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MATERIALITY AND THE FALSE CLAIMS ACT

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LEXISNEXIS SUMMARY:
... After surviving an attempt at repeal and being dormant for many decades, the False Claims Act was rejuvenated by substantial amendments in 1986. ... Under this third prong, the False Claims Act's unique statutory definition of the term "knowingly"-which Congress defined as requiring no showing of intent to defraud -rebuts any presumption that materiality should be an implied element for recovery under (a)(1) and (a)(2). ... Proceeding to the second stage of the analysis, the Court then determined that, unlike the term "false statement" at issue in Wells, the term "fraud" did have a common law meaning which required proof of materiality. ... On the other hand, should "fraudulent" claims be asserted, Neder provides a basis for arguing that Congress might have intended a materiality requirement because of the common law meaning of fraud. ... It is the inclusion of this latter requirement that, under the third prong of Wells/Neder, rebuts any presumption that Congress meant to include materiality as a requirement to prove False Claims Act liability for "fraudulent" claims. ... " The court imposed a materiality element on "false claims," reasoning that "although a 'false claim' is not identical to a 'fraudulent claim,' neither the statute, its legislative history, nor the case law supports a reading that dispenses with a showing of materiality for one but requires it for the other. ...

TEXT:
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I. Introduction

After surviving an attempt at repeal and being dormant for many decades, the False Claims Act was rejuvenated by substantial amendments in 1986. n1 Since its amendment, the False Claims Act has become the principal tool in the campaign to redress waste, abuse, and outright fraud by government contractors. n2 Recoveries of misspent taxpayer funds from lawsuits brought pursuant to the False Claims Act now exceed one billion dollars per year. n3

The increased use of the False Claims Act has resulted in renewed attacks by those who represent government contractors in an effort to find defenses to such suits. Unsatisfied with the language of the Act, some have attempted to add requirements never found in any version of the False Claims Act. Such efforts have sometimes been successful, especially with judges unfamiliar with the unique aspects of this statutory scheme. One such effort has involved the addition of an element of materiality to the Act even though no version of the False Claims Act has ever required such an element.

The United States Supreme Court has laid out an analytical framework for determining whether materiality is an element of a [*840] statute. This analysis, however, has been ignored or not properly employed by several lower courts construing the False Claims Act. As a result, many courts have wrongly held that materiality is an element of a False Claims Act action. These decisions do not withstand scrutiny under the applicable Supreme Court standards and should be overturned.

II. Overview

The Supreme Court set forth a three-part analysis for determining whether materiality is an element of a statute in its opinions in United States v. Wells, n4 and in Neder v. United States. n5 Under the Wells/Neder framework, materiality is clearly an element of a statute if Congress has so stated in the text of the statute. n6 If Congress has not explicitly set out materiality as an element, it can still be implied, but only if a term employed by Congress had a well-settled common law meaning that included materiality as an element. n7 Under the final step of the analysis, any presumption of materiality that arises from the common-law meaning of a term may be rebutted if the text or structure of the statute shows that adding materiality would create an inconsistency. n8

Reviewing the text of all versions of the False Claims Act since 1863 demonstrates that the first test is not met-Congress never set forth materiality as an element of any of the various statutory predicates for False Claims Act liability. n9

Under the second prong of Wells/Neder, an examination of the common law meaning of the statute's operative terminology is conducted to determine if materiality should be implied as an unstated element. The United States Supreme Court has determined that use of the term "false" in a statute silent on the term "materiality" means that materiality is not to be added as a requirement. n10 On the other hand, the same Court has determined that the use of the term "fraud" could support an inference that Congress meant that a statute silent on the element of "materiality" should nonetheless include such a requirement because of the common law elements of fraud. n11

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The False Claims Act has always prohibited a variety of different predicate acts. n12 These actions are enumerated in the current statute at *31 U.S.C. § 3729* (a)(1)-(7). Because the vast majority of litigation under the Act, however, has concerned only (a)(1) or (a)(2) violations, that is our primary focus. n13

Because the term "fraudulent" appears in (a)(1) and (a)(2), it is necessary to apply the third prong of the Wells/Neder analysis to those provisions to determine if the text or structure of the statute show that adding materiality as an element is rebutted by other language of the statute. Under this third prong, the False Claims Act's unique statutory definition of the term "knowingly"-which Congress defined as requiring no showing of intent to defraud n14-rebuts any presumption that materiality should be an implied element for recovery under (a)(1) and (a)(2).

III. A Primer on the Supreme Court's Analysis in Wells and Neder Concerning the Imposition of a Materiality Requirement

A. United States v. Wells

In early 1997, the Supreme Court, in Wells, considered whether materiality was an element of the federal statute-*18 U.S.C. § 1014*- which criminalized knowingly making false statements to a federally insured bank. n15 The Supreme Court first noted that the statute in question never mentioned materiality. Therefore, under a "natural reading of the full text," materiality was not an element. n16

The Supreme Court then considered whether the phrase "false statement" in the statute produced any "implication of materiality" from the common law and concluded that it did not. n17 Finally, the Court confirmed that the statutory history of § 1014 demonstrated that the statute did not contain a materiality requirement. n18 Specifically, the Court noted that § 1014 was amended as part of a broader [*842] recodification of the federal criminal code, and though other sections regarding false representations explicitly included materiality as an element, § 1014 did not. Moreover, the amended § 1014 consolidated thirteen statutory provisions regarding financial institutions, three of which had previously contained a materiality requirement. No such term was included anywhere in § 1014 after consolidation. The clear inference to be drawn from this, the Court held, was "that Congress deliberately dropped the term 'materiality' without intending materiality to be an element of § 1014." n19

B. Neder v. United States

Only two years later, the Supreme Court again visited the question of whether materiality should be implied as an element of a federal statute. In Neder, n20 the Court observed that materiality was not stated as an element in the various bank, wire, and mail fraud statutes before it. Proceeding to the second stage of the analysis, the Court then determined that, unlike the term "false statement" at issue in Wells, the term "fraud" did have a common law meaning which required proof of materiality. n21 Proceeding to the final stage in its analysis, the court concluded that the presumption of adding materiality as an element was not rebutted by the text or structure of the mail, wire, and bank fraud statutes. n22

Thus, under Wells and Neder, a statutory provision lacking an express "materiality" requirement is not presumed to include such an element because of the use of the word "false." On the other hand, a statutory provision using the word "fraud" but lacking an express "materiality" requirement would be presumed to have a materiality element, unless that presumption is rebutted by the language or structure of the statute.

IV. Analysis of the False Claims Act Under Wells/Neder

Application of the Wells/Neder framework to determine whether the False Claims Act has a materiality

requirement is not overly complicated by the fact that the statute's language as originally enacted varies a bit from that found in the current version. The proper inquiry still centers on the terms "false" or "fraudulent"-terms which have [*843] been used since the statute's 1863 passage to define conduct for which a person can be liable under the False Claims Act. n23

Because the current False Claims Act has seven distinct bases for liability in *31 U.S.C. § 3729*(a)(1)-(a)(7), it is necessary to review each provision to determine if materiality should be judicially added. n24 While we briefly address all seven provisions, our analysis focuses primarily on (a)(1) and (a)(2) since the vast majority of False Claims Act cases are brought under those two sections.

A. First Prong: Language of the False Claims Act

The operative provisions of the False Claims Act, after the most recent substantive amendments in 1988, contain nearly three thousand words. n25 Materiality is not one of those words. n26 In fact, a review of all versions of the False Claims Act since its enactment in 1863 demonstrates that the term "materiality" has never appeared in any version. n27

Thus, under the first part of the Supreme Court's framework-a natural reading of the full text-materiality is not an element of a False Claims Act case brought under any of the seven provisions (a)(1) through (a)(7). "Absent a clearly expressed legislative intention to the contrary [statutory] language must ordinarily be regarded as conclusive." n28

Since materiality is not expressed as an element of the statute (and never was), should such a term be added because the common law [*844] understanding of any of the language used by Congress implies such a meaning? Answering this question involves, of course, application of the second prong of the Wells/Neder analysis, and calls for a review of the terminology used in (a)(1) through (a)(7).

B. Second Prong: The Well-Settled Meaning of "False" or "Fraudulent"

1. Application to (a)(1) and (a)(2)

The current version of *37 U.S.C. § 3729*(a)(1) imposes liability upon any person who "knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment" while the current version of *31 U.S.C. § 3729*(a)(2) imposes liability upon any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid[.]" n29 Congress did not provide a definition of the currently used phrase "false or fraudulent claim" or even of a "false claim" or of a "fraudulent claim." Nor was there a statutory definition or a well-settled common law meaning of the precursor language "claim known to be false . . . or fraudulent" or of the phrase "false claim" in existence in 1863. n30 But as we have seen, the Supreme Court has looked at the common law meanings of the individual components of these phrases.

In Wells, the Supreme Court determined that the term "false statement" did not create any presumption that Congress intended materiality to be an element when it did not so provide in a statute. n31 On the other hand, in Neder, the Supreme Court concluded that use of the term "fraud" did imply a materiality element. n32 So, what presumption arises from Congressional use of "false or fraudulent" in referring to claims in *31 U.S.C. § 3729*(a)(1) and (a)(2)?

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Since the statute uses the disjunctive connector "or," there is no need for a litigant to attempt to prove that claims are both false and fraudulent. Either will do. n33 Since the Supreme Court has instructed that the word "false" does not imply a materiality requirement, the relator need only plead for the (a)(1) and (a)(2) claims that the claims were false. n34 Thus, use of "false" does not satisfy the second prong of the Wells/Neder test and, therefore, provides no basis for implying materiality as a term for any of these sections.

On the other hand, should "fraudulent" claims be asserted, Neder provides a basis for arguing that Congress might have intended a materiality requirement because of the common law meaning of fraud. This inquiry requires consideration of the third Neder prong. However, as discussed below, the Neder presumption of materiality for "fraudulent" claims brought pursuant to (a)(1) and (a)(2) is rebutted by the inclusion in (a)(1) and (a)(2) of the term "knowingly," which is defined in *31 U.S.C. § 3729*(b) as requiring no intent to defraud.

2. Application to (a)(3), (a)(4) and (a)(5)

Sections 3729(a)(3), (a)(4), and (a)(5) each impose liability upon those who "defraud" the government. n35 A court thus could, consistent with the Wells/Neder analysis, presume a materiality requirement for actions brought pursuant to those sections in view of their use of the term "defraud" and the common law elements associated with such terminology. Furthermore, since there is no requirement that the person have acted "knowingly"-as is the case for the other provisions of the Act-there is nothing in the text or structure of the False Claims Act to rebut this presumption.

3. Application to (a)(6) and (a)(7)

Neither section (a)(6) nor (a)(7) of the False Claims Act use any form or derivation of the word "fraudulent." Liability under (a)(6) has nothing to do with committing fraud, nor does it concern fraudulent or [*846] even false statements or claims or documents. n36 As such, there are no terms in this section from which a materiality requirement could be implied from the common law.

Similarly, section (a)(7) also does not reach fraud or fraudulent statements or claims. n37 Since there is reference in this section only to "false" records and statements, the second prong of the Wells/Neder analysis for implying a materiality requirement is not met. As Wells made clear, a "false" statement does not create a presumption that Congress intended materiality to be an element when the statute itself is silent, since materiality is not part of a well-settled common law meaning of "false" statements. n38

The language of both (a)(6) and (a)(7) demonstrate that materiality cannot and should not be implied as a presumptive element. That being the case, there is no reason to analyze sections (a)(6) and (a)(7) under the third prong of the Wells/Neder analysis. n39

C. Third Prong: The Language and Structure of the False Claims Act Rebuts Any Presumption That Materiality is an Element of Allegations Brought Under (a)(1) or (a)(2).

Having applied the first two prongs of the Wells/Neder analysis to each of the seven bases for liability under the False Claims Act, it is clear that only two sections need to be extensively analyzed under the third prong. There is no basis under Wells/Neder to imply materiality as an element of claims brought under sections (a)(6) and (a)(7) because no form of the word "fraud" is used in those sections. Conversely, courts certainly may find under Wells/Neder that

materiality is an element of (a)(3), (a)(4), and (a)(5) claims in view of the use of the term "defraud."

Sections (a)(1) and (a)(2) are different. While both reach behavior that is either "false" or "fraudulent," those sections are also qualified by reaching only conduct that is "knowingly" undertaken. It is the inclusion of this latter requirement that, under the third prong of Wells/Neder, rebuts any presumption that Congress meant to include [*847] materiality as a requirement to prove False Claims Act liability for "fraudulent" claims.

Because some courts had gone too far in making it harder for the government and relators to bring False Claims Act cases, n40Congress added language in 1986 to clarify how it intended the term "knowingly," which appears in § 3729(a)(1) and (a)(2), to be interpreted. Specifically, Congress added *31 U.S.C. § 3729*(b) to make it clear that actual knowledge of, deliberate ignorance, or reckless disregard of the truth or falsity of the claim was what was meant by "knowingly." n41 To cement the point that the False Claims Act was not merely an attempt to codify common law fraud but rather a distinct federal statute with its own elements that were not the same as common law fraud, Congress added the following language: ". . . no proof of specific intent to defraud is required." n42

In short, even if a court were to presume that the term "fraudulent" implies materiality as an unstated term, elimination of specific intent to defraud demonstrates that any materiality presumption is unwarranted.

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V. The Refusal of Courts to Add Materiality as an Element the Government Must Prove in a Criminal False Claims Act Case Further Demonstrates That Materality Is Not an Element of the Civil False Claims Act

As originally enacted in 1863, the False Claims Act contained both civil and criminal provisions. n43 When the Act was codified in 1874, the civil and criminal provisions were placed into separate parts of the Code. n44 Since that time, the criminal provisions-which are currently codified at *18 U.S.C. § 287*-have maintained the original language from the 1863 Act, imposing penalties upon those who make a claim, "knowing such claim to be false, fictitious, or fraudulent." n45 This precise language was also used in the civil False Claims Act until 1982, n46 when Congress changed the wording of the civil provisions deleting the term "fictitious" and revising the operative terminology to "false or fraudulent claim." n47 These revisions were a part of a housekeeping effort to "eliminate unnecessary words and for consistency." n48

The circuit courts that have ruled on the criminal False Claims Act, *18 U.S.C. § 287*-with the exception of one that has been vacated by the Supreme Court n49-have all found that it has no materiality requirement. n50 When circuit after circuit has found no materiality [*849] requirement in § 287 for language that is identical to the original civil False Claims Act, it is irreconcilable for courts to impose a materiality requirement on the civil provisions; the civil provisions are rooted in the same language as the criminal provisions and that root language has been held to have no such requirement. n51

The only circuit to hold that the criminal False Claims Act has a materiality requirement has been effectively reversed by the Supreme Court. The Supreme Court's decision in United States v. Wells, although not explicitly addressing § 287, vacated the Eighth Circuit's ruling that materiality was an element of *18 U.S.C. § 1014*, which criminalizes the making of a false statement to a federally insured bank. n52 In Wells, the Eighth Circuit had applied the exact same methodology in imposing materiality upon § 1014 that it had used in imposing the requirement upon § 287. n53 In light of the fact that this rationale was rejected for §1014 by the Supreme Court, the Eighth Circuit's position imposing a requirement on § 287 is of doubtful vitality. n54

Because it is clear that the criminal provisions of § 287 have no materiality requirement, it makes no sense to impose such a requirement upon the parallel civil provisions, which are rooted in the same language from the same original enactment. Indeed, prosecution of a civil case is normally subject to a lower burden of proof, "preponderance of the evidence," in comparison to a higher burden in a criminal case, "beyond a reasonable doubt." It therefore does not comport with the principle behind these different standards-that it should be harder to convict a defendant criminally than find a defendant civilly liable-to force a plaintiff to carry the burden of proving an implied element of [*850] materiality in a civil case, when that element does not exist in the criminal counterpart.

VI. Application of Wells and Neder in the Civil False Claims Act Context Has Yielded Inconsistent Results

Under Wells and Neder, it is improper to engraft a materiality requirement upon statutory causes of action where the statute itself is silent on the issue, unless the common law meaning of the statutory terminology clearly implies the element. Although many courts have imposed a materiality requirement for claims brought under the civil False Claims Act, most of those decisions were issued either prior to or without consideration of the analysis mandated in Wells and Neder. n55 As such, those decisions lack precedential value. To date, only a handful of courts have recognized that Wells and/or Neder must be applied to determine whether the civil False Claims Act has a materiality [*851] requirement. n56 Those that have so recognized have reached varying conclusions.

In United States ex rel. Roby v. Boeing Co., n57 a district court properly found that Wells prohibits the judicial grafting of a materiality requirement upon the False Claims Act. n58

In United States ex rel. Cantekin v. Univ. of Pittsburgh, n59 the Third Circuit observed that Neder may argue against a materiality requirement, but avoided the issue by concluding that the False Claims Act violations at issue were in any event material. n60

Two district courts within the Fifth Circuit attempted to apply Wells and Neder but their analyses were fundamentally flawed and have been cast into doubt by opinions issued by the Fifth Circuit.

The court in United States ex rel. Wilkins v. N. Am. Constr. Corp. n61 correctly recognized that the False Claims Act does not have an "express" materiality requirement. Citing the framework set out in Wells and Neder, the Wilkins court then purported to examine case law pre-dating the 1863 enactment of the False Claims Act concerning the common law meaning of "false claim." n62 The court imposed a materiality element on "false claims," reasoning that "although a 'false claim' is not identical to a 'fraudulent claim,' neither the statute, its legislative history, nor the case law supports a reading that dispenses with a showing of materiality for one but requires it for the other." n63

This judicial throwing up of hands is simply wrong. Under Wells and Neder, it is inappropriate to impose a materiality requirement when the statute does not set forth that requirement, unless it can be shown that such a requirement clearly existed at common law. In reviewing the [*852] case law dealing with "false claims" prior to 1863, the Wilkins court could find no such requirement because it did not exist. Nor did the case law equate the word "false" with "fraudulent." As such, the Wilkins opinion is wrongly decided and of doubtful precedential value. n64

In United States v. Southland Mgmt. Corp., n65 a Mississippi district court recognized that materiality as an element of a False Claims Act was "debatable" under Wells. The district court nonetheless disagreed with the Roby opinion and, without analyzing the common law meaning of the terms in question, adopted an analysis that the language of the various provisions of the False Claims Act somehow "implies" that materiality is an element. n66

The trial court's decision in Southland is of doubtful continuing vitality in view of the Fifth Circuit's subsequent actions. The Fifth Circuit panel to whom this case was assigned reversed the trial court's decision. n67 That panel noted that it was bound by old Fifth Circuit precedents- decided prior to Wells and Neder- holding that materiality was a required element of a cause of action under the civil False Claims Act. n68 However, the panel expressly recognized that it was not itself reaching the issue of whether materiality was an element of the civil False Claims Act and a future panel confronted with this issue would "need to assess whether and to what extent Wells and Neder might undermine" its earlier precedents. n69 After a rehearing en banc, the Fifth Circuit subsequently changed course and affirmed the trial court's decision on other [*853] grounds. n70 The Fifth Circuit explicitly declined to reach the materiality issue previously considered by the trial court and by the panel. n71

The Seventh Circuit has also addressed the issue of materiality but failed to offer any meaningful assistance. In Luckey v. Baxter Healthcare Corp., n72 the Seventh Circuit made a bare citation to Neder, but failed to apply its teachings for determining whether materiality is an implied requirement of the False Claims Act. Luckey involved representations concerning the testing of plasma products sold to the Government. The court first concluded that the statements were not false or fraudulent because it was scientifically debatable whether additional tests should be performed in order to comply with government regulations. n73 In unadorned dicta, the Seventh Circuit then went on to state that the omitted facts that make a statement false must be "material" to the listener's decision and that the speaker must intend the statement or omission to deceive. n74 Its expressed rationale for this statement was to keep misleading half-truths from "swallowing the norm that literal truth is enough." n75

Luckey suffers from obvious infirmities. The issue in Luckey could have been easily resolved by considering whether the statements at issue were false. Indeed, the court had no need to consider the materiality issue. In obvious dicta, the Court nevertheless did consider this issue, but failed to apply the Supreme Court's framework for determining whether a materiality requirement should be implied. Moreover, the court's statement that an intent to deceive is required under the statute is obviously wrong in view of the specific language of the False Claims Act that "no proof of specific intent to defraud" is required. n76

In United States v. Job Resources for the Disabled, n77 a district court followed Luckey while also purporting to apply Wells and Neder and concluded that omissions must be material to "trigger" False Claims Act liability. The court's conclusion that the common law requires materiality for claims alleged to be false in the sense of "misrepresentation," but eliminates materiality for those claims alleged to be "affirmatively false," misses the mark. Whatever the common law says about "misrepresentations" is irrelevant, as that term is not and never was in the False Claims Act.

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VII. The Fourth Circuit's Berge Decision Is Wrongly Decided

Despite the holdings in Wells and in Neder that materiality is not an element of a statute unless Congress so stated or the common law meaning of terms used by Congress at the time of the statute's enactment are so well-settled that materiality should be implied, many courts have failed simply to acknowledge and apply Wells and Neder. Instead, many courts have inappropriately continued to rely upon the Fourth Circuit's decision in United States ex rel. Berge v. Trustees of University of Alabama n78-a decision that was issued one month before Wells and two years before Neder-for its holding that materiality is a required element of a False Claims Act claim. n79 In view of these more recent Supreme Court holdings, continued reliance on this earlier-issued decision in Berge is inappropriate.

Berge's addition of materiality as an element to the False Claims Act is judicial ipse dixit that is inconsistent with

the Supreme Court's decision in Wells, n80 and is not supported by its decision in Neder. Those precedents aside, however, Berge is devoid of reasoned analysis and should not be blindly followed.

The claims in Berge arose from a federally funded research grant at a university. A graduate student alleged that the university violated the False Claims Act by making false statements in progress reports and failing to acknowledge her contributions in grant applications.

The Fourth Circuit rejected the notion that the university's application for continued federal funding for an ongoing study would have been denied had the funding agency known that the graduate student's work had not been recognized in the application. The court [*855] held that the False Claims Act requires that actionable statements be material and the statements at issue were clearly not. n81

The Berge panel relied upon neither an analysis of the statutory language nor of the common law meaning of the terms in question as is required by the Wells/Neder framework. Instead, the court cited its 1974 opinion in United States v. Snider n82 and asserted that it was "making explicit" its "previously unclear" suggestion in a footnote that the civil False Claims Act includes a materiality element. n83

In fact, Snider provides no support for the imposition of a materiality requirement. Snider did not involve the False Claims Act at all, but a prosecution for supplying "false or fraudulent" information to the Internal Revenue Service in violation of *26 U.S.C. § 7205.* n84 The court's discussion of the False Claims Act was limited to a footnote analogizing the criminal version of the False Claims Act to the Internal Revenue Code. The Snider court stated in obvious dicta that the criminal version of the False Claims Act contained a materiality requirement. As was discussed earlier in this article, no other circuit agrees. n85 Despite the suggestion in Berge to the contrary, Snider did not hold that the civil False Claims Act contained a materiality requirement, as it did not even address the civil version of the False Claims Act.

Tyger Constr. Co. v. United States n86 is also cited in Berge. Tyger likewise lacks any reasoned analysis or supporting precedent for imposing a materiality requirement on False Claims Act claims. Instead, the only rationale offered in Tyger was the court's desire to avoid imposing False Claims Act liability for "mere clerical errors." n87 However, as is discussed below, the scienter requirement of the False Claims Act resolves this concern.

VIII. The Policy Rationale For Imposing a Materiality Requirement Is Unpersuasive

Courts that have imposed a materiality element upon actions brought under the False Claims Act have ostensibly done so in an attempt to prevent the imposition of False Claims Act liability for innocent or [*856] trivial mistakes. n88 However, in Wells, the Supreme Court rejected this same argument that materiality should be added as an element of *18 U.S.C. § 1014* to avoid imposition of substantial penalties on arguably trivial or innocent conduct. n89 The Court noted that the mens rea component of the statute assured against its inappropriate application to such conduct:

. . .[A]n unqualified reading of § 1014 poses no risk of criminalizing so much conduct as to suggest that Congress meant something short of the straightforward reading. The language makes a false statement to one of the enumerated financial institutions a crime only if the speaker knows the falsity of what he says and intends it to influence the institution. n90

Like the statute in Wells, the False Claims Act has a scienter element which precludes the imposition of liability for

innocent conduct. The False Claims Act requires that the false or fraudulent claims for payment be "knowingly" submitted to the government, as that term is defined by the False Claims Act. n91 It is the claim for payment that the defendant "knows" to be false that violates the False Claims Act. As numerous courts have found, a true clerical error or innocent mistake made without the requisite knowledge would not meet the scienter requirement necessary for the imposition of liability under the False Claims Act. n92

Indeed, the Senate Report concerning the 1986 amendments-the vehicle by which the definition of "knowingly" was added to the False Claims Act-emphasizes that "the Committee is firm in its intention that the Act not punish honest mistakes or incorrect claims submitted through mere negligence." n93

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The policy argument that a materiality requirement is nonetheless required in order to prevent liability under the False Claims Act for the knowing submission of claims that are false in only a trivial way is likewise not a sufficient basis for judicially engrafting such a requirement. If the government has specified the terms of performance, it ill-behooves the defendant to argue that its knowing non- compliance with those requirements should be excused because the claim is false only in a trivial sense. n94

Allowing defendants to assert the triviality of their knowingly false statements contravenes the "square corners" requirement recognized long ago by the Supreme Court in the area of government contracting and which has been adopted in the civil False Claims Act:

[P]arties that contract with the Government are held to the letter of the contract-irrespective of . . . whether the contract's purpose could be effectuated in some other way-under the maxim that 'men must turn square corners when they deal with the Government' . . . [A] manufacturer who knowingly supplies nonconforming goods to the Government based on a belief that the nonconforming goods are just as good as the goods specified in the contract is liable [under the False Claims Act]. n95

Moreover, as a practical matter, a false statement to the government to get a false claim paid or approved will not usually be of a trivial nature. n96 And defendants are certainly free to lobby Congress to amend the terms of the civil False Claims Act to add a materiality requirement if there are in fact a rash of trivial False Claims Act cases filed. n97 However, the hypothetical parade of horribles of False Claims Act claims predicated upon claims or statements that are false in only a trivial sense provides no basis for judicial legislation of a materiality requirement out of whole cloth.

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IX. Problems Inherent in Adding Materiality as an Element

Those courts that have elected to rewrite the False Claims Act by adding nonexistent terms face a dilemma: Where exactly is a materiality requirement inserted? Is it the claim that must be false in a "material" way, or a statement that must be false in a "material" way?

The most often cited case for imposing a materiality requirement for claims brought under the civil False Claims Act casts the inquiry into the "materiality" of a false statement into whether it has a "natural tendency" to influence the government's action or is "capable" of influencing its action. n98 Well before Berge, employment of this same approach in a civil False Claims Act case was criticized in Tyger because it "insulate[s] from False Claims Act liability a class of contractors who make knowing or even intentionally false claims that are too preposterous or inflated to influence a

reasonable person" and improperly implies that damages are a necessary element of a False Claims Act action. n99 The case law to date illustrates the problems inherent in judicial tinkering with the elements of a statutory claim and demonstrates that the criticisms expressed in Tyger were well-founded.

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A. The Addition of a Materiality Requirement Effectively Results in the Improper Imposition of Additional Elements of Common Law Fraud for Claims Brought Under the False Claims Act

As dozens of courts have made emphatically clear, damages are simply not a required element for a False Claims Act claim. n100 Reliance is likewise not an element of a False Claims Act action. n101 Nonetheless, imposition of a requirement of damages or reliance essentially occurred in two cases involving the U.S. Department of Housing and Urban Development (HUD) arising in the United States District Court for the Southern District of Mississippi as a result of the adoption of a materiality requirement. The Fifth Circuit's subsequent actions, however, have caused these decisions to be of doubtful precedential value.

In United States v. Intervest Corp., n102 the court held that the defendants' false statements that a rental property was "decent, safe, and sanitary" made in requests for housing assistance payments submitted to HUD were, as a matter of fact, immaterial to HUD's decision to pay because HUD approved the requests for payment despite its actual knowledge of the property's deplorable condition. n103

Similarly, in United States v. Southland Mgmt. Corp., n104 HUD had adopted a policy of paying housing assistance requests submitted by landlords of low- income housing who certified that a property was "decent, safe, and sanitary," even when HUD knew that the property did not meet those specifications. HUD's purpose was to further its policy of protecting low-income tenants who would be adversely affected if HUD cut off reimbursements to slum lords, n105 planning instead to pursue its False Claims Act remedies at a later time. The district court held that because HUD paid the vouchers knowing the certifications were false, the government could not establish that the certifications were material. n106

[*860]

These decisions immunized defendants who the government knew had submitted false claims, because the government could not show in such circumstances that the false statement was "material" or, as defined by the courts, capable of influencing the government's decision to pay, since it knew the statements were false and paid the claims anyway.

As such, the rationales expressed by the district courts in Intervest and in Southland inappropriately changed the focus from the conduct of the defendant to the conduct of the government processing clerk. The government's decision to pay claims had absolutely no bearing on whether the defendant knowingly submitted false claims. As the First Circuit stated in United States v. Krizek, "It is the conduct of the [defendant], not the disposition of the claims by the government that creates False Claims Act liability." n107 A contractor's liability for submitting false claims is complete upon submission of the claim; government acceptance of that claim does not absolve a defendant from liability under the False Claims Act. n108 Focus on what happens after the claim is submitted effectively transformed what was labeled a materiality requirement into a damages or a reliance requirement in contravention of decades of case law.

This case law also ignored reality. The clerk who processes the payment requests generally lacks the discretionary authority to deny payment where the required information is provided and certified on the appropriate form-even where the individual approving the claim has knowledge that the certification is false. n109

A panel of the Fifth Circuit later reversed the district court opinion in Southland. n110 The Fifth Circuit panel rejected the proposition that the materiality of a statement is dependent upon how large a role the truth (or falsity) of the statement played in the government's ultimate decision to pay the claim. n111 The panel likewise disavowed the suggestion that the misrepresentation must have actually influenced the relevant governmental entity in order to be material. n112 Instead, the panel concluded that, because the certification of the property's condition was required by HUD, it had the potential to influence HUD's payment [*861] decision and was therefore material. n113 After a rehearing, the Fifth Circuit changed course and affirmed the trial court on other grounds while expressly declining to reach the materiality issues considered by the panel and by the trial court. n114

Regardless of the ambiguity that may be prevailing within the Fifth Circuit, the rationale of the following passage from Kay v. United States- which was quoted in its entirety by the Supreme Court in Wells-applies with equal force to rebut the proposition that materiality is a required element of claims brought under the civil False Claims Act:

It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important . . . . Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense. n115

Conclusion

The plain language of the False Claims Act does not include materiality as an element, nor should such term be implied by the courts for sections (a)(1), (2), (6), or (7) under the controlling analysis set forth in the Supreme Court's Wells and Neder decisions. The refusal of courts to require a showing of materiality in criminal cases under the False Claims Act further bolsters the conclusion that materiality is not a required element in civil cases. Because application of the Wells and Neder decisions has led to inconsistent and even erroneous lower court decisions, the need for clarification persists.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawCriminal OffensesSchemes to DefraudElementsGovernmentsCourtsCommon LawLabor & Employment LawEmployer LiabilityFalse Claims ActRemediesCivil Penalties

FOOTNOTES:

n1 See *31 U.S.C. §§3729*-3733 (1986). The legislation that evolved into what is known popularly today as "The False Claims Act" was originally enacted in 1863, codified by Act of 1874, re-codified in 1926 and again in 1982. As such, this enactment was found in the following places over time: Act of Mar. 2, 1863, Ch. 67, *12 Stat. 696 (1863);* U.S. Rev. Stat. tit. 36 §§ 3490-3494 (1875); *31 U.S.C. §§ 231*-235 (1926); id. §§ 3729-3731 (1982). For a discussion of the evolution of the False Claims Act into its present form, see 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 to the United States ex rel. Gravitt v. Gen. Elec. Co. Litig., *18 Ohio N.U. L. Rev. 35 (1991).*

n2 *Cook County v. United States ex rel. Chandler, 123 S.Ct. 1239, 1248 (2003)* (quoting S. Rep. No. 99-345 p.2 (1986) ("The basic purpose of the 1986 amendments was to make the FCA a 'more useful tool against fraud in modern times.'")).

n3 Judgments and settlements from False Claims Act cases for health care fraud alone exceeded $ 1.2 billion in 2001 and $ 858 million for the first part of fiscal year 2002. Robert D. McCallum, Jr., Assistant Attorney General, Remarks to the American Health Lawyers Association Meeting, Sept. 30, 2002, available at http://www.usdoj.gov/civil/speeches/speech2002.htm.

n4 *519 U.S. 482 (1997).*

n5 *527 U.S. 1 (1999).*

n6 *Wells, 519 U.S. at 489-90* (citations omitted); *Neder, 527 U.S. at 20* (citing Wells).

n7 *Wells, 519 U.S. at 491* (citations omitted); *Neder, 527 U.S. at 22-23* (citations omitted).

n8 *Neder, 527 U.S. at 23-25.*

n9 See discussion infra Part IV.A.

n10 *Wells, 519 U.S. at 491.*

n11 *Neder, 527 U.S. at 22-23.*

n12 From the time of its enactment until 1934, the civil provisions of the False Claims Act did not state the acts which resulted in civil liability, instead incorporating by reference the predicate acts specified in the criminal provisions. E.g., *31 U.S.C. § 231* (1926). In 1934, reference to the criminal provisions was eliminated by reciting the predicate language in the civil provisions. *31 U.S.C. § 231* (1935).

n13 These segments focus on the knowing presentation of "false or fraudulent claim[s]."

n14 *31 U.S.C. § 3729*(b).

n15 *519 U.S. at 487.*

n16 *Id. at 490* (citation omitted).

n17 *Id. at 491.*

n18 *Id. at 492-95.*

n19 *Id. at 493* (citation omitted).

n20 *527 U.S. 1.*

n21 *Id. at 22-23.*

n22 *Id. at 23-25.*

n23 Compare Act of Mar.2, 1863, ch. 67, *12 Stat. 696 (1863)* and *31 U.S.C. § 3729*(1988) (both use "false" or "fraudulent" to define conduct for which a person can be held liable).

n24 Focusing on each distinct cause of action existing under the False Claims Act is consistent with Supreme Court precedent. In *United States v. Gaudin, 515 U.S. 506, 509 (1995),* the Supreme Court noted that *18 U.S.C. § 1001* (the statutory provision which criminalizes the making of false statements) was assumed by the parties to contain a materiality requirement throughout the statute even though only the first clause of the statute provided that materiality was an element the government had to prove. In his concurring opinion, Chief Justice Rehnquist noted that the second clause of § 1001 did not contain a materiality requirement. Instead, the second clause proscribed only making any "false, fictitious, or fraudulent statements or representations." *Id. at 524* (Rehnquist, C.J., concurring). As such, "whether 'materiality' is indeed an element of every offense under § 1001 is not at all obvious from its text." Id. Thereafter, in 1996, Congress revised § 1001 to add a materiality requirement to all of its clauses.

n25 *31 U.S.C. § 3729*-3732.

n26 The word "material" appears only twice, both times in *31 U.S.C. § 3730*(b)(2). The statute uses this term only to modify the type of evidence a relator is required to supply the United States Department of Justice at the time of filing the initial complaint.

n27 See Act of Mar. 2, 1863, ch. 67, *12 Stat. 696 (1863);* U.S. Rev. Stat. tit. 36 §§ 3490-3494 (1865); Id. §§ 3490-3494 (1875); *31 U.S.C. §§ 231*-235 (1926); Id. §§ 231-235 (1935); Id. §§ 231-235 (1943); Id. §§ 3729-3731 (1982); Id. §§ 3729-3733(1986); Id. §§ 3729-3733 (1988). These various versions of the enactment over time are reproduced in their entirety in Helmer, supra note *, at Appendix 4.

n28 *United States v. Wells, 519 U.S. 482, 497 (1997)* (quoting *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).*

n29 As enacted in 1863, the precursor to the provision now enumerated as (a)(1) similarly prohibited certain persons from making or presenting a claim "knowing such claim to be false, fictitious or fraudulent." See Act of Mar. 2, 1863, ch. 67, § 1, *12 Stat. 696 (1863).* Likewise, as originally enacted, the precursor to the provision currently codified as (a)(2) prohibited certain individuals from inter alia making or using any false statement knowing the same to contain any false or fraudulent statement or entry for the purpose of obtaining the payment

or approval of "such claim." Id. The word "fictitious" was deleted from the False Claims Act as part of the 1982 amendments. See *31 U.S.C. § 3729* (1982). The stated purpose of those amendments was not to make substantive changes to the law, but to restate the law to substitute "simpler language" in place of "awkward and obsolete terms." H.R. Rep. No. 97-651, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 1895.

n30 The authors' research did not disclose any pre-1863 cases that provided a well-settled common law meaning for the term "false claim."

n31 *Wells, 519 U.S. at 491.*

n32 *Neder, 527 U.S. at 21-23.*

n33 See, e.g., *United States v. Coop. Grain & Supply Co., 476 F.2d 47, 60 (8th Cir. 1973)* ("[W]e have decided that a false claim, not only a fraudulent claim, is actionable under the Act . . .").

n34 A "false" claim is simply one that is untrue. It must, of course, be made or presented knowingly (as defined under the False Claims Act *31 U.S.C. § 3729*(b)(1)-(3)) to violate the Act.

n35 Specifically, section (a)(3) imposes liability for any person who "conspires to defraud the Govern-ment by getting a false or fraudulent claim allowed or paid." Sections (a)(4) and (a)(5) impose liability for those who commit certain identified acts with an intent to "defraud." See *31 U.S.C. §3729*(a)(3)- (5) (1988).

n36 Section (a)(6) imposes liability upon one who "knowingly buys, or receives as a pledge . . . public property from an officer or employee of the Government . . . who lawfully may not sell or pledge the property."

n37 Instead, this section imposes liability upon one who "knowingly makes, uses, or causes 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."

n38 *United States v. Wells, 519 U.S. 482, 491 (1997).*

n39 Even were this analysis undertaken, the use of "knowingly" in these sections would rebut any presumption of materiality.

n40 See Helmer, supra note *, at 47-48 (discussing effect of 1943 amendments).

n41 *31 U.S.C. § 3729*(b) (1986).

n42 Id. The context of the statute also confirms what extensive case law establishes: That another common law fraud element-damages-is not a required element of a False Claims Act case. Literally dozens of cases have so construed the Act. See, e.g., *Varljen v. Cleveland Gear Co., 250 F.3d 426, 430-31 (6th Cir. 2001); 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); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991); United States v. Killough, 848 F.2d 1523, 1533 (11th Cir. 1988); United States v. Hughes, 585 F.2d 284, 286 n.1 (7th Cir. 1978); United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 460-61 (5th Cir. 1977), cert. denied, *434 U.S. 1035 (1978); Brown v. United States, 524 F.2d 693, 706 (Ct. Cl. 1975); United States v. Ridglea State Bank, 357 F.2d 495, 497 (5th Cir. 1966); Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964),* cert. denied, *380 U.S. 907 (1965); Toepleman v. United States, 263 F.2d 697, 699* (4th Cir.), cert. denied sub nom. *Cato v. United States, 359 U.S. 989 (1959); United States v. Tieger, 234 F.2d 589, 590 & n.4* (3d Cir.), cert. denied; *352 U.S. 941 (1956); United States v. Rohleder, 157 F.2d 126, 129 (3d Cir. 1946); United States ex rel. Trim v. McKean, 31 F. Supp. 2d 1308 (W.D. Okla. 1998); United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 20 F. Supp. 2d 1017 (S.D. Tex. 1998); United States ex rel. Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507, 1509 (M.D. Tenn. 1996); Wilkins ex rel. United States v. Ohio, 885 F. Supp. 1055, 1060 (S.D. Ohio 1995); United States ex rel. Fallon v. Accudyne Corp., 921 F. Supp. 611, 628 (W.D. Wis. 1995); United States v. Kensington Hosp., 760 F. Supp. 1120, 1127 (E.D. Pa. 1991); United States ex rel. Luther v. Consol. Indus., Inc., 720 F. Supp. 919, 923 (N.D. Ala. 1989); United States v. CFW Constr. Co., 649 F. Supp. 616, 618 (D.S.C. 1986); Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 827 (S.D.N.Y. 1986); Thevenot v. Nat'l Food Ins. Program, 620 F. Supp. 391, 396 (W.D. La. 1985); United States ex rel. Fahner v. Alaska, 591 F. Supp. 794, 798 (N.D. Ill. 1984); United States v. Rapoport, 514 F. Supp. 519, 524 (S.D.N.Y. 1981); United States v. Zulli, 418 F. Supp. 252, 253 (E.D. Pa. 1975); United States v. Silver, 384 F. Supp. 617, 620 (E.D.N.Y. 1974),* aff'd, *515 F.2d 505 (2d Cir. 1975); United States v. Johnston, 138 F. Supp. 525, 527-28 (W.D. Okla. 1956); United States v. Am. Precision Prods. Corp., 115 F. Supp. 823, 827-28 (D. N.J. 1953).*

n43 Act of Mar. 2, 1863, ch. 67, *12 Stat. 696 (1863).*

n44 U.S. Rev. Stat. tit. 36 §§ 3490-3494 (1875) and U.S. Rev. Stat. tit. 70 §5438 (1875). Although the False Claims Act was enacted in 1863 it was not codified until 1874, and then because of delays in printing, it was not actually printed until 1875, hence the citation to 1875.

n45 Compare Act of Mar. 2, 1863, ch. 67, *12 Stat. 696 (1863)* and *18 U.S.C. § 287* (2001) (same language used in both).

n46 Between 1874 and 1934, the civil provisions of the False Claims Act did not state the acts that resulted in civil liability, and instead incorporated by reference the predicate acts specified in the criminal provisions. See U.S. Rev. Stat. tit. 36 §3490 (1865); Id. § 3490 (1875); *31 U.S.C. § 231* (1926). As of 1934, this cross-reference to the criminal code was eliminated and the predicate acts were specified in the civil provisions. See id. § 231 (1935); Id. § 231 (1943).

n47 *31 U.S.C. § 3729* (1982).

n48 H.R. Rep. No. 651, 97th Cong., 2d Sess. 2 (1982), reprinted in 1982 U.S.C.C.A.N. 1895, 2037. The stated purpose of the bill was not to make any substantive change to the law, but only to restate the law to substitute "awkward and obsolete terms" with simpler language. Id. at 1895.

n49 *United States v. Wells, 519 U.S. 482 (1997),* rev'g, *63 F.3d 745, 750 (8th Cir. 1995).*

n50 See *United States v. Nash, 175 F.3d 429, 434* (6th Cir.), cert. denied, *528 U.S. 888 (1999)* (applying Wells); *United States v. Harvard, 103 F.3d 412, 419* (5th Cir.), cert. denied, *522 U.S. 824 (1997); United States v. Upton, 91 F.3d 677, 685 (5th Cir. 1996),* cert. denied, *520 U.S. 1228 (1997); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995),* cert. denied, *520 U.S. 1103 (1997); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992); United States v. Elkin, 731 F.2d 1005, 1009* (2d Cir.), cert. denied, *469 U.S. 822 (1984)* overruled on other grounds by *United States v. Ali, 68 F.3d 1468, 1474-75 (2d Cir. 1995); United States v. Irwin, 654 F.2d 671, 682 (10th Cir. 1981),* cert. denied, *455 U.S. 1016 (1982),* overruled on other grounds by *United States v. Daily, 921 F.2d 994, 1004 (10th Cir. 1990).* The Eleventh Circuit, has expressly declined to decide this issue. *United States v. White, 27 F.3d 1531, 1534-35 (11th Cir. 1994).* The D.C. Circuit assumed without deciding that the Eighth Circuit's opinion in Wells and the Fourth Circuit's dicta in a case not involving § 287 were correct. *United States v. Durenberger, 48 F.3d 1239, 1243 (D.C. Cir. 1995).*

n51 For example, in *United States v. Nash, 175 F.3d 429, 434,* cert. denied, *528 U.S. 888 (1999),* the Sixth Circuit applied the Supreme Court's Wells analysis and concluded that there is no materiality requirement in the criminal provisions of the False Claims Act. The Nash court stated that the plain language of the statute does not mention materiality, and that absent exceptional circumstances, the judicial inquiry is complete: No materiality is mentioned, so there is none in the statute. Id. The Nash court elaborated further that Congress has expressly included "materiality" as a requirement in many of the statutes criminalizing false statements; If courts were to read a materiality requirement into statutes like § 287 where the term does not exist, it would create a surplusage of Congress's use of the term in other statutes. Id. Finally, the Sixth Circuit stated that the legislative history of § 287 does not indicate that Congress intended to make materiality a necessary element of the statute. Id. The Sixth Circuit's analysis is in harmony with Wells, as well as holdings in the Second, Fifth, Ninth, and Tenth Circuits. See supra note 50 and accompanying text.

n52 *519 U.S. 482 (1997),* rev'g, *63 F.3d 745 (8th Cir. 1995).*

n53 *63 F.3d 745, 750 (8th Cir. 1995).*

n54 The only other circuit to come close to the Eighth's Circuit's view is the Fourth Circuit. In dicta in United States v. Snider, a non-False Claims Act case, the Fourth Circuit conflated materiality with intent to defraud, and stated that materiality has been required as an element of § 287 while offering no case citation on point. *502 F. 2d 645, 652 (4th Cir. 1974).*

n55 See, e.g., United States ex rel.*Costner v. United States, 317 F.3d 883, 886-87 (8th Cir. 2003); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999),* aff'ing, *998 F. Supp. 971, 991-92 (E.D. Wis. 1998); United States ex rel. Bennett v. Genetics & IVF Inst., Inc., No. 98-2119, 1999 U.S. App. LEXIS 27911* at *7 (4th Cir. Oct. 28, 1999); *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1998); United States ex rel. Berge v. Trs. of Univ. of Ala., 104 F.3d 1453* (4th Cir.), cert. denied, *522 U.S. 916 (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); United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 461 (5th Cir. 1977),* cert. denied, *434 U.S. 1035 (1978);* United States ex rel. Bidani v. Lewis, No. 97 C 6502, *2001 U.S. Dist. LEXIS 260* at *22 (N.D. Ill. Jan. 12, 2001), later opinion *2003 U.S. Dist. LEXIS 3291* at *5 (N.D. Ill. Mar. 5, 2003); *United States ex rel. Riley v. St. Luke's Episcopal Hosp., No. H-94-3996, 2002 U.S. Dist. LEXIS 6289,* at **9, 13-14 (S.D. Tex. Apr. 1, 2002), amended by *200 F. Supp. 2d 673 (S.D. Tex. 2002),* amendment vacated and original opinion reinstated by *2002 U.S. Dist. LEXIS 6287* (S.D. Tex. Apr. 5, 2002); United States ex rel. King v. F.E. Moran, Inc., No. 00 C 3877, *2002 U.S. Dist. LEXIS 16277,* at **29-30 (N.D. Ill. Aug. 29, 2002); *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc. 142 F. Supp. 2d 717, 729*

(W.D.N.C. 2001); United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39, 50 (D. Mass. 2001); United States ex rel. Trice v. Westinghouse Hanford Co., No. CS-96-0171-WFN, 2000 U.S. Dist. LEXIS 8838 at *73 (E.D. Wash. Mar. 1, 2000); United States ex rel. Koch v. Koch Indus., Inc., 91-*CV-763-K, 1999 U.S. Dist. LEXIS 16632,* at *9 (N.D. Okla. Sept. 29, 1999); *United States ex rel. Durcholz v. FKW, Inc., 997 F. Supp. 1159, 1167 (S.D. Ind. 1998),* aff'd on other grounds, *189 F.3d 542 (7th Cir. 1999); United States ex rel. Joslin v. Cmty. Home Health, 984 F. Supp. 374, 383 (D. Md. 1997);* United States v. Frierson, No 95 C 503, *1997 U.S. Dist. LEXIS 3368* *33 (N.D. Ill. Mar. 20, 1997); United States ex rel. Walle v. Martin Marietta Corp., 92-3697 § I(5), *1997 U.S. Dist. LEXIS 138* at *4-5 (E.D. La. Jan. 3, 1997); *Tyger Constr. Co. v. United States, 28 Fed. Cl. 35, 55 (1993).* The concurring opinion in *United States v. Southland Mgmt. Corp., 326 F.3d 669 (5th Cir. 2003)* (Jones, J., concurring), likewise fails to take the Wells/Neder framework into consideration.

n56 *United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999),* cert denied, *531 U.S. 880 (2000); United States ex rel. Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732-33* (7th Cir.), cert. denied, *528 U.S. 1038 (1999); United States ex rel. Wilkins v. N. Am. Constr. Corp., 173 F.Supp.2d 601, 619-30 (S.D. Tex. 2001),* modifying *101 F. Supp. 2d 500, 515-17 (S.D. Tex. 2000);* United States v. Job Res. for the Disabled, No. 97 C 3904, *2000 U.S. Dist. LEXIS 12616,* at **2-12 (N.D. Ill. Aug. 14, 2000) (reconsidering earlier opinion reported at *2000 U.S. LEXIS 6343,* at *9 (N.D. Ill. May 5, 2000)); *United States v. Southland Mgmt. Corp., 95 F. Supp. 2d 629, 636-38 (S.D. Miss. 2000),* rev'd, *288 F.3d 665 (5th Cir. 2002),* reh'g en banc granted by *307 F.3d 352 (5th Cir. 2002),* aff'd on other grounds, *326 F.3d 669 (5th Cir. 2003); United States ex rel. Roby v. Boeing Co., 184 F.R.D. 107, 112 (S.D. Ohio 1998).*

n57 *184 F.R.D. 107, 112 (S.D. Ohio 1998).*

n58 Defendant Boeing Co. did not challenge this ruling on materiality in its subsequent unsuccessful appeal of adverse summary judgment rulings. See *United States ex rel. Roby v. Boeing Co., 302 F.3d 637 (6th Cir. 2002),* cert. denied, *2003 U.S. LEXIS 5190* (June 27, 2003).

n59 *192 F.3d 402, 415 (3d Cir. 1999),* cert. denied, *531 U.S. 880 (2000).*

n60 Id.

n61 *173 F. Supp. 2d 601, 623 (S.D. Tex. 2001)* [hereinafter Wilkins II] modifying *101 F. Supp. 2d 500, 516 (S.D. Tex. 2000)* [hereinafter Wilkins I].

n62 *173 F.Supp.2d at 624-28.*

n63 *Id. at 630.*

n64 The decisional history of this litigation is notable. In Wilkins I, the court held that the common law mandated imposition of a materiality element. *101 F.Supp.2d at 517.* However, the opinion cited as case holdings the arguments of lawyers to the court, which historically were set out in reported decisions before the court's opinion was stated. Id. In fact, the cited decisions did not support the propositions on which the Wilkins I decision relied. To its credit, the trial court elected sua sponte in Wilkins II to reconsider its earlier flawed opinion, after the Fifth Circuit ordered briefing concerning that opinion in conjunction with its consideration of

the appeal taken from the district court's opinion in *United States v. Southland Mgmt. Corp., 95 F. Supp. 2d 629 (S.D. Miss. 2000).* See docket entry of May 21, 2001, supplemental briefs requested, United States v. Southland Mgmt., No. 00-6027 (5th Cir. 2003). On reconsideration, the Wilkins II court found itself reduced to concluding that its earlier conclusion was not directly contradicted by the early cases-an analysis so far from that mandated by Wells and Neder that Wilkins II reduces to judicial fiat.

n65 *95 F. Supp. 2d 629, 636 (S.D. Miss. 2000),* rev'd, *288 F.3d 665 (5th Cir. 2002),* reh'g en banc granted by *307 F.3d 352 (5th Cir. 2002),* aff'd on other grounds, *326 F.3d 669 (5th Cir. 2003).*

n66 Id.

n67 *United States v. Southland Mgmt. Corp., 288 F.3d 665, 677-678 (5th Cir.2002),* reh'g en banc granted by *307 F.3d 352 (5th Cir. 2002),* aff'd on other grounds, *326 F.3d 669 (5th Cir. 2003).*

n68 *Id. at 675.* The cases that the Fifth Circuit cited for this proposition, *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997)* and *United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 461 (5th Cir. 1977),* cert. denied, *434 U.S. 1035 (1978),* were obviously decided without consideration of the Supreme Court's subsequent decisions in Wells and in Neder.

N69 *Southland Mgmt. Corp., 288 F.3d at 678 n.15.*

n70 *326 F.3d 669, 671.*

n71 Id.

n72 *183 F.3d 730, 732-33* (7th Cir.), cert. denied, *528 U.S. 1038 (1999).*

n73 *Id. at 732.*

n74 *Id. at 732-33.*

n75 *Id. at 732.*

n76 *31 U.S.C. §3729*(b).

n77 *2000 U.S. Dist. LEXIS 12616* at **2-8 (reconsidering earlier opinion reported at *2000 U.S. Dist. LEXIS 6343* at *9.

n78 *104 F.3d 1453* (4th Cir.), cert. denied, *522 U.S. 916 (1997).*

n79 See, e.g., *United States ex rel. Bennett v. Genetics & IVF Inst., Inc., No. 98-2119, 1999 U.S. App.*

LEXIS 27911 at *7 (4th Cir. 1999); *United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999),* aff'g *998 F. Supp. 971, 991-92 (E.D. Wis. 1998); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1998); United States ex rel. Phillips v. Pediatric Servs. of Am., Inc. 142 F. Supp. 2d 717, 729 (W.D.N.C. 2001); United States ex rel. Durcholz v. FKW, Inc., 997 F. Supp. 1159, 1167 (S.D. Ind. 1998),* aff'd on other grounds, *189 F.3d 542 (7th Cir. 1999); United States ex rel. Joslin v. Cmty. Home Health, Inc., 984 F. Supp. 374 (D. Md. 1997).* The progeny of Berge have likewise been blindly relied upon by other courts without any consideration of the impact of Wells and Neder upon Berge's holding. See, e.g., *United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39, 50 (D. Mass. 2001)* (following Harrison).

n80 See *United States ex rel. Roby v. Boeing Co., 184 F.R.D. 107, 112 (S.D. Ohio 1998)* (decisions such as Berge holding that materiality was an element of the False Claims Act were weakened by the Supreme Court's subsequent decision in Wells).

n81 *Berge, 104 F.3d at 1459, 1461-62.*

n82 *502 F.2d 645, 652 n.12 (4th Cir. 1974).*

n83 *Berge, 104 F.3d at 1459.*

n84 *502 F.2d at 646-47, 650.*

n85 See discussion infra Part V.

n86 *28 Fed. Cl. 35, 55 (1993).*

n87 Id.

n88 See, e.g., *Tyger Constr. Co., 28 Fed. Cl. at 55* (mere clerical errors should not be subject of False Claims Act liability); *Phillips v. Pediatric Servs. of Am., Inc., 142 F. Supp. 2d 717, 729 (W.D.N.C. 2001)* (mistakes that were product of shoddy record-keeping do not constitute false claims).

n89 *Wells, 519 U.S. at 498.*

n90 *Id. at 498-99.*

n91 *31 U.S.C. § 3729*(b). For purposes of the False Claims Act, "knowingly" means "that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information and no proof of specific intent to defraud is required." Id.

n92 See, e.g., *Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1420-21 (9th Cir. 1992)* (relator's criticism of defendant's calculations prove no more than an "innocent mistake." Without more, the common

failings of engineers and other scientists are not culpable under the [FCA]); *United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991)* (innocent mistakes and mere negligence are defenses to a False Claims Act claim); *United States ex rel. Roby v. Boeing Co., 184 F.R.D. 107, 112 (S.D. Ohio 1998)* (False Claims Act not enacted to address scientific dispute, but is "concerned with persons who knowingly submit false or fraudulent claims for payment to the United States.").

n93 S. Rep. No. 99-345, at 7 (1986) reprinted in 1986, U.S.C.C.A.N. 5266, 5272.

n94 Cf. *Kay v. United States, 303 U.S. 1, 5 (1938),* quoted in *Wells, 519 U.S. at 494-95* ("It does not lie with one knowingly making false statements with intent to mislead . . . to say that the statements were not influential or the information not important.").

n95 *United States ex rel. Compton v. Midwest Specialties, Inc., 142 F.3d 296, 302-05 (6th Cir. 1998),* citing *Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-86 (1947); Rock Island, A & L. R. Co. v. United States, 254 U.S. 141, 143 (1920); United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Nat'l Wholesalers, 236 F.2d 944 (9th Cir. 1956),* cert. denied, *353 U.S. 930 (1957);* see also *United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d. 409, 413-14 (6th Cir. 2002); Varljen v. Cleveland Gear Co., 250 F.3d 426, 430 (6th Cir. 2001).*

n96 Cf. *Wells, 519 U.S. at 499* ("A statement made for the purpose of influencing a bank will not usually be about something a banker would regard as trivial . . . .").

n97 Such lobbying would not likely be successful. As noted in note 42, supra, the False Claims Act can be violated even if the United States has not suffered any damages. Thus, if a zero damage case can be sufficient for False Claims Act liability, why should a small or trivial damage case not be sufficient?

n98 *Berge, 104 F.3d at 1460,* citing *United States v. Norris, 749 F.2d 1116, 1122 (4th Cir. 1984),* cert. denied, *471 U.S. 1065 (1985).* This approach is consistent with the way in which the Supreme Court has often defined materiality. See, e.g., *Kungys v. United States, 485 U.S. 759, 770 (1988)* (material statement is one that "must have a natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed.") (internal citation omitted); see also *Neder v. United States, 527 U.S. 1, 16 (1999).* For an alternative formulation of materiality in the False Claims Act context, see *United States ex rel Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999),* cert. denied, *531 U.S. 880 (2000)* (relying upon the definition in the Restatement of Torts). At least one court has explicitly recognized that the implied certification theory for False Claims Act liability and whether the falsity of the statement could or would have influenced the government's decision to pay "essentially requires a materiality analysis." *United States ex rel. Pogue v. Diabetes Treatment Ctrs., 238 F. Supp. 2d 258, 264 (D. D.C. 2003)* (discussing inter alia *Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994); United States v. TDC Mgmt. Corp., 288 F.3d 421, 426 (D.C. Cir. 2002); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999)).* In *United States ex rel. Mikes v. Strauss, 274 F.3d 687, 697 (2d Cir. 2001),* the Second Circuit specifically declined to address the materiality issue.

n99 *Tyger Constr. Co. v. United States, 28 Fed. Cl. 35, 55 (1993).*

n100 See supra note 42.

n101 *United States v. Ehrlich, 643 F.2d 634, 639 (3d Cir. 1981); United States v. Bd. of Educ., 697 F. Supp. 167, 179 (D. N.J. 1988); United States v. Rapoport, 514 F. Supp. 519, 523-24 (S.D.N.Y. 1981);* United States v. Hughes Aircraft Co., No. CV 89-6842-WJR(Sx), *1991 U.S. Dist. LEXIS 20548* at **4-5 (C.D. Cal. Jan. 17, 1991); see also *Neder, 527 U.S. at 25* (recognizing that elements of reliance or damages required at common law for fraud would be inconsistent under language of fraud statutes prohibiting "scheme to defraud" and not just a completed fraud).

n102 *67 F. Supp. 2d 637, 647 (S.D. Miss. 1999).*

n103 *Id. at 648.*

n104 *95 F. Supp. 2d 629, 636 (S.D. Miss. 2000),* rev'd, *288 F.3d 665 (5th Cir. 2002),* reh'g en banc granted by *307 F.3d 352 (5th Cir. 2002),* aff'd on other grounds, *326 F.3d 669 (5th Cir. 2003).*

n105 *Id. at 639 & n.10.*

n106 Id.

n107 *111 F.3d 934, 940 (D.C. Cir. 1997).*

n108 See *Varljen v. Cleveland Gear Co., 250 F.3d 426, 431 (6th Cir. 2001)* (citing *United States v. Aerodex, Inc., 469 F.2d 1003, 1009 (5th Cir. 1972)).*

n109 E.g., *United States v. Intervest, 67 F. Supp. 2d 637, 648 (S.D. Miss. 1999).*

n110 *United States v. Southland Mgmt. Corp., 288 F.3d 665, 679* (5th Cir.), reh'g en banc granted by *307 F.3d 352 (5th Cir. 2002),* aff'd on other grounds, *326 F.3d 669 (5th Cir. 2003).*

n111 Id.

n112 Id.

n113 Id. The panel believed itself bound by pre- Wells/Neder precedent in not reaching the materiality issue. However, the panel did recognize that a future panel of the Fifth Circuit confronted with the issue of whether materiality is an element of the False Claims Act would "need to assess whether and to what extent Wells and Neder 'undermine'" prior Fifth Circuit precedents. *Southland Mgmt. Corp., 288 F.3d at 678 n.15.*

n114 *326 F.3d 669, 771 (5th Cir. 2003).*

n115 *United States v. Wells, 519 U.S. 482, 494-95,* (1997) (quoting *Kay v. United States, 303 U.S. 1, 5-6 (1938)).*