedies alone underdeter breach of duties to cooperate, because courts have been reluctant to extend the common law of fraud to cover such breaches, and because it is often especially difficult for the Government to monitor performance.

Contract remedies for breach are insufficient because they are limited to compensatory measures.[82] If the only remedy for the breach of a duty to cooperate is compensation for harms caused, a government contractor in breach risks nothing by submitting a false certification of compliance. If the false certification harms the Government, it is by preventing it from learning of the first-order breach, thereby causing the Government to pay a claim it does not owe. In order to show that harm and that the certification was false, the Government must be able to prove the first-order breach. But in that case, the Government can recover for the first-order breach, and the false certification has caused it no harm. Compensatory damages for obstructive breach generate a catch-22: a plaintiff can show obstructive harm only if she has not suffered that harm.[83]

These limitations of the compensatory remedies available in contract would not be fatal if courts were willing to impose liability in tort for fraud in the performance. A knowingly false certification of compliance is a lie. The availability of punitive damages for the fraud would impose costs on the breaching party over and above those it must pay anyway for the first-order breach, breaking out of the catch-22.

But U.S. courts have been reluctant to impose liability in fraud for acts that are also breaches of a contract.[84] Courts in several states apply the economic loss rule to bar actions for fraud except where the alleged misrepresentation is "independent from the acts that breached the contract."[85] Other courts reach similar conclusions by holding simply that there must be "a breach of duty which is collateral or extraneous to the contract," that the fraudulent acts must be "separate and distinct" from the breach of contract, or that the plaintiff's losses "must include actual damages … in addition to those attributable to the breach."[86] Such rules often prevent recovery in tort for falsely certifying compliance with contract terms.

82. For a more detailed account of the argument presented in this paragraph, see *id.* at 15–18.

83. The above argument skips over a few subtleties. The breach of a duty to cooperate can delay recovery and prevent mitigation, increasing the nonbreaching party's losses and increasing a damage award should the breach be discovered. But the promisor pays those damages only if the breach is discovered. In many cases, obstructive breach remains a good bet. *See id.* at 18–22.

84. For a more detailed discussion of these cases, see *id.* at 45–49.

85. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239 (Fla. 1996). *See generally* Jean Braucher, *Deception, Economic Loss and Mass-Market Consumers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 836–49 (2006); Steven C. Tourek et al., *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875 (1999); R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789 (2000).

86. Americana Petroleum Corp. v. Northville Indus. Corp., 606 N.Y.S.2d 906, 908 (N.Y. App. Div. 1994); Cimino v. FirsTier Bank, 530 N.W.2d 606, 613 (Neb. 1995); Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 684 N.E.2d 1261, 1271 (Ohio Ct. App. 1996).

The False Claims Act does an end-run around these doctrines. By granting the Government a statutory right to treble damages and per-claim fines,[87] the Act allows the Government to contract for effective duties to cooperate in recovery, in the form of express certifications of compliance. The FCA's extracompensatory remedies hopefully make it a bad bet for a contractor to falsely certify compliance with duties that it has in fact breached.[88] Contractually required certifications of compliance thereby reduce the Government's costs of monitoring for compliance and recovering for breach.

And the Government has a special need for such mechanisms. First, government employees and organizations tasked with monitoring performance sometimes do a relatively poor job of it.[89] In the extreme case, agency employees might have participated in defrauding the Government. Less dramatically, but perhaps more commonly, agencies can be captured by companies whom they are tasked to monitor.[90] An agency might also worry that exposing waste will lead to decreased funding in future years. And there is simple incompetence, inattention, and relative lack of resources.[91] Second, the structure of many government contracts makes breach especially difficult to detect. Unlike contracts between private parties, many government contracts include material terms that are not aimed at securing the highest-quality goods or services at the lowest price.[92] Government contracts include ownership and hiring requirements, labor standards, environmental mandates, and other regulatory and statutory compliance terms that increase costs without directly affecting the quality of the goods or services tendered.[93] Because the breach or performance of such duties does not manifest

87. 31 U.S.C. § 3729(a) (Supp. III 2009).

88. In fact, the FCA does the theory of duties to cooperate one better by providing that violators can reduce their liability by reporting their violations. *Id.* § 3729(a)(2). A static penalty for failure to cooperate in recovery means that once a party breaches her duty to cooperate, she has a reason to continue in her noncooperative behavior: to avoid that penalty. The FCA's dynamic penalties give a government contractor who first fails to cooperate in recovery a reason to change its ways.

89. It was evidence of the military's and DOJ's inattention to serious fraud that caused Congress in 1986 to strengthen the FCA's *qui tam* provisions. Helmer & Neff, *supra* note 27, at 40–45 (describing the role in the passage of the 1986 amendments of *Gravitt v. General Electric*, 680 F. Supp. 1162 (S.D. Ohio 1988), *appeal dismissed*, 848 F.2d 190 (6th Cir. 1988)). For a general discussion of the agency problems involved in government bureaucracy, see SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 85–188 (1978).

90. *See, e.g.*, Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Thomas Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039–74 (1997).

91. *See* Kovacic, *supra* note 76, at 1822–25.

92. *See, e.g.*, CHRISTOPHER M. MCCRUDDEN, BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, AND LEGAL CHANGE 3, 20 (2007) (discussing the use by governments of their purchasing power to participate in the market while regulating it to achieve socioeconomic and political goals). McCrudden specifically discusses protecting national industry through the Buy American Act, *id.* at 26–27; ensuring fair wages, *id.* at 37–42; and promoting affirmative action in employment, *id.* at 131–57.

93. *See, e.g.*, United States *ex rel.* Holder v. Special Devices, Inc., 296 F. Supp. 2d 1167, 1177 (C.D. Cal. 2003) (discussing materiality of compliance with environmental and labor regulations

itself in the performance the Government receives, compliance with them is especially difficult for the Government to observe. Finally, the Government often pays for services rendered to third parties or to the public at large.[94] Where this is the case, it can be difficult for the Government to monitor even whether the goods or services have been provided, much less whether they have been provided in compliance with contract specifications.

Because it is often difficult for it to observe breach, the Government is in special need of effective mechanisms to contract for cooperation. The FCA's provisions for express certification address that need. If a contracting agency is worried about its ability to monitor performance, it can demand that the contractor expressly certify its compliance, thereby triggering the Act's extracompensatory remedies.[95] This is not to say that the FCA is the only possible solution to the monitoring and reporting problem. Criminal penalties[96] might serve as well as civil ones, though criminal fraud typically comes with heightened scienter requirements,[97] always a heavier burden of proof,[98] and never today with *qui tam* prosecutions.[99] Alternatively, in the absence of the FCA, courts might have developed the common law of fraud to achieve some of the same results. In fact, one of us has argued elsewhere that the common law should move in this direction for contracts between private parties.[100] While the relative merits of these different approaches present an interesting question of theory, in practice the existence of the False Claims Act obviates the need for such alternatives.

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in government contract). For requirements regarding contractors' labor practices, see FAR subpts. 22.1–22.6 (2010); 41 U.S.C. §§ 6501–6511 (Supp. IV 2010) (labor standards for manufacturing contractors); 40 U.S.C. §§ 3141–3148 (2006) (formerly 40 U.S.C. § 276a) (labor standards for construction contractors); 41 U.S.C. §§ 6701–6707 (Supp. IV. 2010) (labor standards for service contracts). For environmental requirements, see FAR pt. 23 (2010). For requirements regarding hiring practices see Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965) (requiring contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin"), and Exec. Order No. 11,141, 29 Fed. Reg. 2,477 (Feb. 15, 1964) ("[C]ontractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees, or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age …").

94. Two examples that generate many FCA cases are the Medicare and Medicaid programs.

95. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).

96. 18 U.S.C. § 287 (2006).

97. *See* SEC v. Palmisano, 135 F.3d 860, 864–66 (2d Cir. 1998).

98. *See* United States v. Yermian, 468 U.S. 63, 64 (1984) (holding that to establish criminal false or fraudulent statement the "Government must prove beyond a reasonable doubt that the statement was made with knowledge of falsity"); *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

99. *See* Robert K. Hoffman et al., *The Civil False Claims Act*, *in* BRIEFING PAPERS, Sept. 2001, at 1, 11 (describing criminal FCA actions as parallel to *qui tam* civil actions).

100. Klass, *Contracting for Cooperation*, *supra* note 2.

III. THE LAW OF IMPLIED CERTIFICATION

The theory of contracting for cooperation explains why the False Claims Act imposes treble damages and other penalties for false certifications of compliance with government contracts. It does not yet explain the judicially created rule that the mere act of requesting payment might implicitly represent such compliance for the purpose of assessing FCA liability. This Part starts in on that project. The first section reconstructs the history of the implied certification doctrine, distinguishes several different implied certification rules, and discusses the existing circuit split on the most important one: implied certification of post-formation performance. The second examines the rule's compatibility with the text, purpose, and history of the FCA. The third argues against one version of the rule that courts occasionally articulate. This sets the stage for Part IV, which provides a theory of implied certification and recommends several reforms to existing practices.

A. *The Cases*

This Article is about how courts determine when a claim is false or fraudulent for purposes of applying the False Claims Act. The two sections of the Act most relevant to our questions are currently codified at 31 U.S.C. § 3729(a)(1)(A) and (B), which we will refer to as section "(1)(A)" and "(1)(B)."[101] They provide that a person violates the FCA if she

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.[102]

As we noted in Part II.A, courts have distinguished three types of false certifications under these sections: "factually false" claims, claims that are "legally false" based on an express certification, and claims that are "legally false" based on an implied certification. The line between factual falsehoods and implicit legal falsehoods is not as analytically crisp as one might hope, a topic we address at the end of this section. But because these are the categories courts use, we also employ them.[103]

Section (1)(A) prohibits factually false claims.[104] A claim is factually false if it requests payment for goods or services that have not been provided.[105]

101. Until 2009, these provisions were designated as sections 3729(a)(1) and (a)(2). The change was made in Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621–25.

102. 31 U.S.C. § 3729(a)(1)(A)–(B) (Supp. III 2009).

103. *See* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., No. 10-1505, 2011 WL 2150191, at *6–7 (1st Cir. June 1, 2011) (criticizing the categories used by other circuits).

104. 31 U.S.C. § 3729(a)(1)(A) (Supp. III 2009).

105. United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008); Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).

The False Claims Act was first enacted to target fraud of this type.[106] During the early years of the Civil War, there were reports of crates labeled "muskets" sold to the Government that were in fact filled with sawdust and individual horses or mules were sold to the Government several times over.[107] Such false billing practices would today fall under section (1)(A)'s "false or fraudulent claim[s]." Other examples of factually false claims include Medicare reimbursement requests for medical services not provided,[108] double billing for goods or services,[109] invoices that overstate the purchase prices of items for government reimbursement,[110] and claims for worthless services.[111]

In other cases, a contractor has provided the requisite goods or services but has violated some other contract term, statute, or regulation. While such breaches or violations are not in themselves fraudulent, such a contractor might commit fraud if it also certifies compliance.[112] Courts designate claims accompanied by false certifications "legally false."[113] Legally false claims can be further divided into those in which there is an express certification of compliance and those in which the certification is implied.

False express certifications are, from a doctrinal point of view, the easy cases. Here a contractor expressly represents to the Government that it has performed when it in fact is in breach, or that it has complied with a statute or regulation that it has in fact violated. Such express falsehoods run afoul of section (1)(B), which prohibits using or making a "false record or statement material to a false or fraudulent claim."[114] In *Roby v. Boeing*, for example, a contract for the sale of helicopters to the Army required Boeing to submit a form certifying that the helicopters conformed to specific contract requirements.[115] Boeing supplied the helicopters, so its requests for payment were

106. *See* United States v. McNinch, 356 U.S. 595, 599 (1958) (explaining that the FCA was originally adopted based on evidence that "the United States had been billed for nonexistent or worthless goods, charged an exorbitant price for goods delivered, and generally robbed in purchasing necessities of war").

107. Helmer & Neff, *supra* note 27, at 35. *See also* S. EXEC. DOC. NO. 37-72, at 489 (1862) ("He cannot be looked upon as a good citizen, entitled to favorable consideration of his claim, who seeks to augment the vast burdens, daily increasing, that are to weigh on the future industry of the country, by demands on the Treasury for which nothing entitled to the name of an equivalent has been rendered.").

108. *See, e.g.*, United States v. Stevens, 605 F. Supp. 2d 863, 868 (W.D. Ky. 2008); United States *ex rel.* Woodruff v. Haw. Pac. Health, Civil No. 05-00521 JMS/LEK, 2007 WL 1500275, at *4–5 (D. Haw. May 21, 2007).

109. *See, e.g.*, United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 956 (9th Cir. 1995).

110. *See, e.g.*, United States v. Neifert-White Co., 390 U.S. 228, 230 (1968).

111. *See, e.g.*, United States *ex rel.* Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1053 (9th Cir. 2001). For examples of the limits of worthless services claims under section (A)(1), see Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732–33 (7th Cir. 1999); Sweeney v. ManorCare Health Servs., Inc., No. C03-5320RJB, 2005 WL 4030950, at *6 (W.D. Wash. Mar. 4, 2005).

112. *See* 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009).

113. United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc, 543 F.3d 1211, 1217 (10th Cir. 2008); Mikes v. Straus, 274 F.3d 687, 696–97 (1st Cir. 2001).

114. 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009).

115. United States *ex rel.* Roby v. Boeing Co., 79 F. Supp. 2d 877, 879 (S.D. Ohio 1999).

not factually false.[116] The relator, however, alleged that the transmission gears did not conform to the contract requirements, although Boeing had expressly certified such compliance.[117] While the breach itself was not fraud, Boeing's certifications may have misrepresented its performance, rendering its claims for payment legally false.[118] "Certification" is not a term of art. As the Ninth Circuit observed:

> The theory of liability … could just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding" theory, but that is not as succinct. … So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.[119]

In express false certification cases, there are two wrongful acts: first, a contractual breach or statutory or regulatory violation and, second, an express false statement to the contrary.[120]

Courts also have held that the very act of submitting a claim for payment can implicitly represent that the contractor has committed no wrong.[121] They have identified two types of implied certification: implied certification of no pre-formation fraud in the inducement and implied certification of post-formation compliance with contract terms, statutes, or regulations.

Courts have long held that fraud in the inducement followed by a claim for payment will support an action under the False Claims Act. In its 1943 decision in *Ex rel. Marcus v. Hess*, the Supreme Court considered an FCA claim based on collusive bidding for a government contract.[122] The claims for payment were not factually false, as the defendant provided the electrical work required by the contract.[123] Nor were the requests for payment accompanied by express certifications regarding the formation of the contract, representations that there had been no collusive bidding or similar violations.[124] Yet the Court did not hesitate to find that the collusive bidding violated the False Claims Act: "This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the [Government]."[125] Since *Marcus*, many courts have held that claims for payments under a government contract that has been fraudulently induced violate the

116. *Id*.
117. *Id*.
118. *Id*. at 894.
119. United States *ex rel*. Hendow v. Univ. of Phx., 461 F.3d 1166, 1172 (9th Cir. 2006).
120. *See id*. at 1171; Rodriguez v. Our Lady of Lourdes Med. Ctr., 552 F.3d 297, 303 (3d Cir. 2008).
121. Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001); Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994).
122. United States *ex rel*. Marcus v. Hess, 317 U.S. 537, 539 (1943).
123. *See id*. at 542–43.
124. *See id*.
125. *Id*. at 543.

FCA, often invoking the metaphor of an enduring taint.[126] These cases firmly establish that fraud in the inducement will support a claim under the FCA despite the fact that the goods or services have been rendered (the claim is not factually false) and there is no misrepresentation of compliance (there is no false express certification). Fraud in the inducement can take any of a number of forms, including collusive bidding,[127] factual misrepresentations such as an undisclosed conflict of interest in the bidding process,[128] and a misrepresented intent to perform.[129]

Other implied certification cases involve not pre-formation fraud in the inducement, but post-formation breach of contract terms or violation of governing statutes or regulations. The theory behind these cases is that the act of submitting a claim for payment implicitly represents material compliance with relevant contract terms, statutes, and regulations. Implied certification of post-formation compliance does not have the pedigree of implied certification of no fraud in the inducement. The doctrine is less than twenty years old and the Supreme Court has yet to consider it. There is consequently more disagreement among courts on the right rule for implied certifications of compliance, and even on its validity.

The seminal case is the U.S. Court of Federal Claims' 1994 decision in *Ab-Tech Construction v. United States*.[130] Ab-Tech contracted with the Small Business Administration for the construction of a facility for the Army Corps of Engineers pursuant to section 8(a) of the Small Business Act, which is designed to assist minority-owned businesses.[131] Though the contract stipulated that Ab-Tech would not enter into any management or joint-venture agreements without government approval, two weeks after the contract was awarded, Ab-Tech secretly entered into an agreement that suggested it was working as a front for a non-minority-owned business.[132] Ab-Tech subsequently submitted claims for payment for services rendered.[133] While those

126. *See, e.g.*, Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 (4th Cir. 1999); United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1377 (D.C. Cir. 2000); United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1164 (10th Cir. 1999); United States *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 69 n.33 (D.D.C. 2007); Daewoo Eng'g & Constr. Co. v. United States, 73 Fed. Cl. 547, 586 (Fed. Cl. 2006); United States *ex rel.* Perales v. St. Margaret's Hosp., 243 F. Supp. 2d 843, 853 (C.D. Ill. 2003).

127. *See, e.g.*, *Marcus*, 317 U.S. at 543; United States v. Ehrlich, 643 F.2d 634, 636 (9th Cir. 1981).

128. *See, e.g.*, United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 910–11 (4th Cir. 2003).

129. *See, e.g.*, United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1169 (9th Cir. 2006); United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005); United States *ex rel.* Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 723 (N.D. Ill. 2007). *But see* United States *ex rel.* Graves v. ITT Educ. Servs., Inc., 284 F. Supp. 2d 487, 503 (S.D. Tex. 2003) (suggesting that promissory fraud is a rare basis for liability under the FCA).

130. 31 Fed. Cl. 429 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).

131. *Id.* at 431–32.

132. *Id.* at 433.

133. *Id.*

claims were neither factually false nor accompanied by false express certifications of compliance, the court held that they "represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the 8(a) program."[134] Because Ab-Tech was in fact out of compliance with those requirements, the implied certification was false: "In short, the Government was duped by Ab-Tech's active concealment of a fact vital to the integrity of that program. The withholding of such information—information critical to the decision to pay—is the essence of a false claim."[135]

The *Ab-Tech* rule can be described either as an interpretive default or as a duty to disclose. Considered as an interpretive default, the rule is that unless a contractor says otherwise, a claim for payment represents material compliance with relevant contract terms, statutes, and regulations. That default is more or less equivalent to a duty to disclose because, in most cases, the act of opting out of that default representation will inform the Government that the contractor is in breach. To avoid liability under the implied certification of compliance rule, the noncompliant contractor must disclose that it is in material breach. Thus, the *Ab-Tech* court characterized the wrong at issue as "deliberately withholding" information about its violation of the minority-owned business rules, and explained that "[t]he withholding of such information—information critical to the decision to pay—is the essence of a false claim."[136] Either way, implied certification of compliance under the FCA is at bottom a tool for getting government contractors to share information about their performance or nonperformance—in accordance with our general explanation of the Act in Part II.B. In the analysis below, we follow most courts, which define the doctrine as "implied certification," and treat the relevant rules as interpretive defaults. Similar arguments would go through if we formulated them instead as duties to disclose.[137]

134. *Id*. at 434.

135. *Id. Ab-Tech* was in several ways an easy case. While the court did not draw the inference, the evidence suggested that Ab-Tech might have intended all along to serve as a front for a non-minority-owned business. Within a month after being awarded the contract, Ab-Tech had entered into a pair of agreements giving another company considerable control over the project and a share of the profits. *Id*. at 433. Then, in response to the Government's inquiries, Ab-Tech did not disclose the entire agreement and its president lied about the existence of related bank accounts. *Id*. at 432.

136. *Id*. at 434; *see also* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010) (holding that "to establish the existence of a 'false or fraudulent' claim on the basis of implied certification of a contractual condition, the FCA plaintiff … must show that the contractor withheld information about its noncompliance with material contractual requirements"); BMY-Combat Sys. Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 125 (1997) (finding a violation of the *Ab-Tech* rule where the contractor "withheld from the [Government] information on [the contractor's] noncompliance [which was] critical to the [Government's] decision to pay"); United States *ex rel*. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 414–15 (6th Cir. 2002) (affirming the district court's findings that certifications of compliance at the time of contracting imposed on the defendant a duty to file amended reports should they later fall out of compliance).

137. Section 3729(a)(1)(G) prohibits "knowingly conceal[ing] … an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G) (Supp. III 2009). We suggest in the Conclusion that if Congress ever decides to create clearer statutory authority

Ab-Tech articulated a relatively broad rule for implied certification of compliance. In the years immediately following, several courts adopted similarly expansive rules. In *Shaw v. AAA Engineering and Drafting*, the relator argued that a photography company violated the FCA by submitting invoices for payment after breaching a contract term regarding the proper disposal of chemicals.[138] Observing that "FCA liability under § 3729(a)(1) may arise even absent an affirmative or express false statement," the Tenth Circuit held that the relator was required to show only that the defendant "submitted invoices for full payment on the contract knowing that it had failed to comply with the … contract requirements."[139] In *Ex rel. Bryant v. Williams Building Corp.*, a case involving asbestos removal from military housing units, the district court similarly concluded that "payment invoices represented an implied certification [by the defendant] of its continuing adherence to all material terms."[140] And in *Pickens v. Kanawha River Towing*, the district court held that "[a]n affirmative statement … is not necessary to state a cause of action under § 3729(a)(1) of the FCA," and that the relator therefore needed to plead only that the defendant submitted invoices without disclosing its breach of contractual terms requiring compliance with the Clean Water Act.[141]

Other courts were less sympathetic to the *Ab-Tech* rule. In 1996, the Ninth Circuit appeared to many to reject it entirely.[142] The relator in *Ex rel. Hopper v. Anton*, a teacher who also raised several employment-related claims, alleged that her former employer had violated federal and state laws in its special education evaluation and placement program, for which it received federal funds.[143] Without citing *Ab-Tech*, the Ninth Circuit affirmed summary judgment for the defendant: "Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."[144] In *Ex rel. Joslin v. Community Home Health of Maryland*,[145] a Maryland district court expressed similar concerns about the *Ab-Tech* rule:

for the judicially created rule for implied certification of compliance, the language in subsection (1)(G) provides a starting point.

138. 213 F.3d 519, 523 (10th Cir. 2000).

139. *Id.* at 532–33. *See also id.* at 531 ("[T]he language and structure of the FCA itself supports the conclusion that, under 31 U.S.C. § 3729(a)(1), a false implied certification may constitute a 'false or fraudulent claim.' ").

140. United States *ex rel.* Bryant v. Williams Bldg. Corp., 158 F. Supp. 2d 1001, 1010 (D.S.D. 2001).

141. 916 F. Supp. 702, 707 (S.D. Ohio 1996); *see also* McNutt *ex rel.* United States v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005); S.F. Unified Sch. Dist. *ex rel.* Contreras v. Laidlaw Transit, Inc., 106 Cal. Rptr. 3d 84, 94 (Cal. Ct. App. 2010).

142. United States *ex rel.* Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996).

143. *Id.* at 1263–64.

144. *Id.* at 1266.

145. United States *ex rel.* Joslin v. Cmty. Home Health of Md., 984 F. Supp. 374 (D. Md. 1997).

> To hold that the mere submission of a claim of payment, without more, always constitutes an "implied certification" of compliance with the conditions of the Government program seriously undermines this principle by permitting FCA liability potentially to attach every time a document or request for payment is submitted to the Government.[146]

To this day several circuits have expressly declined to adopt the theory of implied certification of compliance.[147]

While the Ninth Circuit's decision in *Hopper* is sometimes treated as a rejection of implied certification altogether,[148] read as a whole the opinion is not so categorical.[149] The court emphasized that FCA liability is especially inappropriate "where regulatory compliance is not a *sine qua non* of receipt of state funding" and where "[t]here are administrative and other remedies for [the] regulatory violations."[150] In 2001 the Second Circuit picked up on the former factor to craft a narrower rule for implied certification, which several courts have since adopted.

The case, *Mikes v. Straus*, was brought by a physician who, after being fired by a medical practice, alleged that his former employer violated Medicare regulations by failing to properly calibrate medical devices, and then violated the FCA by submitting reimbursement claims for treatments using those devices.[151] Observing that the *Ab-Tech* rule did not "fit comfortably into the health care context because the False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations,"[152] the Second Circuit held that "implied false certification is appropriately applied only when the underlying statute or regulation upon which

146. *Id*. at 384.

147. *See* United States *ex rel*. Steury v. Cardinal Health, Inc., 625 F.3d 262, 270 (5th Cir. 2010); United States *ex rel*. Marcy v. Rowan Cos., 520 F.3d 384, 389 (5th Cir. 2008); United States *ex rel*. Herrera v. Danka Office Imaging Co., 91 F. App'x 862, 864–65 (4th Cir. 2004); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 786 n.8 (4th Cir. 1999); United States *ex rel*. Willard v. Humana Health Plan of Tex., Inc., 336 F.3d 375, 382 (5th Cir. 2003). *See also* United States *ex rel*. Bennett v. Bos. Scientific Corp., No. H-07-2467, 2011 WL 1231577, at *13 (S.D. Tex. Mar. 31, 2011) (describing implied certification theories but noting they were never adopted in the Fifth Circuit); United States *ex rel*. Stebner v. Stewart & Stevenson Servs., Inc., 305 F. Supp. 2d 694, 700 (S.D. Tex. 2004) (adopting a narrow view of implied certification as existing only where "the invoice represents that the contractor has disclosed deficiencies or nonconformance areas").

148. *See*, *e.g*., Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 532–33 (10th Cir. 2000); *In re* Pharm. Indus. Average Wholesale Price Litig., 491 F. Supp. 2d 12, 17 (D. Mass. 2007); United States *ex rel*. Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1216 n.3 (E.D. Cal. 2002) (suggesting that the Ninth Circuit has not adopted the implied certification theory). *But see* United States *ex rel*. Holder v. Special Devices, Inc., 296 F. Supp. 2d 1167, 1175–76 (C.D. Cal. 2003) (reading *Hopper* narrowly and distinguishing it from a case where payment was expressly conditioned on compliance).

149. In 2006, the Ninth Circuit suggested that the viability of the implied certification theory remained an open question for it. United States *ex rel*. Hendow v. Univ. of Phx., 461 F.3d 1166, 1172 n.1 (9th Cir. 2006). Last year it "join[ed] our sister circuits in recognizing a theory of implied certification under the FCA." Ebeid *ex rel*. United States v. Lungwitz, 616 F.3d 993, 996 (9th Cir. 2010).

150. United States *ex rel*. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996).

151. Mikes v. Straus, 274 F.3d 687, 692–93 (2d Cir. 2001).

152. *Id*. at 699.

the plaintiff relies *expressly* states the provider must comply in order to be paid."[153] We call this the "compliance-condition rule." According to the compliance-condition rule, a request for payment implicitly certifies compliance with only those contract terms, statutes, or regulations that condition payment on the contractor's compliance with them.[154] The *Mikes* opinion states that the rule is an interpretive one.[155] It does not provide a separate materiality requirement but determines when "instances of regulatory noncompliance will cause a claim to be false."[156] The court concluded that because the relevant provisions of the Medicare statute did not expressly condition payment on compliance, the defendants could not be held liable under the implied certification theory.[157]

It is important to distinguish the compliance-condition rule from what we will call the "certification-condition rule." Several courts have held or suggested that "a false certification of compliance with a statute or regulation cannot serve as the basis for a *qui tam* action under the FCA unless payment is conditioned *on that certification*."[158] As we discuss in the third section

153. *Id.* at 700. *See also* United States *ex rel.* Kirk v. Schindler Elevator Corp., 601 F.3d 94, 114–15 (2d Cir. 2010) (reaffirming rule from *Mikes*), *rev'd on other grounds*, 131 S. Ct. 1885 (2011). This compliance-condition rule does not apply to implied certification cases involving fraud in the inducement. In these cases the question is whether the defendant would have been awarded the contract absent the misrepresentation. United States *ex rel.* Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 726 (N.D. Ill. 2007).

154. *Mikes*, 274 F.3d at 700.

155. *Id.*

156. *Id.* at 697. Other courts have read the *Mikes* rule as imposing a heightened materiality requirement on plaintiffs who allege implied certification. *See, e.g.*, United States *ex rel.* Marcy v. Rowan Cos., 520 F.3d 384, 389 (5th Cir. 2008) (suggesting that the compliance-condition rule provides the test for materiality under section (a)(2), now section (1)(A)).

157. *Mikes*, 274 F.3d at 701–02.

158. United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000) (citing United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996)) (emphasis added); *see also* United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) ("[W]here the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation."); United States *ex rel.* Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002); United States *ex rel.* Graves v. ITT Educ. Servs., Inc., 284 F. Supp. 2d 487, 501–02 (S.D. Tex. 2003) (applying the certification-condition rule to dismiss complaint); United States *ex rel.* Joslin v. Cmty. Home Health of Md., Inc., 984 F. Supp. 374, 385 (D. Md. 1997) (declining to recognize implied certification theory but holding that if it did, the complaint would fail the certification-condition test). *Mikes* itself cites these cases and announced something like a similar rule: "a claim under the Act is legally false only where a party certifies compliance with a statute or regulation as a condition to government payment." 274 F.3d at 697. This is, however, dicta, as the court observed that the express certifications at issue were simply not false under the facts alleged. *Id.* at 699.

Several courts have held that a false certification need not be contractually required or a condition of payment to support an FCA claim. United States *ex rel.* Bryant v. Williams Bldg. Corp., 158 F. Supp. 2d 1001, 1004, 1009 (D.S.D. 2001) (daily quality control reports not required by construction contract); BMY-Combat Sys. Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 126–27 (1997) (internal records not delivered to the Government prior to payment but used after payment to hide breach).

of this Part, it is unclear from the cases whether the certification-condition rule is meant to apply to claims of express certification, to claims of implied certification, or to both, though the rule has very different implications in these different contexts.[159] For the moment, we merely note the difference between the two rules. While the compliance-condition rule holds that there is an implied certification only where payment is expressly conditioned on *compliance* with a contract term, statute, or regulation, the condition-certification rule suggests that some FCA claims require payment to be conditioned on the *certification* of such compliance.[160]

The compliance-condition rule is arguably on its way to becoming the majority rule. A number of courts have followed *Mikes*'s holding with respect to compliance with statutes or regulations.[161] Others have extended the rule to include implied certification of compliance with contract terms.[162] Susan

159. *See infra* Part III.C.

160. Courts and commentators do not always clearly distinguish between the two rules. In *United States ex rel. Hendow v. University of Phoenix*, for example, the Ninth Circuit emphasized the certification-condition rule in its discussion of governing law, 461 F.3d 1166, 1172–73 (9th Cir. 2006), but when it turned to the facts of the case, the court concluded that the action could go forward because "*compliance* with the [statute] is a necessary condition of continued eligibility and participation," *id.* at 1176 (emphasis added). *See also Graves*, 284 F. Supp. 2d at 497; Levy et al., *supra* note 6, at 143–44.

161. *See, e.g.*, United States *ex rel.* Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002) ("[L]iability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned."); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) ("Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim."); United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1218 (10th Cir. 2008) ("Under the implied certification theory … the analysis focuses on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite to the government's payment."); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010) ("[T]o establish the existence of a 'false or fraudulent' claim on the basis of implied certification of a contractual condition, the FCA plaintiff … must show that the contractor withheld information about its noncompliance with material contractual requirements."); United States *ex rel.* Swafford v. Borgess Med. Ctr., 98 F. Supp. 2d 822, 831 (W.D. Mich. 2000) ("[A]n implied false certification theory can succeed only where the defendant's compliance with statutory or regulatory authority is so essential for reimbursement that, if the government had been aware of the defendant's noncompliance, it would have refused payment."); United States *ex rel.* Woodruff v. Haw. Pac. Health, Civil No. 05-00521 JMS/LEK, 2007 WL 1500275, at *7 (D. Haw. May 21, 2007) (dismissing FCA claims where plaintiff failed to allege that statute, regulation, or agreement explicitly conditioned participation and payment on compliance). *See also* United States *ex rel.* Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 382–83 (5th Cir. 2003) (indicating that if it were to adopt the implied certification theory, the court would adopt the compliance-condition rule); 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) ("[I]mplied false certification is viable only when the underlying Federal statute or regulation provides that compliance is a condition or prerequisite of payment.") (dicta).

162. United States *ex rel.* Coppock v. Northrop Grumman Corp., No. Civ.A.3:98-CV-2143-D, 2003 WL 21730668, at *13 (N.D. Tex. July 22, 2003); United States *ex rel.* Holder v. Special Devices, Inc., 296 F. Supp. 2d 1167, 1176–77 (C.D. Cal. 2003) (distinguishing *Hopper* on the grounds that the contracts at issue specifically stated that the defendant was required to comply with the Clean Air and Clean Water Acts).

Levy, Daniel Winters, and John Richards have recently argued that the compliance-condition test is the right narrowing principle for a wide variety of implied certification claims, and that it rationalizes much of the case law under the FCA.[163]

But the compliance-condition rule has generated a new set of questions. One concerns whether the contract, statute, or regulation must *expressly* condition payment on compliance. While *Mikes* emphasized the need for express language,[164] last year in *United States v. Science Applications International Corp.*,[165] the D.C. Circuit reached a different conclusion:

> [T]o establish the existence of a "false or fraudulent" claim on the basis of implied certification of a contractual condition, the FCA plaintiff … must show that the contractor withheld information about its noncompliance with material contractual requirements. The existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not … a necessary condition. The plaintiff may establish materiality in other ways, such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue.[166]

Though the court expressed the rule in terms of materiality, it is better understood as specifying what a claim implicitly represents for purposes of FCA liability.[167]

A second question concerns just how strict the condition must be: Is compliance conditional if the Government might have paid the claim even if it had known of the violation? It is clear that if the Government would have had *a duty* to pay even had it known of the violation, there is no FCA violation.[168] But several courts have gone further to hold that where the Government has *discretion* to pay despite the violation, compliance is not a condition of payment and there is no implied certification. In *Ex rel. Marcy v. Rowan*, for example, the Fifth Circuit considered a drilling lease that was "subject to cancellation" for the contractor's environmental violations.[169] The court held that because "nothing in the lease *requires* cancellation or otherwise denies benefits to the Defendants" on the basis of the violations, the environmental requirements "were not prerequisites to continuation of the lease" and

163. Levy, Winters, and Richards see less divergence in the case law than we do. Levy et al., *supra* note 6, at 143–52. We would read their article as reformist rather than descriptive.

164. Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001).

165. 626 F.3d 1257 (D.C. Cir. 2010).

166. *Id.* at 1269; *see also* United States *ex rel.* Hutcheson v. Blackstone Medical, Inc., No. 10-1505, 2011 WL 2150191, at *9 (1st Cir. June 1, 2011) (adopting the *Science Applications* rule in a case alleging a kickback scheme for Medicare providers).

167. As the Fifth Circuit recently observed (adopting a different rule), "[t]he prerequisite requirement 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." United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 269 (5th Cir. 2010).

168. *See* United States v. Southland Mgmt. Corp., 326 F.3d 669, 677 (5th Cir. 2003) (holding that claims for funds to which defendants were entitled, despite violations, are not false claims under the FCA).

169. United States *ex rel.* Marcy v. Rowan, 520 F.3d 384, 389 (5th Cir. 2008).

therefore could not support an implied certification claim.[170] The district court in *Ex rel. Coppock v. Northrop Grumman* similarly dismissed a claim because the relator had failed "to allege that failure to certify statutory or contractual compliance would *necessarily* have resulted in termination of the leases."[171] The Tenth Circuit, however, has adopted the opposite rule under the rubric of materiality. In *United States ex rel. Lemmon v. Envirocare of Utah* it concluded that "materiality does not require a plaintiff to show conclusively that, were it aware of the falsity, the government would not have paid. Rather, it requires only a showing that the government *may* not have paid."[172] Other courts have similarly permitted claims to go forward even where it appears that the Government had discretion to pay despite the violation.[173]

Yet a third question concerns the scope of the condition: must compliance be a condition of *payment* for the goods or services rendered, or is it enough that it is a condition of *participation* in the contract? *Ab-Tech* held that the defendant had implicitly certified its "continuing adherence to the requirements for participation" in the SBA's minority-owned business program.[174] *Mikes*, however, distinguished conditions of participation from conditions of payment, holding that a claim against Medicare implies compliance with express conditions of payment, but not with conditions of participation in the program.[175]

A number of courts have followed *Mikes* and especially in Medicare cases distinguish between conditions of payment and conditions of participation.[176] Others have rejected the distinction. In *Hendow v. University of Phoe-*

170. *Id.* at 389–90 (emphasis added); *see also* United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 270 (5th Cir. 2010) (reaffirming the reasoning in *Marcy*). In both *Marcy* and subsequent cases, the Fifth Circuit has used this reasoning to avoid deciding whether to recognize the implied certification doctrine.

171. United States *ex rel.* Coppock v. Northrop Grumman Corp., No. Civ.A.3:988-CV-2143-D, 2003 WL 21730668, at *12 (N.D. Tex. July 22, 2003). The above statement applies to contractually required compliance with environmental regulations. The *Coppock* court held that contractual terms involving usage of a property were a prerequisite to a grant of rent credits, and therefore could serve as the basis for an implied certification claim. *Id.* at *13.

172. 614 F.3d 1163, 1170 (10th Cir. 2010); *see* United States *ex rel.* Sanchez-Smith v. AHS Tulsa Reg'l Med. Ctr., 754 F. Supp. 2d 1270, 1297–98 (N.D. Okla. 2010) (discussing *Lemmon*).

173. *See, e.g.*, BMY-Combat Sys. Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 115 (1997) (contractor asked Government to waive compliance with term after discovery of violation).

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

175. Mikes v. Straus, 274 F.3d 687, 702 (2d Cir. 2001) ("Since [the Medicare statute] does not expressly condition *payment* on compliance with its terms, defendants' certifications … are not legally false.").

176. United States *ex rel.* Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 382–83 (5th Cir. 2003); United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1222 (10th Cir. 2008); United States *ex rel.* Woodruff v. Haw. Pac. Health, Civil No. 05-00521 JMS/LEK, 2007 WL 1500275, at *6–8 (D. Haw. May 21, 2007); Sweeney v. ManorCare Health Servs., Inc., No. C03-5320RJB, 2005 WL 4030950, at *5 (W.D. Wash. Mar. 4, 2005); *see also Conner*, 543 F.3d at 1222 (recognizing that the distinction between conditions of payment and conditions of participation might be more relevant in the Medicare context than elsewhere); United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 268–70 (5th Cir. 2010) (suggesting that if the Fifth Circuit were to adopt an implied certification rule, it would require that payment be conditioned on compliance).

nix, the Ninth Circuit labeled the participation-payment division a "distinction without a difference."[177] Emphasizing that the defendant university had expressly promised to comply with federal regulations that prohibited incentive-based payments to its recruiters, the court reasoned that "[i]f such promises were not conditions of payment, the University would be virtually unfettered in its ability to receive funds from the government while flouting the law."[178] Similarly, in *Ex rel. Tyson v. Amerigroup Illinois*, the district court, affirming a jury finding of implied false certification, concluded that each time the HMO defendant filed a Medicare payment claim, it falsely represented that it was complying with the requirement that it not discriminate in enrolling participants based on the need for health services, a requirement of participation in the Illinois Medicare program.[179] Reasoning that "[a] condition of participation is a condition of payment," the court held:

> The question is whether Defendants would have been awarded the contracts and been paid or allowed to keep their contracts with [the Government if the Government] knew that they were discriminating against pregnant and ill individuals …. Plaintiffs are not required to provide that the false claims were "information crucial to the decision to pay" or identify a federal regulation that "*expressly* state[s] the provider must comply in order to be paid."[180]

And in *Ex rel. Augustine v. Century Health Services*, the Sixth Circuit upheld a finding of implied certification based on a breach of Medicare conditions of participation related to the funding of employee pension programs where the defendant had truthfully certified compliance, was required to amend such certifications to reflect any changes, later fell out of compliance, and then failed to amend.[181]

Finally, we note that while there is universal agreement that factually false claims violate the FCA and disagreement about whether a claim represents compliance, the line between factual falsehoods and implicit legal falsehoods is not as analytically sharp as one might wish. While courts have said that a factual falsehood is, in essence, billing for goods or services not provided,[182]

177. United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1176 (9th Cir. 2006); *see also Woodruff*, 2007 WL 1500275, at *7 (concluding that "*Hendow* distinguishes *Mikes*; it does not disfavor its holding"); *Conner*, 543 F.3d at 1222 (distinguishing the Medicare context from Title IV loan program).

178. *Hendow*, 461 F.3d at 1176.

179. United States *ex rel.* Tyson v. Amerigroup Ill., 488 F. Supp. 2d 719 (N.D. Ill. 2007).

180. *Id.* at 726 (quoting *Mikes*, 274 F.2d at 700).

181. United States *ex rel.* Augustine v. Century Health Servs., 289 F.3d 409, 415 (6th Cir. 2002). In addition to the cases discussed in the above paragraph, see United States *ex rel.* McNutt v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1257 (11th Cir. 2005) (Medicare provider's nondisclosed noncompliance with Anti-Kickback Law violated FCA); Gublo v. NovaCare, Inc., 62 F. Supp. 2d 347, 355 (D. Mass. 1999) (assuming that a falsehood concerning a condition of participation violates the FCA); *In re* Pharm. Indus. Average Wholesale Price Litig., 491 F. Supp. 2d 12, 18 (D. Mass. 2007) (finding that Medicaid claims impliedly certified compliance with anti-kickback statute).

182. *Conner*, 543 F.3d at 1217; *Mikes*, 274 F.2d at 697.

they have not defined what counts as "goods or services." Thus in *Shaw v. AAA Engineering and Drafting*, the United States argued that the failure to disclose illegal dumping of chemicals used in photographic developing violated the FCA because the defendant "was being paid not only for photography services but also for environmental compliance."[183] There is a plausible argument that the Government pays for every contract term that imposes a duty on the other side. From this perspective, any breach is a failure to provide the goods or services contracted for.

Despite the analytic similarity between factual and legal falsehoods, courts generally find it easy to distinguish breaches of a government contract's primary purpose from other breaches. Were we to rewrite the doctrine from the ground up, we would do away with the distinction between factual and legal falsehoods altogether. Because we want to point the way forward from existing law, we will work in the language courts use.

B. *Statutory Authority*

The False Claims Act is a federal statute. Any evaluation of the implied certification doctrine, whether for fraud in the inducement or for fraud by post-formation noncompliance, should begin with the statute's text, purpose, and history.[184] There is no question but that factually false claims—payment requests for goods or services never provided—violate section (1)(A)'s prohibition of "false or fraudulent claims."[185] It is equally clear that a false express certification qualifies as a "false record or statement material to a false or fraudulent claim" under section (1)(B).[186] It is less obvious where in the statute one finds the authority for the implied certification doctrines.

In fact, there is a fair argument that the statute as written leaves no room for implied certification. The phrase "false or fraudulent claim" in section (1)(A), according to this argument, is a term of art with a well-established meaning. A false or fraudulent claim is a request for payment for goods or services that have not been provided.[187] Section (1)(B) stipulates that a contractor who does not make a false or fraudulent claim in this narrow sense might still violate the FCA by submitting a "false record or statement" that is material to the Government's decision to pay.[188] Because section (1)(B) unequivocally requires an express certification—a "record or statement"—it is difficult to make out an argument that it authorizes FCA claims based on

183. 213 F.3d 519, 531 (10th Cir. 2000).

184. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2–3 (2008).

185. These were the very type of actions that the False Claims Act was enacted to address. CONG. GLOBE, 36TH CONG., 3d SESS. 952 (1863).

186. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., No. 10-1505, 2011 WL 2150191, at *4 (1st Cir. June 1, 2011); *Conner*, 543 F.3d at 1217; *Mikes*, 274 F.3d at 696–97.

187. *But see* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785–86 (4th Cir. 1999) (observing that "false or fraudulent claim" is a term of art with a broad, not a narrow, meaning).

188. 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009).

implied certification.[189] Consequently, courts that address the statutory authority for implied certification typically turn to section (1)(A).[190] It is, after all, the claim itself that is said to represent compliance or no fraud in the inducement.[191] But this broad reading of "false or fraudulent claim" in section (1)(A) threatens to render section (1)(B) superfluous. If all claims against the Government implicitly represent that the claiming party is not in material breach or in violation of pertinent statutes and regulations or did not commit fraud in the inducement, then it does not matter if the claim is accompanied by an express certification to that effect. If Congress meant section (1)(A) to include implied certification, why did it add section (1)(B)?

There are ways to avoid this conclusion. First, section (1)(A) uses the term "false *or fraudulent* claim."[192] If the highlighted words do any work, one might argue, it is to expand liability beyond claims that are merely false—claims for goods or services not provided—to include claims tainted by other sorts of fraudulent behavior.[193] This does not yet tell us what sorts of bad behavior suffice to render a claim fraudulent. If "fraudulent" has its common law meaning, for example, it includes fraud in the inducement, but perhaps excludes implied certification of post-formation compliance.[194] The

189. In *Pickens v. Kanawha River Towing*, the district court reached a similar conclusion about the so-called reverse false claim section, 916 F. Supp. 702, 708 (S.D. Ohio 1996), then codified as section 3729(a)(7), which at that time defined FCA violations to include "knowingly mak-[ing], us[ing], or caus[ing] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,"31 U.S.C. § 3729(a)(7) (1994). After finding that the relator could use the implied certification theory under section 3729(a)(1), the court concluded that the theory did not apply under section 3729 (a)(7), for the reason that "[a] failure to report does not count as a statement or record."*Pickens*, 916 F. Supp. at 708. The 2009 amendments to the FCA changed the reverse false claims section by adding knowing concealment to the list of wrongs, superceding *Pickens*. 31 U.S.C. § 3729(a) (1)(G) (Supp. III 2009).

190. As the Tenth Circuit put it, because section (1)(A) "requires only the presentation of a 'false or fraudulent claim for payment or approval' without the additional element of a 'false record or statement,' … FCA liability under [section (1)(A)] may arise even absent an affirmative or express false statement by the government contractor." Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531–32 (10th Cir. 2000). *See also* United States *ex rel*. Wright v. Cleo Wallace Ctrs., 132 F. Supp. 2d 913, 925–26 (D. Colo. 2000); S.F. Unified Sch. Dist. *ex rel*. Contreras v. Laidlaw Transit, Inc., 106 Cal. Rptr. 3d 84, 94 (Cal. Ct. App. 2010) (making similar argument with respect to the interpretation of the California FCA).

Some courts have located authority for implied certification claims in section (1)(B), most notably the Seventh Circuit in a fraud-in-the-inducement case. United States *ex rel*. Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005). This reading works especially well in cases, like *Main*, in which the fraud in the inducement takes the form of an expressly false statement. It does not work so well in cases of collusive bidding or other forms of fraud in the inducement that do not turn on an express falsehood.

191. *Mikes*, 274 F.3d at 699 ("An implied false certification claim is based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment.").

192. 31 U.S.C. § 3729(a)(1)(A) (Supp. III 2009).

193. *See* United States *ex rel*. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 443–44 (6th Cir. 2005) (on the authority of *United States v. Wells*, 519 U.S. 482, 490–92 (1997), using the common-law meaning of "fraudulent" to determine whether the FCA includes a materiality requirement).

194. *See* RESTATEMENT (SECOND) OF TORTS § 526 (1977).

common law has long recognized fraud in the inducement but does not interpret a request for payment as representing contractual compliance.[195] Alternatively, one might seek a more expansive reading of "fraudulent" in the flexibility that courts have traditionally adopted in defining "fraud." Courts commonly avoid narrow ex ante definitions of wrongful deception, on the theory that such definitions tend to create safe harbors for bad actors to exploit.[196] So long as courts enforce robust scienter and materiality requirements, "fraudulent" might reasonably be read to include the failure to disclose a contractual, regulatory, or statutory violation.

Does the expansive reading of section (1)(A) as encompassing implied certification render section (1)(B) redundant? It might under the broad *Ab-Tech* rule, according to which a claim implicitly represents no material breach or violation.[197] Such an implication would render express certification of material compliance superfluous, but not under the *Mikes* compliance-condition rule.[198] According to *Mikes*, a claim implies compliance only with those contract terms, statutes, and regulations that expressly stipulate preconditions of payment.[199] A section (1)(B) express certification is subject to no such requirement. It is enough that the defendant provided a "false record or statement" material to the Government's decision to pay.[200] Thus, as the district court in *Ex rel. Hockett v. Columbia/HCA Healthcare* explained, where the "law does not specifically condition payment on compliance … to render claims false, there typically is an express certification of compliance with applicable law, not an implied representation."[201] *Hockett* concerned Medicare pricing regulations, compliance with which was not a condition of payment.[202] Applying the above rule, the court concluded that annual express certifications of compliance with those regulations might violate the FCA if false, but that individual claims for payment did not implicitly certify compliance and therefore could not be used in the calculation of per-claim fines.[203] So long as allegations of implied certification under section (1)(A) are subject to elements that do not apply to claims of express certification under (1)(B), implied certification does not render section (1)(B) redundant.

While the Supreme Court has yet to consider an implied certification case, the Court's interpretive approach to the False Claims Act supports an

195. *See id.* § 525 & cmt. B. The rule in many jurisdictions, described in Part II.B above, that a breach alone will not support a claim for fraud suggests that a mere request for payment does not imply compliance.

196. *See, e.g.*, Smith v. Harrison, 49 Tenn. 230, 242–43 (1871) ("[I]t is part of the equity doctrine of fraud not to define it, lest the craft of men should find ways of committing fraud which might evade such a definition.").

197. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434–35 (1994).

198. Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001).

199. *Id.*

200. 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009).

201. United States *ex rel.* Hockett v. Columbia/HCA Healthcare, 498 F. Supp. 2d 25, 70 (D.D.C. 2007) (citations and internal quotation marks omitted).

202. *Id.*

203. *Id.* at 70–71.

expansive reading of section (1)(A).[204] The Court "has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil."[205] And it has held that the FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."[206] Lower courts have adopted similarly expansive interpretive approaches to the Act.[207] And the implied certification theory finds some support in the Act's legislative history. The House Report on the 1986 amendments observed that "the False Claims Act is … used as the primary vehicle by the Government for recouping losses suffered through fraud."[208] And the Senate Report described the FCA as reaching "each and every claim submitted under a contract … which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation."[209]

Our interest in the implied certification rule is not so much in its statutory pedigree as in its function and justification in the government contracting process. The above interpretive arguments show that the language, purpose, and history of the statute leave room for the judicially created implied certification rules. Those arguments do not preclude more narrow readings of the statute. Nor do they show that implied certification is a good rule, or, if so, which judicial approach to it is the right one. The correctness of implied certification under the False Claims Act ultimately depends on the answers to questions of policy and purpose.

C. *Problems with the Certification-Condition Rule*

The next Part argues that the policies and purposes of the False Claims Act support implied certification of both no fraud in the inducement and post-formation compliance with contract terms, statutes, and regulations. More specifically, we argue that with respect to implied certification of post-formation compliance, courts should adopt a variation on the compliance-

204. That said, the Court's recent cases have tended to restrict the reach of the FCA. *See* Schindler Elevator Corp. v. United States *ex rel.* Kirk, 131 S. Ct. 1885, 1893 (2011) (holding that an agency's written response to a Freedom of Information Act request constituted a public disclosure, barring a *qui tam* action); Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2130 (2008) ("Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute."); Rockwell Int'l Corp. v. United States, 549 U.S. 457, 476 (2007) (refusing to allow a relator with no "direct and independent knowledge of the information upon which his allegations were based" to share in the recovery); Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 782–87 (2000) (refusing to construe the FCA to allow suits against states).

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

206. *Id.*; *see also* Rainwater v. United States, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims.").

207. *See, e.g.*, Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787–88 (4th Cir. 1999).

208. H.R. REP. NO. 99-660, at 18 (1986).

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

condition rule articulated by the Second Circuit in *Mikes*.[210] There is much less sense, however, to the certification-condition rule, which courts often run together with the compliance-condition rule. The *compliance*-condition rule holds that a claim for payment represents compliance only with those terms, statutes, or regulations that condition payment or participation on *compliance* with them.[211] The *certification*-condition rule is that "a false certification of compliance with a statute or regulation cannot serve as the basis for a *qui tam* action under the FCA unless payment is conditioned on that *certification*."[212] While many courts have articulated the certification-condition rule,[213] the cases exhibit considerable confusion as to its proper application and one finds in them no clear justification for it. We suggest that courts abandon the rule.

Judicial statements of the certification-condition rule leave it uncertain whether it is meant to apply to allegations of express false certifications, of implied false certifications, or both. There is an ordinary-language argument that the rule should apply only to allegations of express false certification.[214] Conditions precedent are events that might or might not occur, and are often acts that are within a contractor's control.[215] The implicit meaning of a claim is neither. This suggests that if a government contract conditions payment on certification, it conditions payment on express certification.

But why should we insist that payment be conditioned on certification when the defendant has made an express false certification—when it has knowingly submitted "a false record or statement material to a false or fraudulent claim" that otherwise satisfies section (1)(B)? In *Pickens v. Kanawha River Towing*, an Ohio district court held that the defendant's failure to record violations of the Clean Water Act in a ship's log created a false record for the purposes of the False Claims Act.[216] In reaching this conclusion, the court held that a ship's log was "clearly a record" for purposes of the FCA, that the FCA "does not require that the false record be one that the defendant is under an obligation by law to maintain," and that "if the government relies upon or otherwise reviews such logs as part of its regulatory role, then the Defendants would have submitted a false report in order to avoid an obligation to the government."[217] We see little to criticize here. Given

210. Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001).

211. *Id*.

212. United States *ex rel*. Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000) (emphasis added).

213. *See supra* note 158.

214. *See* United States *ex rel*. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902–03 (5th Cir. 1997) (applying the certification-condition rule to Medicare annual cost reports).

215. *See* RESTATEMENT (SECOND) OF CONTRACTS § 242 (1981).

216. 916 F. Supp. 702, 705–08 (S.D. Ohio 1996).

217. *Id*. at 708. *Pickens* dealt with a reverse FCA action under section 3739(a)(7), now codified as section 3729(a)(1)(G). In *United States ex rel. Bryant v. Williams Building Corp*., 158 F. Supp. 2d 1001 (D.S.D. 2001), the district court reached a similar conclusion in a section (1)(B) case. The defendant in *Bryant* allegedly failed to disclose in daily, nonmandatory progress reports the

section (1)(B)'s requirement that the false record be both knowing and material to the claim for payment, there is no reason to impose the additional requirement that the certification be a condition of payment.

Some courts have applied the certification-condition rule instead to allegations of implied certification of compliance. In *Ex rel. Siewick v. Jamieson Science and Engineering*, for example, the D.C. Circuit considered the argument that a defense contractor implicitly certified compliance with a revolving-door statute.[218] The court affirmed summary judgment for the defendant based on the fact that the plaintiff "point[ed] to nothing suggesting that [the defendant] was required to certify compliance with § 207 as a condition of its contract."[219] But the *Siewick* court did not explain why the certification-condition rule should apply to allegations of implied certification. The only proposed explanation we have found is in *Ex rel. Hutcheson v. Blackstone Medical*, where the Massachusetts District Court distinguished three versions of the implied certification theory:

> [1] that a claim is legally false under an implied certification theory where a claimant makes no express statement about compliance with a statute or regulation, but by submitting a claim for payment [the claimant] implies that it has complied with any preconditions to payment … [2] that the implied certification theory is essentially a materiality analysis … [3] that implied certification exists where a statute requires express certification but the claimant did not expressly certify.[220]

On the court's third theory, the certification-condition rule is an interpretive one: the fact that the payment is conditioned on certification explains why the claim for payment implies compliance.[221] But then the *Hutcheson* court was surely right that this theory is "not broad enough to fully define" implied certification.[222] That payment is conditioned on certification can be *one possible* reason to interpret a claim for payment as implicitly certifying compliance. It is not the *only* possible reason. The certification-condition rule is unsatisfactory both as applied to allegations of express certification and as applied to allegations of implied certification. Courts should abandon it.

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discovery of asbestos in government housing units on which it was doing construction. *Id.* at 1003–04. Without expressly considering the mandatory/nonmandatory issue, the court held that the plaintiff had submitted sufficient evidence that daily progress reports were expressly false certifications under the FCA to survive the defendant's motion for summary judgment. *Id.* at 1009.

218. United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, 214 F.3d 1372, 1374 (D.C. Cir. 2000) (considering alleged violations of 18 U.S.C. § 207).

219. *Id.* at 1376; *see also* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 793 (4th Cir. 1999) (affirming the dismissal of action based on implied certification "because [the relator] has never asserted that such implied certifications were in any way related to, let alone prerequisites for, receiving continued funding"); United States *ex rel.* Smith v. Yale Univ., 415 F. Supp. 2d 58, 91 (D. Conn. 2006) (applying the *Mikes* rule and finding that certification was a prerequisite); United States *ex rel.* Graves v. ITT Educ. Servs., Inc., 284 F. Supp. 2d 487, 497 (S.D. Tex. 2003) (applying the certification-condition rule to implied certification).

220. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 694 F. Supp. 2d 48, 62–63 (D. Mass. 2010), *rev'd*, 2011 WL 2150191 (1st Cir. June 1, 2011).

221. *Id.* at 63.

222. *Id.*

IV. A THEORY OF IMPLIED CERTIFICATION

Part II of this Article provided a theory of the False Claims Act as a whole. The theory begins from the fact that it is often especially difficult for the Government to detect breaches of contract or material violations of statutes or regulations by government contractors.[223] The FCA addresses this problem by allowing the Government to contract for effective duties to cooperate, in the form of certifications of compliance backed by extracompensatory remedies.[224] We are now in a position to apply that theory to evaluate the judicially created doctrines of implied certification. There are two types of implied certification cases: those in which the alleged underlying and nondisclosed wrong is fraud in the inducement and those in which the alleged underlying and nondisclosed wrong is post-formation noncompliance with a contract term, statute, or regulation. This Article's primary interest is implied certification of the second type. But it will be useful to start with a few words about the first.

A. *Implied Certification of No Fraud in the Inducement*

Judge Easterbrook has suggested that fraud in the inducement belongs under the FCA umbrella because fraud is fraud, no matter when it occurs.[225] In *Ex rel. Main v. Oakland City University* he stated that

> [t]he statute requires a causal rather than a temporal connection between fraud and payment. If a false statement is integral to a causal chain leading to payment it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.[226]

While we like Judge Easterbrook's realist approach, his proposed explanation ignores entrenched differences between the common law's treatment of fraud in the inducement and its treatment of fraud in the performance. As we discussed in Part II.B, U.S. courts tend to disfavor claims of post-formation fraud in the performance. The FCA rules for factually false claims, false express certification, and even false implied certification of compliance address that disfavor. The statute mandates treble damages and fines where courts might otherwise limit a plaintiff to contract remedies.[227]

The common law places no similar hurdles before the plaintiff who alleges fraud in the inducement.[228] There is no question but that a contractor who secures a government contract by deliberate deception has committed the tort of fraud, giving the Government the right to both compensatory

223. *See supra* notes 89–100 and accompanying text.
224. *See* 31 U.S.C. § 3729(a)(1) (Supp. III 2009).
225. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005).
226. *Id.* (internal citations omitted).
227. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).
228. *See supra* notes 194–95 and accompanying text.

and punitive damages.[229] Like the FCA, the common law's remedial scheme is designed both to make the Government whole and to punish those who have defrauded it.[230] Moreover, unlike fraud in the performance, fraud in the inducement gives the Government the right to cancel the contract,[231] providing an additional deterrent against pre-formation fraud.[232] And the false statement statute, 18 U.S.C. § 1001, criminalizes false statements to and other forms of fraud against the Government.[233] While it is often unclear whether an implied certification of post-formation compliance would constitute a lie for purposes of such criminal liability, fraud in the inducement often involves express falsehoods that clearly do. Taken together, these laws provide the Federal Government considerable protection against fraud in the inducement—considerably more than against fraud in the performance, despite Judge Easterbrook's equation of the two.[234]

The puzzle, then, is this: Given that the common law and criminal statutes already protect the Government against fraud in the inducement, and that the language of the False Claims Act applies only to fraud in the performance, why should courts go out of their way to read the Act to cover pre-formation fraud? The Supreme Court's explanation of an enduring taint[235] is no more than a metaphor. Judge Easterbrook's leveling approach ignores the legal difference between fraud in the inducement and fraud in the performance. So why not adhere more closely to the FCA text?

One possible answer is that, in many cases, the Government can recover more under the False Claims Act than it can under federal common law. Compensatory damages for the tort of fraud are limited to the Government's verifiable losses[236] and awards of punitive damages are available only at the discretion of juries and trial judges.[237] The FCA, on the contrary, requires

229. United States v. United Techs. Corp., 626 F.3d 313, 321–25 (6th Cir. 2010); United States *ex rel.* Westrick v. Second Chance Body Armor Inc., 685 F. Supp. 2d 129, 136–42 (D.D.C. 2010).

230. RESTATEMENT (SECOND) OF TORTS § 549, 906–08 (1977).

231. United States *ex rel.* Garrison v. Crown Roofing Servs., Inc., No. H-07-1018, 2011 WL 1005062, at *5 (S.D. Tex. Mar. 16, 2011); United States v. A & C Invs., Inc., 513 F. Supp. 589, 590 (N.D. Ill. 1981); Brown v. United States, 524 F.2d 693, 700 (Ct. Cl. 1975).

232. For a theory of the deterrent effect of the right to terminate, see Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 7–8 (1993).

233. 18 U.S.C. § 1001(a) (2006). *See, e.g.*, Rockwell Int'l Corp. v. United States, 549 U.S. 457, 462–63 (2007); United States *ex rel.* Crews v. NCS Healthcare of Ill., Inc., 460 F.3d 853, 858 (7th Cir. 2006); United States v. Eghbal, 475 F. Supp. 2d 1008, 1011 (C.D. Cal. 2007); United States *ex rel.* V.I. Hous. Auth. v. Coastal Gen. Constr. Servs. Corp., 299 F. Supp. 2d 483, 485 (D.V.I. 2004); United States *ex rel.* Rosales v. S.F. Hous. Auth., 173 F. Supp. 2d 987, 1001 (N.D. Cal. 2001).

234. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005).

235. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543 (1943).

236. RESTATEMENT (SECOND) OF TORTS § 549(2) (1977) (stating that a plaintiff is entitled to "damages sufficient to give him the benefit of his contract … if these damages are proved with reasonable certainty").

237. United States *ex rel.* Rosales v. S.F. Hous. Auth., 173 F. Supp. 2d 987, 1024 (N.D. Cal. 2001).

courts to award treble damages and, in most cases, per-claim fines of between $5,000 and $10,000.[238] Add the provisions for recovery of the costs of bringing the action,[239] and the amounts involved can far exceed what would be available in a common law action for fraud.

But these higher damage amounts are icing on the cake. If courts had not read the FCA to cover fraud in the inducement, they might instead have developed federal common law to achieve the same results. Courts could have held, for example, that punitive damages are especially warranted for fraud against the Government, as such deception is both especially wrongful and especially likely to go undetected. Nor should we forget the deterrence effect of criminalization.[240] It is not obvious that the FCA's higher damage measures are needed.

More significant are the FCA's *qui tam* provisions.[241] As we argued in Part II.B, fraud against the Government is especially likely to go undetected. Government employees and organizations tasked with monitoring for fraud often do a poor job of it.[242] And the structure of many government contracts makes fraud especially difficult to detect.[243] Permitting private persons to sue on behalf of the Government addresses the detection problem. By extending the FCA to cover fraud in the inducement, courts give those with knowledge of such fraud a new reason to share that information with the Government. While the FCA's remedial scheme adds some deterrence, it is the Act's *qui tam* provisions that provide the real punch.[244]

238. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).
239. *Id.* § 3729(a)(3).
240. *See* Fed. Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 623 (7th Cir. 1989).
241. 31 U.S.C. § 3730(d)(1) (2006).
242. *See supra* note 89.
243. *See supra* notes 92–94 and accompanying text.
244. Our observations about the redundancy of FCA liability for fraud in the inducement and the explanation in the Act's *qui tam* provisions find some support in the legislative history. In 1863, Representative Cowan argued that that the FCA was unnecessary because existing laws already outlawed fraudulent misrepresentation.

> I believe now in addition to the remedies provided by the common law, there is a statute in almost every State in the Union which makes the procurement of money or any valuable thing by means of a false misrepresentation of an existing fact, and by means of the credence which he obtains in consequence of that false misrepresentation, procures money or any other valuable thing, that instant he becomes guilty of the offense and is within the range and purview, I think, of the statute of every State in the Union, and I am not so certain but also within the laws and statutes of the United States.

CONG. GLOBE, 36TH CONG., 3D SESS. 952, 954–55 (1863) (statement of Rep. Cowan). He argued that the problem facing the Government was that its agents were routinely failing to bring suit based on fraudulent misrepresentations:

> Indeed, it is not now so much for the want of law that this mischief prevails everywhere, as it is from a seeming utter unwillingness on the part of those in authority to vindicate the laws that already exist by subjecting to punishment those who are guilty.… Are there no courts; are there no district attorneys; is the form of indictment lost; or is it taken to be understood that a man can cheat the Government with impunity, although as to all other people he is amenable to the municipal laws for preventing frauds and cheats? I have no doubt that if the officers of the Government would do their duty when a man is caught procuring money by these pretenses, and false and forged claims in any of the thousand modes by which it may be

We are not the first to argue that the False Claims Act's *qui tam* provisions address the difficulty of detecting fraud against the Government. Congress emphasized the detection problem when it strengthened the FCA's *qui tam* provisions in 1986,[245] and then again when it amended the Act in 2009.[246] And many scholars have made similar observations.[247] Our point, however, is a bit different. The difficulty in detecting fraud against the Government explains not only why the FCA has its *qui tam* provisions, but also why courts should choose to extend the FCA, with its *qui tam* provisions, beyond post-formation falsehoods to include fraud in the inducement. Interpreting a claim for payment as certifying that the contract has not been obtained by fraud expands the enforcement of already-existing rules against fraud in the inducement. While the FCA's remedies are redundant as applied to fraud in the inducement, its procedural provisions are not.

B. *Implied Certification of Compliance*

The False Claims Act's remedial provisions are not redundant when applied to fraud in the performance, which the Act more clearly targets. Factually false claims for payment (section (A)(1)) and false express certifications of post-formation compliance (section (A)(2)) are both forms of fraud in the performance. So too are the false implied certifications of post-formation compliance that some courts have found. The law does not give contracting parties nearly as much protection against fraud in the performance as it gives them against fraud in the inducement.[248] That difference, together with the theory of contractual duties to cooperate, explains and justifies the FCA's special attention to the former.

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done, he could be punished. He could be now if the proper officers were on his trail, and if the proper precautions were taken to enforce the laws we now have.

Id. at 954.

245. *See* S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud there appears to be a great unwillingness to expose illegalities.").

246. *See The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing on S. 2041 Before the S. Comm. on the Judiciary*, 110th Cong. 120 (2008) (Statement of Pamela Bucy, Bambridge Professor of Law, Univ. of Ala. Sch. of Law) ("Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring. They will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate.").

247. *See*, *e.g.*, Kovacic, *supra* note 76, at 1822–24; Joel M. Androphy & Mark A. Correro, *Whistleblower and Federal Qui Tam Litigation—Suing the Corporation for Fraud*, 45 S. TEX. L. REV. 23, 26 (2003); J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 554–63 (2000); Carl Pacini & Michael Bret Hood, *The Role of Qui Tam Actions Under the False Claims Act in Preventing and Deterring Fraud Against the Government*, 15 U. MIAMI BUS. L. REV. 273, 276–77 (2007).

248. *See supra* Part II.B.

Yet, on the whole, courts have been less sympathetic to claims of implied certification of post-formation compliance than to claims of implied certification of no fraud in the inducement. This attitude is of a piece with the general judicial reluctance to impose tort liability for fraud in the performance, and perhaps reflects courts' sense that tort principles should not be allowed to intrude into contractual relationships.[249] But it also stems from worries specific to the False Claims Act context, such as the threat of interference with other regulatory mechanisms and the costs of frivolous litigation.[250] We believe that despite these costs, there are good reasons to sometimes impose FCA liability for what is, in effect, a government contractor's failure to disclose breach. Sorting out just when this is the case is the project of the remainder of this Part.[251] This section develops a theoretical framework that can be used to evaluate implied certification. To develop the theory, we temporarily restrict ourselves to *Ab-Tech*'s simple, if relatively broad, implied certification rule: "a contractor who knowingly fails to perform a material requirement of its contract, … yet seeks or receives payment as if it fully performed without disclosing the nonperformance, has presented a false claim to the Government and may be liable therefor."[252] The next section applies the framework to examine how and why we might want to narrow, or even abandon, the *Ab-Tech* rule.

The *Ab-Tech* rule involves two interpretive defaults. First, and most obviously, the rule provides that, unless a government contractor says otherwise, its claim for payment implicitly represents compliance with all material terms of the contract.[253] We consider this an interpretive default because we think a contractor could avoid FCA liability by expressly informing the Government of any material breach or violation when requesting payment, and perhaps even by expressly disclaiming any implied representation of compliance. Second, and less obviously, the default meaning of a claim can itself be a matter of contract. We believe that it should be possible for the parties to a government contract to stipulate whether a claim shall or shall not represent material compliance. If this is right, then *Ab-Tech* also establishes a contractual default: if the contract is silent, claims for payment represent compliance. The first default governs the interpretation of *claims*, the second

249. *See* WILLIAM LLOYD PROSSER, *The Borderland of Tort and Contract*, *in* SELECTED TOPICS ON THE LAW OF TORTS 380, 437–38 (1954).

250. *See infra* notes 283–90 and accompanying text.

251. The theory of implied certification that we develop in this section could be extended to explain FCA liability for factually false claims under section (1)(A) as well. As we noted in Part II.B, factually false claims straddle the divide between express and implied falsehoods. A claim for payment need not expressly list goods or services provided to support a claim under section (1)(A). Nor need it expressly state that those goods or services have value, though if they are worthless the claim might be found factually false. A full-blown theory of the rule for factual falsehoods also would explain these aspects of the rule. That explanation would be similar to the account of the rules for implied legal falsehoods that we develop here.

252. United States *ex rel.* Accudyne Corp., 921 F. Supp. 611, 627 (W.D. Wis. 1995) (summarizing the *Ab-Tech* rule).

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

default the interpretation of *contracts*. Whether courts should adopt these interpretive defaults depends on a variety of familiar factors, which Ian Ayres and Robert Gertner have cataloged.[254] We begin with *Ab-Tech*'s default interpretation of claims for payment.

The *Ab-Tech* claim default has three important advantages. First, it is hopefully majoritarian. If most government contractors perform their obligations, then unless there is a significant worry about enforcement error (which we consider below), most would prefer to represent compliance. Second, an implied representation of compliance is also the information-forcing default. Contractors who are in contractual, statutory, and regulatory compliance already have a reason to share that information; noncompliant contractors do not. The implied representation gives the latter group a new reason to expressly disclose material breaches or violations.

Third, the implied representation tracks the ethical standards to which government contractors should be held. Oliver Wendell Holmes observed that "[m]en must turn square corners when they deal with the Government."[255] We think this is as much an ethical truth as a legal one. The special obligations of those who contract with the Government are a large, and largely unexplored, topic. It is no mistake that the False Claims Act was first passed during the Civil War.[256] The ethical or civic duties of government contractors are especially vivid in defense-related contracts during times of war. In the words of an 1863 House report: "Worse than traitors in arms are the men, who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation, while patriot blood is crimsoning the plains of the south, and bodies of their countrymen moldering the dust."[257] Shirking and deception in such contracts entail more than reductions in or reallocations of gains of trade. A crate labeled muskets and filled with sawdust exploits collective efforts at self-defense for individual gain and puts at risk individuals who are serving the collective good. All government contracts exhibit something of this structure. It is the citizenry as a whole that ultimately pays the price of opportunism against the Government. Perhaps in private contracting the rules of the game permit such purely self-regarding acts—though even here there are reasons for doubt.[258] But the ethical norms governing those who contract with the polity as a whole demand more. Requesting payment on a government contract that one has knowingly materially breached is simply wrong. The compliance default expresses and institutionalizes that ethical fact.

254. *See* Ayres & Gertner, *Filling Gaps*, *supra* note 19, at 95–127.

255. Rock Island C.R.R. v. United States, 254 U.S. 141, 143 (1920).

256. False Claims Act, ch. 67, 12 Stat. 696 (1863).

257. Report of the Committee on Government Contracts, H.R. Rep. No. 37-50, at 47 (1863). This statement is often mistakenly attributed to Abraham Lincoln. *See*, *e.g.*, 89 Cong. Rec. 10847 (1943); David Heron et al., *Bad Mules: A Primer on the Federal and Michigan False Claims Acts*, Mich. B.J., Nov. 2009, at 22, 22.

258. *See*, *e.g.*, Market St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 593–94 (7th Cir. 1991); Todd D. Rakoff, *Good Faith in Contract Performance:* Market Street Associates Ltd. Partnership v. Frey, 120 Harv. L. Rev. 1187, 1190–91 (2007).

Cutting against the *Ab-Tech* claim rule is the stickiness of a default representation of compliance. Defaults are sticky when parties who would or should prefer to say something other than the default fail to opt out of it.[259] One cost of opting out of the *Ab-Tech* compliance default is the cost of knowing when one is in breach. Only contractors who are aware of a breach or violation know to opt out of the implicit certification of compliance. The FCA's separate scienter requirement,[260] however, minimizes that cost. A contractor who misrepresents compliance because it is even negligently ignorant of its own breach or violation should escape FCA liability. More significant is the fact that the compliance default runs against the grain of the common law. The general law of contracts does not interpret a claim for payment as representing material compliance.[261] Unsophisticated government contractors are therefore less likely to know what they are saying by asking for payment. Finally, and most obviously, we can expect the default to stick because contractors who are in breach will not want to share that fact.

It is the stickiness of the *Ab-Tech* default that explains the familiar objection that the *Ab-Tech* rule threatens to transform every breach of a government contract, statute, or regulation into an FCA suit.[262] A sticky default can be a good thing. For example, if the representation of material compliance tracks the right ethical standards for government contractors, then it is not a problem that contractors who would prefer not to make the representation do not opt out of it. But stickiness also has its downsides. We see four possible worries: interference with efficient breach, increased costs of judicial error, lowering the bar for frivolous litigation, and interference with administrative regulatory mechanisms. We find only the last two significant.

Those schooled in the theory of efficient breach might worry that increased FCA liability threatens to undermine the expectation measure of damages. Supercompensatory awards such as the FCA's treble damages and per-claim fines, the objection goes, will tend to discourage efficient breaches, and the Government will ultimately pay for that efficiency loss.[263] A contractor that knows that, if its costs of performance go up or if a better opportunity appears, it will not have the option of breaching and paying damages will charge the Government a higher price for its goods or services. That higher price will not correspond to a better product, but will reflect the

259. Ayres & Gertner, *Majoritarian vs. Minoritarian Defaults*, *supra* note 19, at 1598.

260. 31 U.S.C. § 3729(b)(1) (Supp. III 2009).

261. *See infra* notes 194–95 and accompanying text.

262. *See* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1221 (10th Cir. 2008) (finding "no basis in either law or logic to adopt an express false certification theory that turns every violation of a Medicare regulation into the subject of an FCA qui tam suit"); Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) ("[A] claim for reimbursement made to the government is not legally false simply because the particular service furnished failed to comply with the mandates of a statute, regulation or contractual term that is only tangential to the service for which reimbursement is sought.").

263. For an economic account of why this is so, see Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency & Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

reduced value that the transaction is expected to generate. The costs to contractors of expanded FCA liability will be passed on to the Government.[264]

This worry rests on two mistakes. First, it neglects the simplifying assumptions of the efficient breach theory: that the nonbreaching party is aware of the breach and that the transaction costs of awarding expectation damages are less than it would cost the parties to negotiate a release.[265] The FCA comes into play only when these simplifying assumptions do not hold. Under the implied certification rule, a contractor has violated the FCA only if the Government paid a claim in ignorance of a material breach, and then only because the contractor breached its duty to cooperate by failing to inform the Government of its nonperformance.[266] Without knowledge of the breach, the Government will not sue for expectation damages. Far from threatening efficient breach, the duties to cooperate that the FCA enforces are designed to secure the conditions that make efficient breach possible.

Second, the efficient breach theory assumes that the only costs of a breach are monetizable losses suffered by the nonbreaching party.[267] As we have already observed, government contracts often include material terms—statutory or regulatory compliance, ownership requirements, adherence to labor and hiring standards—that are not designed solely to increase the value of the goods or services provided.[268] Because the breach of such a term does not impose a direct financial loss on the Government, it is difficult to judge when that breach is efficient. More to the point, there is no guarantee that the expectation measure will force the breaching party to internalize the social costs of such violations, though those social costs are precisely the reason the Government chose to include the term in the contract.[269]

There are, however, other reasons to worry about increased costs that come from the stickiness of the *Ab-Tech* default. One is the risk of enforcement error.[270] Government contracts are complex creatures whose meaning is often difficult for a court or jury to sort out after the fact. Absent the FCA, an erroneous finding of breach exposes a government contractor to liability for compensatory damages.[271] With an expanded FCA, an erroneous finding of breach exposes the contractor to treble damages and per-claim fines.[272] Even if FCA liability is efficient in cases of actual breach and actual failure to inform, contractors might reasonably worry about false positives. The costs

264. *See id.*

265. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 150–52 (8th ed. 2010).

266. *See supra* Part III.A.

267. *See* POSNER, *supra* note 265, at 149–54 (discussing cost of an efficient breach in terms of actual economic loss).

268. *See supra* notes 92–93.

269. *See generally* MCCRUDDEN, *supra* note 92.

270. *See* Kovacic, *supra* note 76, at 1831–32.

271. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981) (describing the goal of damages for breach as attempting to compensate the nonbreaching party).

272. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).

of false positives will again be built into the prices charged the Government, ultimately increasing the price the public pays for goods and services.

There is something to this second objection, though we think less than first appears. Most importantly, the objection neglects the FCA's scienter requirement.[273] Under the *Ab-Tech* rule, as in any FCA case, the plaintiff must prove not only that the defendant was in material breach when it submitted the claim, but also that it knew of or was deliberately indifferent to that breach.[274] Courts have not shied away from applying the FCA's scienter requirements to protect contractors against liability for unknown breaches or violations.[275] These scienter requirements function to sort out borderline instances of material breach—just those where judicial error is most likely. Many hard cases turn not on what the defendant did, but on what the contract, statutes, or regulations required her to do. Their outcomes depend on questions of interpretation. Where the relevant term or rule is susceptible to two or more readings, the defendant has a scienter defense close at hand: it reasonably believed that it was not under the obligation in question. In *Ex rel. Lamers v. City of Green Bay*, for example, the relator brought an FCA suit on the basis of a municipality's alleged noncompliance with bus-routing requirements for federal transit grants.[276] Emphasizing the complexity and nuance of the regulations, the Seventh Circuit affirmed summary judgment for the defendant.[277] The court concluded that some of the alleged false certifications "reveal more confusion than artifice," while others were at most "fudging under the mistaken impression" that the city had to meet certain requirements.[278] The scienter requirement tends to insulate from FCA liability precisely those cases where false positives are most likely.

We find a third worry about *Ab-Tech*'s claim default more significant. The *Ab-Tech* rule lowers the bar for alleging an FCA violation, imposing added litigation costs on government contractors forced to reply to frivolous claims. Like other allegations of fraud, FCA suits are subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.[279] Absent the theory of implied certification, an FCA plaintiff must

273. *Id.* § 3729(b)(1).

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

275. *See, e.g.*, United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018–20 (7th Cir. 1999); United States *ex rel.* Swafford v. Borgess Med. Ctr., 98 F. Supp. 2d 822, 832–33 (W.D. Mich. 2000); United States *ex rel.* Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 328–29 (9th Cir. 1995); United States *ex rel.* Roby v. Boeing Co., 100 F. Supp. 2d 619, 626 (S.D. Ohio 2000); Riley Constr. Co. v. United States, 65 Fed. Cl. 264, 269–70 (2005); Wang v. FMC Corp., 975 F.2d 1412, 1420–21 (9th Cir. 1992); United States v. Basin Elec. Power Coop., 248 F.3d 781, 792–94 (8th Cir. 2001); United States v. Newport News Shipbuilding, Inc., 276 F. Supp. 2d 539, 560–61, 565 (E.D. Va. 2003).

276. *Lamers*, 168 F.3d at 1014.

277. *Id.* at 1019–20.

278. *Id.* at 1019. For an example of an easy case where the court affirmed a finding of knowledge or reckless indifference, see United States *ex rel.* Augustine v. Century Health Servs., 289 F.3d 409, 416 (6th Cir. 2002).

279. *See, e.g.*, United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997) (affirming dismissal of FCA claim not pled with sufficient particularity);

plead with particularity either that the defendant submitted a claim for goods or services not provided (section (1)(A)) or that the defendant submitted an express false certification of compliance (section (1)(B)). Under the *Ab-Tech* rule, this is no longer the case. To survive a motion to dismiss, the plaintiff need allege only that the defendant made a claim for payment knowing that it was in material breach.[280]

The problem here lies in the Act's *qui tam* provisions. Anyone who spends a bit of time with the FCA case law will be struck by the proportion of FCA actions that appear in employment disputes. This is not in itself a bad thing. The FCA was designed to give employees with inside information about government fraud a new reason to share that information with enforcers.[281] But the *Ab-Tech* rule's reduced pleading requirements make it much easier to attach a colorable FCA claim to what is essentially a suit for wrongful discharge or other employment-related action.[282] Because the FCA claim is more likely to survive a motion to dismiss, it will impose costs on the government contractor and the court system whether or not it ultimately succeeds—again increasing the costs of contracting with the Federal Government.

The last problem with the *Ab-Tech* rule is one emphasized both by the Ninth Circuit in *Hopper* and by the Second Circuit in *Mikes*: the FCA is a blunt instrument for the enforcement of statutory and regulatory compliance, especially where there exist administrative and other mechanisms that can provide more tailored or nuanced responses to the underlying wrongs.[283]

Ebeid *ex rel.* United States. v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010) (same); United States *ex rel.* Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 384–85 (5th Cir. 2003) (same); Gublo v. NovaCare, Inc., 62 F. Supp. 2d 347, 354–55 (D. Mass. 1999) (same); United States *ex rel.* Smith v. Yale Univ., 415 F. Supp. 2d 58, 82–89 (D. Conn. 2006) (same).

280. *Compare* United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010) (reversing lower court's dismissal of implied certification claim), *and* United States *ex rel.* Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507, 1509–13 (M.D. Tenn. 1996) (same), *and In re* Cardiac Devices Qui Tam Litig., 221 F.R.D. 318, 346–47 (D. Conn. 2004) (denying 12(b)(6) motion because claim legally false, if not factually false), *and* United States *ex rel.* Wright v. Cleo Wallace Ctrs., 132 F. Supp. 2d 913, 926 (D. Colo. 2000) (same), *with* United States *ex rel.* Lobel v. Express Scripts, Inc., 351 F. App'x 778, 779–80 (3d Cir. 2009) (granting 12(b) motion because compliance with statute not condition of payment), *and Willard*, 336 F.3d at 382–83 (same), *and* United States *ex rel.* Westmoreland v. Amgen, Inc., 707 F. Supp. 2d 123, 137–39 (D. Mass. 2010) (same).

281. *See* United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) ("The archetypal *qui tam* FCA action is filed by an insider at a private company who discovers his employer has overcharged under a government contract.").

282. Or, in Medicare cases, a medical malpractice lawsuit. *See, e.g.*, United States *ex rel.* Bailey v. Ector Cnty. Hosp., 386 F. Supp. 2d 759 (W.D. Tex. 2004). In *Bailey*, the plaintiff argued that pre-surgery tests were unnecessary, endangered his life, and "were performed only to obtain money [from] Medicare." *Id.* at 761. The court dismissed the plaintiff's FCA claim because he failed to plead it with sufficient particularity. *Id.* at 764.

283. Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001); *Hopper*, 91 F.3d at 1267. *See also* Malcolm Harkins, *The Ubiquitous False Claims Act*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 131, 134 (2007).

William E. Kovacic has argued that FCA actions can also interfere with nonlegal, relational methods of resolving contractual disputes between contractors and contracting agencies. *Supra* note 76, at 1834–38. We are not convinced by Kovacic's argument. First, it neglects the fact that a contractor can insulate itself from FCA liability by cooperating with the Government in

Many courts have expressed this worry in Medicare cases. As a California district court observed:

> To allow FCA suits to proceed where government payment of Medicare claims is not conditioned on perfect regulatory compliance—and where HHS may choose to waive administrative remedies, or impose a less drastic sanction than full denial of payment—would improperly permit qui tam plaintiffs to supplant the regulatory discretion granted to HHS under the Social Security Act, essentially turning a discretionary denial of payment remedy into a mandatory penalty for failure to meet Medicare requirements.[284]

Add to this the fact that many Medicare enforcement actions concern the quality of care, in effect regulating the practice of medicine and potentially encroaching on the jurisdictions of state and local regulatory bodies.[285] Other areas where courts have noted potential regulatory interference include compliance with environmental regulations,[286] educational standards,[287] low-income housing programs,[288] and federal transportation regulations.[289] Here too the availability of the *qui tam* action exacerbates the problem. When the federal government brings a suit under the FCA, it has presumably balanced

discovering and addressing breaches. *See* Ben Depoorter & Jeff De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 154 (2006) ("Confessions will be enhanced when a company can prevent the willful decision of private attorney generals to prosecute if the novelty aspect of the information is preempted by the company itself."). Second, while Kovacic is probably right that "purchasing agencies and contractors sometimes collectively ignore or bend procurement rules because full compliance would significantly inhibit the efficient production of needed goods and services,"*supra* note 76, at 1837, we think the cure is to build more flexibility into government contracts, rather than ignoring their breach. Third, we think the more significant problem in government contracting is agency overidentification with the interests of private contractors. While the recently disbanded Minerals Management Service was perhaps an extreme example, the problems of agency capture and corruption are widespread. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, OIG INVESTIGATIONS OF MMS EMPLOYEES (Sept. 8, 2008), *available at* http://www.doioig.gov/images/stories/reports/pdf//RIKinvestigation.pdf. The FCA tends to disrupt unduly close relationships between agencies and private contractors, exerting a pressure on them to remain at arm's length. In sum, while we think agencies need flexibility in performing their regulatory functions, as parties to contracts agencies do better turning the same square corners that their counterparts must.

284. United States *ex rel.* Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002). *See also* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1221 (10th Cir. 2008) (Under expansive FCA liability, "[a]n individual private litigant ostensibly acting on behalf of the United States could prevent the government from proceeding deliberately through the carefully crafted remedial process and could demand damages far in excess of the entire value of Medicare services performed by a hospital."); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999) ("[The plaintiff], it seems, wants to use the FCA to preempt the FTA's discretionary decision not to pursue regulatory penalties against the City. But the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations.").

285. *See Mikes*, 274 F.3d at 700 ("[C]ourts are not the best forum to resolve medical issues concerning levels of care. State, local or private medical agencies, boards and societies are better suited to monitor quality of care issues.").

286. *See* Pickens v. Kanawha River Towing, 916 F. Supp. 702, 705–06 (S.D. Ohio 1996).

287. United States *ex rel.* Diop v. Wayne Cnty. Cmty. Coll. Dist., 242 F. Supp. 2d 497, 525 (E.D. Mich. 2003).

288. United States v. Southland Mgmt. Corp., 326 F.3d 669, 675 (5th Cir. 2003).

289. *Lamers*, 168 F.3d at 1020.

any costs of interference with other regulatory mechanisms against the benefits of recovery under the Act. The *qui tam* plaintiff has little or no reason to take such regulatory interference into account.[290]

For the moment we do not draw any conclusions about how these different factors balance out when evaluating the desirability of *Ab-Tech*'s default interpretation of a claim for payment. Our goal in this section is to provide a general theory of implied certification. The next section applies that theory to the doctrine. Before going there, however, we must address the second side of the *Ab-Tech* default. The default interpretation of a claim for payment as representing material compliance can itself be a creature of contract. Absent the *Ab-Tech* rule, the parties might contract into that default. Under the *Ab-Tech* rule, the parties might in theory contract out of it.[291] The *Ab-Tech* rule is, therefore, also a contractual default: it specifies the legal effects of the parties' acts absent their agreement to the contrary.[292]

The most significant concerns with that contractual default have to do with relative institutional competence.[293] If the default were no implied certification, a contracting agency could get FCA protection against undisclosed breaches only by contracting for certification, express or implied. A no-certification default might therefore prompt the agency to determine what form of FCA liability would best serve the Government's interests. This would have two advantages. First, the contracting agency is better situated than a court to determine whether it will benefit from expanded FCA liability—whether the added protections of express or implied certification are worth the above-described costs. Second, the contracting agency is more likely under the no-certification default to make fine-grained decisions about which first-order duties the FCA should cover. If the agency independently monitors for and responds to certain violations, it can protect those regulatory processes from FCA interference by not requiring a certification of compliance with the relevant duties. By requiring a contractor to certify compliance with some duties and not others, the agency can tailor the reach of the FCA.[294]

There are, however, advantages to the implied-certification contractual default. If most government contracts would benefit from the rule, then it is

290. For further, sometimes speculative, discussion of possible divergences between the interests of *qui tam* plaintiffs and that of the Government, see Kovacic, *supra* note 76, at 1825–41. For a game-theoretic account, see Depoorter & De Mot, *supra* note 283.

291. "In theory" because the default could be especially sticky.

292. *See* Ayres & Gertner, *Filling Gaps*, *supra* note 19, at 87 ("Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.").

293. While we emphasize here the relative institutional competences of courts and contracting agencies, there is also the issue of the relative competence of courts and legislatures. As we argued above, the language of the FCA allows but does not mandate the *Ab-Tech* rule. We discuss how Congress might usefully address implied certification in the Conclusion.

294. *See*, *e.g.*, United States *ex rel.* Stebner v. Stewart & Stevenson Servs., Inc., 305 F. Supp. 2d 694, 698–99 (S.D. Tex. 2004) (finding that progress payment invoices represented that defendant complied with the progress payment clause of the contract, and did not address "the quality of any particular truck or conformance with any particular term in the contract").

arguably the majoritarian default—the one most contracting agencies would or should choose. And we might worry that a no-certification contractual default is especially sticky, due to the problems of capture and competence. Perhaps contracting agencies, or the individuals who represent them, cannot be trusted to insist on certification duties when negotiating contracts.[295] Finally, we might prefer the judicially imposed certification default because it better captures ethical standards to which government contractors should be held. The judicially created default plays an expressive function. It says that while parties might contract around those standards, in the normal government contract it is wrong for a contractor to request payment for a contract that it has materially breached.

C. *Recommended Reforms*

We now have in place an analytic framework for deciding what interpretive rules courts should use to decide when a government contractor has certified post-formation compliance. The answer depends both on the relative costs and benefits of interpreting claims for payment as implicitly certifying compliance and on whether we want agencies or courts deciding the reach of the FCA. This section applies that framework to evaluate the current state of FCA jurisprudence and to recommend a few reforms.

We have identified three significant costs of implied certification of compliance: by lowering the pleading bar, the default interpretation of claims increases the costs of frivolous litigation;[296] expansive application of the FCA's harsh penalties can interfere with more nuanced regulatory responses to violations;[297] and as a contractual default, the rule might in practice prevent agencies from contracting for more tailored certification duties in ways that would address the first two costs.[298] The FCA's *qui tam* provisions magnify these costs, as relators are unlikely to take account of the Government's interest in achieving the best regulatory mix.[299]

One response would be to abandon implied certification of compliance altogether. The False Claims Act gives contracting agencies a powerful tool for monitoring contractors' compliance with government contracts, statutes, or regulations. If an agency is worried about detecting a breach or violation, it can require a contractor to certify compliance with the duty in question. The FCA makes such certifications credible. Where most breaches of con-

295. Whether this is so is, again, an empirical question. Cutting against it is the widespread use of mandatory standard terms in federal procurement contracts. The Federal Acquisition Regulation system contains mandatory contract clauses to be used for particular types of contracts. *See, e.g.*, FAR 12.301(b) (2010) (acquisition of commercial items); FAR subpt. 36.5 (construction and architect-engineer contracts); FAR 41.501 (acquisition of utility services). If individual agents of the Government cannot be trusted, perhaps the Federal Acquisition Regulation system could be. Still, agency capture is a concern.

296. *See supra* notes 279–82 and accompanying text.

297. *See supra* notes 283–90 and accompanying text.

298. *See supra* notes 293–95 and accompanying text.

299. *See supra* note 290 and accompanying text.

tract expose a contractor to compensatory damages only, under the FCA false certifications are punished with treble damages and large per-claim fines.[300] Congress having given contracting agencies this tool, courts should encourage them to use it in drafting contracts. The best way to do so is to require contracting agencies that want the protections of the FCA to contract for them expressly, rather than adopting a contractual default that every claim represents material compliance. Under such a regime, the agency would balance the relative effectiveness of FCA certification of compliance with a given contract term, statute, or regulation against other methods of monitoring and enforcement. *Qui tam* plaintiffs would be required to plead that a defendant contractor actually submitted a false certification. And government contractors would be given notice in the contract of the extent of their potential liability under the FCA.

While we are sympathetic to the above arguments, we do not advocate doing away with implied certification of compliance altogether. There are at least five reasons to keep some version of the judicially created rule. First, capture and lack of competence mean that we should not always trust agencies to specify the FCA's reach. Second, even if agencies attend to FCA certification, the certification default provides a desirable baseline in negotiations. Rather than asking for additional disclosure duties and greater potential liability, it puts contracting agencies in a position of negotiating for tailored express disclosures that will reduce the contractor's potential liability.[301] Third, we should not forget the certification default's expressive function. The certification default affirms that contracting with the Government is different, that it imposes heightened ethical obligations not to take advantage of the other side. Fourth, implied certification is already the rule in many jurisdictions.[302] Before advocating wholesale revision, we should explore the gains available from less radical change. We argue below that the *Ab-Tech* rule can be narrowed in ways that address many of the costs of implied certification. Finally, as we discuss at the end of this section, many of the gains from abandoning the judicially created doctrines of implied certification can be achieved by better practices by contracting agencies under the existing rules.

So far we have focused our attention on the broadest version of implied certification of compliance: the *Ab-Tech* rule that a request for payment represents material compliance with all contract terms and relevant statutes and regulations.[303] We can imagine several ways of limiting the rule to take account of the problems of frivolous litigation, regulatory interference, and

300. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).

301. For the benefits of a favorable default, see Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, *in* Behavioral Law and Economics 116, 136–37 (C. Sunstein ed., 2000).

302. Only the Fourth and Fifth Circuits have declined to adopt the implied certification rule. *See supra* note 147.

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

institutional competence without abandoning implied certification of compliance altogether.

First, courts could ask in every case whether FCA liability is likely to interfere with other regulatory mechanisms. Under such a rule, a claim for payment would represent compliance only with those contract terms, statutes, or regulations that the Government does not separately monitor and enforce. Such a rule would directly address the worry about regulatory interference. And by reducing the scope of implied certification, it would put some limits on frivolous claims.

Judicial inquiry into regulatory interference has its downsides. The rule would require time and energy for courts to sort out just when there is sufficient agency monitoring and oversight to exempt an obligation from the implied certification rule. The outcomes of that inquiry would in some cases be difficult to predict. And one can imagine circuit splits in its application, a problem for contractors who might be subject to suits in multiple jurisdictions.

Another option would be to distinguish compliance with contract terms from compliance with governing statutes or regulations, and hold that claims for payment represent only contractual compliance.[304] Courts have not explained why the FCA, which is at its core about fraud in government contracting, should extend to the nondisclosure of regulatory or statutory violations when such compliance is not expressly incorporated into the contract. And agencies might be more likely to have well-developed mechanisms to monitor and enforce statutory and regulatory compliance than the performance of a contract. If so, exempting statutory and regulatory compliance from the implied certification rule would address the threat of regulatory interference. And the rule has the advantage of clarity. All a court need ask is whether the alleged wrong was a breach of the contract.

This rule too has its flaws. Most importantly, there are reasons to doubt whether the distinction between contractual compliance and statutory or regulatory compliance cuts at the joints. Contracting agencies often do not monitor for compliance with, for example, labor laws or environmental regulations. Exempting them from the FCA would remove an important tool for their enforcement.

Yet a third option would be to draw a line based on the identity of the parties. If *qui tam* litigation causes many of the costs of implied certification of compliance, perhaps the solution is to allow implied certification suits to go forward only when the Government appears in court, as a party or amicus, to advocate the theory. Unlike the *qui tam* plaintiff, the Government is more likely to consider the costs of implied certification when deciding whether or not to sue, join, or file an amicus brief. In fact, courts may in

304. The court in *United States ex rel. Contreras v. Laidlaw Transit*, applying the California FCA, suggests a similar distinction but applies it to avoid the certification-condition rule. 106 Cal. Rptr. 3d 91, 94 (Cal. Ct. App. 2010).

practice be using government participation as such a proxy. A nonscientific examination of the cases suggests that courts are more likely to accept a claim of implied certification when the Government is a party or files an amicus brief in support of the implied certification claim than when the Government has chosen not to participate in a case.[305]

Again the rule has its flaws. Congress first included the FCA's *qui tam* provisions because, in its judgment, agencies cannot always be trusted to monitor compliance.[306] It strengthened the Act's *qui tam* provisions in 1986 in response to evidence that both the military and the Department of Justice were failing to push for full civil recovery for fraudulent contracting practices.[307] We have argued that one of the advantages of *Ab-Tech*'s contractual default is that contracting agencies cannot always be trusted to include certification requirements in their contracts. An agency that fails at the contracting phase, whether because of capture or because of inattention, to require certification is all the more likely to fail to adequately monitor performance. Nor is there any support in the language of the Act for imposing on *qui tam* plaintiffs a burden that is different from that imposed on the Government. While Congress might adopt a narrowing principle of this sort, there is little authority for the courts to do so.

Courts have employed none of these narrowing rules but have opted for a fourth one: the compliance-condition rule from the Second Circuit's decision in *Mikes v. Straus*.[308] The *Mikes* rule holds that a claim for payment does not represent material compliance with every term, statute, or regulation, but only with those that expressly provide that their fulfillment is a condition of payment.[309]

In adopting the compliance-condition rule, the Second Circuit explained that it was striking a balance between the Government's interest in enforcing the Medicaid statute and the parallel role of other administrative bodies in enforcing that statute and the practice of medicine more generally.[310] That is, the *Mikes* rule was meant to address the problem of regulatory interference. And there is a connection between the rule and that function. The fact that a contract, statute, or regulation expressly conditions payment on com-

305. *Compare* Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001) (dismissing implied certification claim; U.S. attorney declined to intervene in suit), *and* United States *ex rel.* Westmoreland v. Amgen, Inc., 738 F. Supp. 2d 267 (D. Mass. 2010) (same), *and* Sanches v. City of Crescent City, No. C 08-1395 MEJ, 2010 WL 1461439 (N.D. Cal. 2010) (same), *and* Herndon v. Sci. Applications Int'l Corp., No. 05CV2269-BEN (RBB), 2007 WL 2019653 (S.D. Cal. 2007) (same), *with* United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010) (allowing implied certification claim; U.S. intervened), *and* United States *ex rel.* Augustine v. Century Health Servs. Inc., 289 F.3d 409, 414–15 (6th Cir. 2002) (same), *and* United States *ex rel.* Sanchez-Smith v. AHS Tulsa Reg'l Med. Ctr., 754 F. Supp. 2d 1270 (N.D. Okla. 2010) (same).

306. *See* H.R. Rep. No. 37-50, at 47 (1863).

307. *See* Helmer & Neff, *supra* note 27, at 40–51.

308. 274 F.3d 687, 700 (2d Cir. 2001).

309. *Id.* (read broadly to include not only statutory and regulatory compliance, but also compliance with contract terms).

310. *Id.* at 699–702.

pliance evinces a choice to enforce the duty by way of the contract, rather than through other regulatory mechanisms. If the chosen remedy for a breach or violation is withholding payment on the contract, then imposing FCA liability for a failure to disclose a violation when requesting payment does not interfere with its enforcement. On the contrary, the implied representation of compliance in these cases enables the Government to better exercise its preferred remedy.

The *Mikes* compliance-condition rule, however, may be too narrowly drawn. The problem lies in the Second Circuit's insistence that compliance be a condition of *payment*, and that conditions of *participation* in the contract do not fall within the implied certification rule.[311] The arguments that favor implied certification of compliance with conditions of payment applies also to compliance with many conditions of participation.

An examination of the *Mikes* opinion suggests that what drove the court's decision for the defendants was not that compliance with the Medicare provision at issue was a condition of participation, but that the statute provided extensive noncontractual monitoring and enforcement mechanisms for the alleged violation. The relator in *Mikes* alleged that his former employer had failed to properly calibrate certain medical devices.[312] In rejecting the suit, the Second Circuit emphasized that the Medicare statute anticipated that peer-review organizations would monitor for such quality of care violations, that it defined the statutory violations to include only gross and flagrant dereliction in a substantial number of cases, that it mandated that providers be given reasonable notice of and an opportunity to cure violations, and that it gave the secretary of Health and Human Services discretion to apply a range of regulatory responses to such violations.[313] But as later decisions have pointed out, many conditions of participation are not accompanied by such detailed and extensive monitoring and enforcement mechanisms.[314] This is true, for example, of the Title IV rule that recipients of federal education subsidies may not pay recruiters on a per-student basis.[315] It is even true of many Medicare conditions of participation, such as nondiscrimination in the enrollment of patients,[316] compliance with the Anti-Kickback Statute,[317] and the proper accounting of expenses for setting reimbursement levels.[318]

311. *Id*. at 700.
312. *Id*. at 694–95.
313. *Id*. at 701–02 (discussing 42 U.S.C. § 1320c-5(a)).
314. The best judicial discussion can be found in the Tenth Circuit's decision in *United States ex rel. Conner v. Salina Regional Health Center, Inc.*, 543 F.3d 1211, 1222 (2008).
315. *See* United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1176–77 (9th Cir. 2006).
316. *See* United States *ex rel.* Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 725–26 (N.D. Ill. 2007).
317. *See* United States *ex rel.* McNutt v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259–60 (11th Cir. 2005); *In re* Pharm. Indus. Average Wholesale Price Litig., 491 F. Supp. 2d 12, 17–18 (D. Mass. 2007).
318. *See* United States *ex rel.* Augustine v. Century Health Servs. Inc., 289 F.3d 409, 415 (6th Cir. 2002).

False Claims Act liability for the failure to disclose violations of such conditions of participation does not interfere with other regulatory mechanisms. More to the point, because the Government does not separately monitor for compliance with these duties, implied certification of compliance with them, backed by the FCA, can provide real benefits.

For similar reasons, we agree with the D.C. Circuit that the *Mikes* restriction to *express* conditions is too restrictive.[319] In many cases it will be easy to show that "both parties to the contract understood that payment was conditional on compliance with the requirement at issue."[320] If the defendant cannot show a significant risk of regulatory interference, it should be enough that the nondisclosed breach or violation would have been material to the Government's decision to pay a claim.

What begins to emerge is something like a two-part rule. With respect to express conditions of payment, a claim always represents compliance. With respect to nonexpress but mutually understood conditions of payment and conditions of participation, a claim implicitly represents compliance if and only if the contract, statute, or regulation does not provide for other monitoring and enforcement mechanisms that FCA liability would interfere with. The second part of this rule is similar to the first possible narrowing principle identified above: a direct judicial inquiry into the potential for regulatory interference. And it currently suffers from the same problems: increased litigation costs and decreased predictability of case outcomes. But coupled with the *per se* rule for express conditions of payment, the benefits of such a rule seem worth those costs. Many cases involving implied conditions of payment and conditions of participation do not lie on the border and sophisticated parties should be able to predict these conditions. We believe that a university should know that the Department of Education does not monitor for incentive-based pay to recruiters or impose sanctions other than termination, or that a Medicare provider should know that violations of the Anti-Kickback Statute will result in termination of its contract. In these situations, the Government can enjoy the advantages of implied certification without causing undue confusion.

A third question that *Mikes* did not address concerns the requisite strength of the condition: Does a claim imply compliance with a contract term, statute, or regulation that does not mandate nonpayment in cases of noncompliance, but merely gives the Government the option of withholding payment? This is a harder question on the above theory. On the one hand, the fact that the Government has discretion to pay despite a violation might suggest the availability of other regulatory responses. In *Ex rel. Marcy*, the Fifth Circuit considered a provision in an offshore drilling lease that gave the Government the right to cancel for environmental violations, but did not

319. United States v. Science Applications Int'l Corp., 626 F.3d 1257, 1270 (D.C. Cir. 2010).
320. *Id.* at 1269.

require such cancellation.[321] In holding that there was no implied certification of compliance, the court emphasized that the lease provision also allowed the Government to "exercise 'other remedies' available against the defendant" for such violations.[322] If the Government has discretion to pay despite a violation, that discretion might be to give it the ability to choose a more nuanced regulatory response. On the other hand, the failure to disclose a violation when requesting payment effectively prevents the Government from exercising such choice. One might guess that the cancellation clause was included in the *Marcy* contract because the Government knew that environmental violations would be particularly difficult to observe. The threat of cancellation was a way to increase the costs of violating those provisions to take account of the low probability of detection. If this is right, then FCA liability for the knowing failure to disclose the violation is appropriate: it addresses the informational problem that led the Government to include the termination clause in the first place.

We think the Fifth Circuit's *per se* rule in *Marcy* is, on balance, misguided. The strength of the condition is a poor proxy for the existence of other mechanisms for monitoring and enforcement. There are too many other reasons for a contract to give the Government the right to a remedy without mandating that it exercise that right. In some contracts the Government might want the option of paying because its cost of termination could be very large, though the threat of nonpayment is the primary means of enforcement. In other contracts, such language might simply be the result of the inattentive use of boilerplate. The facts in *Marcy* exemplify the problem. While the Fifth Circuit emphasized that the lease mentioned "other remedies" for the environmental violations at issue,[323] the lease language strongly suggests that the provision was meant not to describe alternative remedies, but to clarify that the Government might pursue such remedies *in addition to* canceling the lease.[324] At the very least, the Fifth Circuit should have more fully explored what other means the Government had to discover and sanction the environmental violations at issue.

This suggests a rule for nonmandatory conditions of payment similar to that for conditions of participation: courts should ask whether implied certification of compliance with the duty in question threatens to interfere with other regulatory mechanisms. The mere fact that the Government would have had the option to pay despite the violation should not be enough to

321. United States *ex rel.* Marcy v. Rowan Cos., 520 F.3d 384, 389–90 (5th Cir. 2008).

322. *Id.* at 90.

323. *Id.*

324. "Whenever the Lessee fails to comply with any of the provisions of the [Outer Continental Shelf Lands] Act, the regulations issued pursuant to the Act, or the terms of this lease, the lease shall be subject to cancellation in accordance with the provisions of section 5(c) and (d) of the Act *and* the Lessor may exercise any other remedies which the lessor may have, including the penalty provisions of Section 24 of the Act." Brief for Appellant at 6, United States *ex rel.* Marcy v. Rowan Cos., 520 F.3d 384 (5th Cir. 2008) (No. 06-31238), 2007 WL 5196331 (alteration in original) (emphasis added).

insulate contractors who request payments without disclosing material violations from the FCA.

The upshot of our discussion is a rule for implied certification of compliance that lies somewhere between the rules articulated in *Ab-Tech* and in *Mikes*. We suggest a simple burden-shifting test. The fact that a contract term, statute, or regulation explicitly or implicitly conditions either participation in or payment for a contract on compliance with that term, statute, or regulation creates a prima facie case that a claim for payment represents such compliance. The burden is then on the defendant to show that FCA liability would interfere with other regulatory mechanisms for monitoring and enforcing compliance. Such a showing will be difficult if not impossible in cases in which the contract, statute, or regulation expressly required the Government to withhold payment for the undisclosed breach or violation. A defendant is more likely to be able to satisfy that burden when compliance is a condition of participation rather than payment, when compliance was a material but not express condition of payment, or when the Government would have had the discretion to pay despite the violation.

While we think it would be a good thing for courts to adopt such a rule, we also consider it a second-best solution. Implied certification of compliance allows the FCA to reach undisclosed breaches and violations in contracts where the agency should have but failed to require express certification. The first-best solution would be for contracting agencies themselves to determine the FCA's reach through express certification requirements.

We have argued that implied certification of compliance is a contractual default: the parties should be able to contract for alternative interpretations of claims for payment. Significant gains can therefore be achieved by better government contracting practices under any implied certification rule. Contracting agencies should consider the costs and benefits of implied certification and write their contracts accordingly. They should require express certification of compliance for those contractual, statutory, or regulatory duties that are best enforced through self-reporting, and, if appropriate, stipulate that a claim for payment shall not represent compliance with other obligations.[325] Such tailored certification requirements are especially appropriate in standard-form government contracts in highly regulated areas, such as Medicare provider agreements. It is cheaper and more effective for the agency to decide the scope of FCA certification ex ante than it is for courts to do so ex post. There are also opportunities to encourage greater agency

325. It is an interesting question what it should take to opt out of an implied certification contractual default. One possibility would be to say that it is enough to require express certification of compliance with some duties. Under this rule, the fact that a contract requires express certification would mean that a claim for payment does not represent implied compliance with others. We worry that such a rule would be open to abuse. By agreeing to certify compliance with some obligations, a contractor could effectively escape FCA liability for the failure to report the breach or violation of others. It would therefore be better to require the parties expressly to contract out of the implied certification default.

attention to the scope of certification through the Federal Acquisition Regulation system. The FAR regulations currently permit agencies to use "certificates of conformance" in lieu of source inspections when any defect would only involve small losses or the contractor is especially trustworthy.[326] It might be amended to encourage or require agencies to adopt certificates of compliance in other circumstances, such as when compliance would otherwise be especially difficult to detect.

V. CONCLUSION

Implied certification of post-formation compliance plays an important role in the regulation of government contracts. By effectively imposing on contractors a duty to disclose material breaches, implied certification addresses the Government's difficulties in monitoring performance and recognizes the special ethical obligations that attach to government contracts. As a contractual default, the rule also addresses the problems of agency capture and competence in the contracting process, making it more likely that the protections of the False Claims Act will reach contractors who attempt to take advantage of lax government oversight. In practice, courts have applied the doctrine in a way that generally prevents interference with other regulatory mechanisms and protects contractors against frivolous *qui tam* lawsuits. And because the rule is a mere default, it leaves room for contracting agencies to further specify defaults and disclosure duties in individual transactions.

The best rule for when a claim for payment implicitly represents performance lies somewhere between the rules in *Ab-Tech* and in *Mikes*. The fact that compliance with a contract term, statute, or regulation is a condition of payment for or participation in a government contract should create a strong legal presumption that a claim for payment under the contract implicitly represents such compliance. That presumption should be rebutted only if a defendant can show that FCA liability would interfere with other regulatory mechanisms. Such a showing is difficult if not impossible where the agency or legislature has expressly provided that compliance is a condition of payment. It is easier where compliance is a condition only of participation in the transaction where the condition is implicit, or where the rule gives government decision makers discretion to pay despite a breach or violation.

Even under our more tailored rule, implied certification is not without its costs. This is why we would welcome greater agency attention to certification in the drafting of contracts. We also note that many of the costs of implied certification of compliance come not from the rule itself, but from other aspects of the False Claims Act. We have already described how the availability of *qui tam* actions magnifies the costs of implied certification. While *qui tam* actions are an essential part of the FCA's architecture, Congress might consider raising the bar for claims of implied certification in

326. FAR 46.504 (2010).

cases where the Government elects not to appear. Also relevant in this respect are the FCA's mandatory penalties, particularly the $5,000 to $10,000 per-claim fines.[327] In cases involving factual falsehoods—claims for goods or services not provided—those fines bear some relation to the underlying wrong. Each claim is another lie. This is not so in cases involving legal falsehoods, expressed or implied. Here the underlying wrong is the false certification or undisclosed violation. The seriousness of such a lie or nondisclosure bears no relationship to the number of times the contractor billed the Government for goods or services rendered. The multiplying effect of per-claim fines further increases the potential costs of frivolous litigation and the potential interference of the FCA with other regulatory mechanisms. The Act's remedial structure is another area that might benefit from legislative attention.

Finally, and more generally, Congress should consider amending the False Claims Act to expressly recognize and regularize implied certification. Section 3729(a)(1)(G), which authorizes reverse FCA claims, already includes such language.[328] In addition to imposing liability on a contractor who "knowingly makes, uses, or causes to be made or used, a false record or statement"—the same language as that in section (1)(B)—section (1)(G) imposes liability on one who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[329] While this formulation is not perfect, by adding some such language to section (1)(B) Congress could provide clearer statutory authority for the implied certification doctrine.[330]

Implied certification of compliance under the False Claims Act is also ripe for consideration by the Supreme Court. The above analysis suggests that if the Court grants certiorari on the issue, much could depend on the facts of the case. The opinions in *Skilling v. United States*, which sharply limited the scope of "honest services" fraud, suggests that at least in the criminal context this Court is unsympathetic to broad definitions of "fraud."[331] If the first implied certification case to reach the Supreme Court involves a violation that might have been subject to a noncontractual and discretionary regulatory response, such as one often sees in the Medicare context, the Court is more likely to take a dim view of the implied certification rule. If the case

327. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).

328. *Id.* § 3729(a)(1)(G).

329. *Id.*

330. One possible formulation: "any person who … (2) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim, *or knowingly fails to disclose a breach or violation that is material to such a claim* … is liable to the United States Government. …"

331. 130 S. Ct. 2896, 2931–32 (2010) (limiting the "honest services" fraud statute to encompass only cases involving bribes and kickbacks and rejecting the Government's argument that it also encompasses "undisclosed self-dealing"). *See also id.* at 2941 (Alito, J., concurring) (agreeing with the Court's limitation on the "honest services" fraud statute); *id.* at 2942 (Sotomayor, J., concurring in part and dissenting in part) (same); *id.* at 2935 (Scalia, J., concurring) (arguing that the honest services fraud statute is unconstitutionally vague).

involves a more straightforward breach or violation, knowledge of which clearly would have caused the Government to deny payment or participation in the program, the Court is likely to be more sympathetic. Given the overall positive role that implied certification plays in the regulation of government contracts, we hope that the first case to reach the Court satisfies the latter description. At present, implied certification under the FCA is an unruly rose bush. While it would benefit from a trellis and some pruning, it would be a shame to cut it back too far or remove it from the garden altogether.