

Covington Burling LLP
Decision Tracker: Universal Health Services v. United States ex rel. Escobar

Case Citation	Date	Court	Circuit	Industry Sector	Escobar Issue	Posture	Disposition	Summary of Holding
United States ex rel. Thayer v. Planned Parenthood of the Heartland, Inc., No. 4:11-cv-00129-JAJ-CFB, 2016 WL 7474797 (S.D. Iowa June 21, 2016)	6/21/2016	S.D. Iowa	8th Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Some Claims Dismissed/Denied; Some Claims Proceed	Relator adequately pled an implied certification claim, materiality, and scienter in its complaint alleging that defendant health services provider fraudulently billed Medicaid for reproductive health services by impliedly certifying compliance with applicable Iowa Medicaid laws and regulations.
United States ex rel. Creighton v. Beauty Basics Inc., No. 2:13-CV-1989-VEH, 2016 WL 3519365 (N.D. Ala. June 28, 2016)	6/28/2016	N.D. Ala.	11th Cir.	Education	Implied Certification; Materiality	Motion to Amend Complaint	Claims Dismissed/Denied	Relator inadequately pled an implied certification claim and materiality in its complaint alleging that defendant beauty school fraudulently submitted financial aid applications to the U.S. Department of Education by impliedly certifying compliance with accreditation requirements. In order to raise an implied certification claim, relator "must" allege the two-part falsity test set forth in <i>Escobar</i> . Relator's proposed amended complaint did not contain sufficient "specific representations about the goods or services provided" to satisfy the "rigorous" standard of materiality under <i>Escobar</i> .
United States ex rel. Voss v. Monaco Enterprises, Inc., No. 2:12-CV-0046-LRS, 2016 WL 3647872 (E.D. Wash. July 1, 2016)	7/1/2016	E.D. Wash.	9th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relators did not sufficiently demonstrate materiality in support of claims that defendant contractor fraudulently submitted claims for payment by certifying compliance with relevant contractual and regulatory requirements. <i>Escobar</i> "reinforced the necessity of pleading facts to support allegations of materiality" and stated that "limits on FCA liability are to be addressed through strict enforcement of the materiality and scienter requirements."
United States ex rel. Dresser v. Qualium Corp., No. 5:12-cv-01745-BLF, 2016 WL 3880763 (N.D. Cal. July 18, 2016)	7/18/2016	N.D. Cal.	9th Cir.	Health Care	Materiality	Motion to Dismiss	Claims Dismissed/Denied	The government inadequately pled an implied certification claim and materiality in its complaint alleging that defendant health care provider fraudulently submitted claims for payment for sleep-related medical devices by certifying compliance with relevant Medicare regulations. On materiality, the government alleged that it would not have paid defendants had it known of regulatory noncompliance, but it did "not explain why." This failure does not meet <i>Escobar</i> 's "heightened materiality standard."
United States ex rel. Doe v. Health First, Inc., No. 6:14-cv-501-Orl-37DAB, 2016 WL 3959343 (M.D. Fla. July 22, 2016)	7/22/2016	M.D. Fla.	11th Cir.	Health Care	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled an implied certification claim that defendant health care providers fraudulently submitted claims for reimbursement to Medicare by impliedly certifying compliance with the Anti-Kickback Statute and the Stark Act. After <i>Escobar</i> , the two prongs of the falsity test "must exist to impose liability under the [Implied] Certification Theory." Relators must "be mindful" of this "obligation" when filing a complaint.
United States ex rel. Se. Carpenters Reg'l Council v. Fulton Cty., Georgia, No. 1:14-CV-4071-WSD, 2016 WL 4158392, at *1 (N.D. Ga. Aug. 5, 2016)	8/5/2016	N.D. Ga.	11th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relators inadequately pled materiality in its complaint alleging that defendant contractor fraudulently submitted claims for payment by certifying compliance with the "prevailing wage" provisions of the Davis-Bacon Act. Relators failed to demonstrate this misrepresentation was "so central" to the contract that "the government would not have paid [defendants'] claims had it known of these violations." Therefore, relators failed to show that defendant's compliance was material to the government's decision to pay their claims.
United States ex rel. Cohen v. City of Palmer, Alaska, 668 Fed. App'x 247 (9th Cir. 2016) (memorandum opinion)	8/12/2016	9th Cir.	9th Cir.	Government Contracts	Implied Certification	Appeal from Dismissal	Claims Dismissed/Denied	Dismissal of relator's complaint alleging that defendant contractor fraudulently applied for government stimulus funds by certifying compliance with certain laws, regulations, and contractual provisions was affirmed on appeal. Relator did not demonstrate that defendant failed to comply with any applicable law. Consequently, relator could not demonstrate that that defendant failed to disclose a material noncompliance which made defendant's statements "misleading half-truths."
New Jersey ex rel. Santiago v. Haig's Service Corp., No. 12-4797 (WJM), 2016 WL 4472952 (D.N.J. Aug. 24, 2016)	8/24/2016	D.N.J.	3d Cir.	Government Contracts	Implied Certification	Summary Judgment	Claims Dismissed/Denied	In a New Jersey FCA case, relator inadequately demonstrated an implied certification claim. Relator alleged in its complaint that defendant fraudulently submitted claims to the state by certifying compliance with the New Jersey Prevailing Wage Act. Since the New Jersey FCA is similar to the federal FCA, the court applied <i>Escobar</i> . Like the federal FCA, the New Jersey FCA "proscribes misrepresentation by omission[.]" But even if the defendant failed to properly pay wages, there was no "statutory or contractual requirement" to certify payrolls for payment.

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United States v. Crumb, No. 15-0655-W5-N, 2016 WL 4480690 (S.D. Ala. Aug. 24, 2016)	8/24/2016	S.D. Ala.	11th Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Proceed	The government adequately pled an implied certification claim for several alleged schemes by defendant health care provider to submit false claims to government health insurers for Botox and ultrasound procedures that were not medically necessary, were not supported by qualifying diagnoses, and were represented as multiple patient encounters. The misrepresentations were material to the government's payment decision because, without them, the underlying claims "are not covered and payable claims under applicable rules, regulations, policies and contract terms."
United States ex rel. Knudsen v. Sprint Communications Co., Nos. C13-04476 CRB, C13-4465 CRB, C13-4542 CRB, 2016 WL 4548924 (N.D. Cal. Sept. 1, 2016)	9/1/2016	N.D. Cal.	9th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled materiality in its complaint alleging that defendant telephone companies fraudulently overcharged the government in providing cellular and data plan services. A failure to meet a regulatory requirement is not per se material to the government's payment decision. To sufficiently plead materiality, the government must show more, "such as alleging that the government consistently refuses to pay claims that violate the allegedly material term."
United States ex rel. Lee v. Northern Adult Daily Health Care Center, 205 F. Supp. 3d 276 (E.D.N.Y. 2016)	9/7/2016	E.D.N.Y.	2d Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled materiality in its complaint alleging that defendant health care center billed government insurers for inappropriate and discriminatory services that were inconsistent with U.S. Department of Health and Medicaid regulations. Under <i>Escobar</i> , a relator must demonstrate that defendant's "misrepresentations were material and that the government would have refused reimbursement had it known of [defendant's] noncompliance" with applicable regulations.
United States v. TXL Mortgage Corp., No. 15-1658 (JEB), 2016 WL 5108019 (D.D.C. Sept. 20, 2016)	9/20/2016	D.D.C.	D.C. Cir.	Financial Services	Materiality	Motion for Default Judgment	Claims Granted	The government adequately demonstrated materiality in its complaint alleging that defendant mortgage company provided "facially inaccurate facts" and "violated key FHA underwriting requirements, which then fraudulently induced the government" into endorsing home mortgage loans which subsequently required payout.
United States ex rel. Rose v. Stephens Institute, No. 09-cv-05966-PJH, 2016 WL 5076214 (N.D. Cal. Sept. 20, 2016); 2016 WL 6393513 (N.D. Cal. Oct. 28, 2016)	9/20/2016	N.D. Cal.	9th Cir.	Education	Implied Certification; Materiality	Reconsideration of Denial of Summary Judgment	Claims Proceed	Relators adequately pled an implied certification claim and materiality in their complaint alleging that defendant university fraudulently obtained funds from the U.S. Department of Education by certifying compliance with Title IV's incentive compensation ban ("ICB"). On implied certification, <i>Escobar</i> "did not establish a rigid two-part test for falsity that must be met every single implied certification case." Here, defendant did make "specific representations" in its payment claims that were "misleading half-truths." On materiality, "[n]othing in <i>Escobar</i> suggests that actions short of a complete revocation of funds are irrelevant to the court's materiality analysis." Thus, relators' evidence concerning the government's use of corrective reforms, fines, and settlement agreements show that ICB compliance was "capable of influencing" the government's payment decision. On October 28, 2016, the court certified three questions for interlocutory appeal: (1) whether <i>Escobar</i> 's two-part test must always be satisfied for implied certification liability; (2) whether an educational institution automatically loses its institutional eligibility if it fails to comply with the ICB; and (3) whether <i>Escobar</i> overruled <i>United States ex rel. Hendow v. Univ. of Phoenix</i> , 461 F.3d 1166, 1174 (9th Cir. 2006), finding that an ICB violation is material under the FCA.
United States ex rel. George v. Fresenius Medical Care Holdings, Inc., No. 2:12-cv-00877-AKK, 2016 WL 5361666 (N.D. Ala. Sept. 26, 2016)	9/26/2016	N.D. Ala.	11th Cir.	Health Care	Implied Certification; Materiality	Summary Judgment	Claims Dismissed/Denied	Relator inadequately demonstrated an implied certification claim and materiality in its complaint alleging that defendant dialysis provider fraudulently obtained funds from Medicare by purposefully shortening run times and then billing Medicare for full treatment times. Though Medicare does not ask providers to report on treatment duration, there is "an inherent assumption" that treatment will be of a "sufficient duration" to "realize" treatment benefits. Even so, relator failed to provide evidence regarding how much time was shaved off and whether this affected treatment efficacy, preventing the court from determining whether the defendants omitted "critical qualifying information" that would be material to the payment decision.

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United States ex rel. Ferris v. Afognak Native Corp., No. 3:15-cv-0150-HRH, 2016 WL 9088706 (D. Alaska Sept. 28, 2016)	9/28/2016	D. Alaska	9th Cir.	Government Contracts	Materiality	Request for Leave to File Motion for Judgment on the Pleadings	Claims Proceed	Relator's complaint alleged that defendants fraudulently obtained government contracts by falsely certifying that its business complied with the Small Business Administration's 8(a) Business Development Program. Relator also alleged these misrepresentations "had the potential" to influence payment. Under <i>Escobar</i> , "such vague allegations are probably not sufficient." Instead, a relator "must allege some facts that show that the government actually does not pay claims if they involve the statutory violations in question." However, defendants failed to make this argument in its motion for judgment on the pleadings, which instead argued that defendants were eligible 8(a) business, and so leave to file the motion was denied.
United States ex rel. Scharff v. Camelot Counseling, No. 13-cv-3791 (PKC), 2016 WL 5416494 (S.D.N.Y. Sept. 28, 2016)	9/28/2016	S.D.N.Y.	2d Cir.	Health Care	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled materiality in its complaint alleging that defendant substance-abuse treatment center fraudulently submitted claims for Medicaid reimbursement that did not comply with New York Medicaid regulations. Relator's "conclusory assertion" that defendant "failed to comply with material Medicaid regulations" does not meet the "demanding" requirement to allege materiality after <i>Escobar</i> . Specifically, relator failed to connect the fraudulent conduct to specific claims for reimbursement, to explain why the conduct was material, to cite express conditions for reimbursement, and to allege that the government has refused to reimburse other clinics for engaging in similar conduct.
City of Chicago v. Purdue Pharma L.P., 211 F. Supp. 3d 1058 (N.D. Ill. 2016)	9/29/2016	N.D. Ill.	7th Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	The City did not state an implied certification claim in its complaint alleging that defendant pharmaceutical companies deceptively marketed opioid drugs, causing medical professionals to submit false claims for prescription and office visit reimbursement. On implied certification, <i>Escobar</i> abrogated Seventh Circuit doctrine rejecting the implied certification theory. Notwithstanding, the City alleged that it "continues to pay" for false claims, in contradiction to the materiality standard presented in <i>Escobar</i> .
United States ex rel. Miller v. Weston Educational, Inc., 840 F.3d 494 (8th Cir. 2016)	10/19/2016	8th Cir.	8th Cir.	Education	Materiality	Appeal from Summary Judgment to Defense	Claims Proceed	Relators adequately demonstrated materiality in their complaint alleging that defendant university fraudulently induced the U.S. Department of Education to provide Title IV financial aid funds by altering grade and attendance records. The government "expressly conditions" defendant's participation in Title IV with recordkeeping compliance. Also, the government relied upon these records to ensure regulatory compliance. Finally, relators did not have to prove "actual harm" because this is not an element of materiality.
United States ex rel. Nelson v. Sanford-Brown, Ltd., 840 F.3d 445 (7th Cir. 2016)	10/24/2016	7th Cir.	7th Cir.	Education	Implied Certification; Materiality	Appeal from Summary Judgment to Defense	Claims Dismissed/Denied	In case on remand from Supreme Court for reconsideration in light of <i>Escobar</i> , which abrogated court's prior opinion rejecting relator's claims on the ground that the implied certification theory cannot give rise to liability under the FCA, relator failed to establish an implied certification claim based on allegations that defendant, a for-profit higher education enterprise, fraudulently obtained funds from the government by certifying compliance with Title IV regulations. Relator did not meet either of <i>Escobar's</i> two conditions establishing false certification liability (defendant (1) made "specific representations about the goods or services provided" (2) that were rendered "misleading half-truths" based on defendant's "failure to disclose noncompliance with material statutory, regulatory, or contractual requirements"), because he failed to offer any evidence that misrepresentations were made in connection with claims for payment. Relator also failed to establish materiality due to his failure to demonstrate that the "government's decision to pay [defendant] would likely or actually have been different had it known of [defendant]'s alleged noncompliance with Title VI regulations," when the payer-agency had already examined defendant's practices multiple times and declined to impose any penalties.

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United States v. Dynamic Visions, Inc., 216 F. Supp. 3d 1 (D.D.C. 2016)	10/24/2016	D.D.C.	D.C. Cir.	Health Care	Materiality	Summary Judgment (Government Motion)	Claims Granted	The government adequately pled an implied certification claim and materiality in its complaint alleging that defendant home health care provider fraudulently submitted claims for Medicaid reimbursement that did not contain "plans of care" as required by regulation. The government demonstrated materiality through three undisputed forms of evidence: the D.C. Medicaid regulation stated that reimbursement is only made for "authorized services"; the defendant's contract states that the government can withhold payment for regulatory noncompliance; and the Medicaid Director stated it does not reimburse for services without a plan of care.
United States ex rel. Fisher v. IASIS Healthcare LLC, No. CV-15-00872-PHX-JJT, 2016 WL 6610675 (D. Ariz. Nov. 9, 2016)	11/9/2016	D. Ariz.	9th Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Proceed	Relators adequately pled an implied certification claim in their complaint alleging that defendant fraudulently submitted claims for Medicare and Medicaid reimbursement that did not comply with multiple contractual and regulatory requirements. Even though a "legal or contractual violation alone is not enough" to satisfy materiality, relators point to relevant contractual requirements which were "fundamental to Medicare and Medicaid operation and material to any government decision to pay claims." Since these requirements were the "sine qua non" of government payment, relators adequately pled materiality.
New York ex rel. Khurana v. Spherion Corp., No 15 Civ. 6605 (JFK), 2016 WL 6652735 (S.D.N.Y. Nov. 10, 2016); 2017 WL 1437204 (S.D.N.Y. Apr. 21, 2017)	11/10/2016	S.D.N.Y.	2d Cir.	Government Contracts	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relator brought suit under the New York False Claims Act and the New York City False Claims Act, alleging that defendant contractor fraudulently submitted claims to the City and State of New York that did not comply with multiple contractual provisions. Relying on <i>Escobar</i> , the court found that relator inadequately pled an implied certification claim. False certification applies "not to a breach of a contractual provision itself, but instead to a false certification of contractual, statutory, or regulatory compliance made in connection with a claim submission." Relator failed to allege that defendant "expressly certified compliance with any provision of its contract" or made "specific representations" in connection with its claim for payment.
United States ex rel. Panarello v. Kaplan Early Learning Co., No. 11-CV-00353-WMS-JJM (W.D.N.Y. Nov. 14, 2016)	11/14/2016	W.D.N.Y.	2d Cir.	Government Contracts	Implied Certification; Materiality	Reconsideration of Dismissal	Claims Dismissed/Denied	The government inadequately pled an implied certification claim in its complaint alleging defendant contractor fraudulently submitted claims for payment by certifying compliance with the Davis-Bacon Act's requirement to pay "prevailing wages." <i>Escobar</i> clarified that specific representations must be present in "some" circumstances. However, <i>Escobar</i> "cannot be read to impose the 'specific representation' requirement in every case." On materiality, the government must demonstrate more than it would have the "option to decline" payment.
United States ex rel. Grant v. United Airlines, Inc., No. 2:15-cv-00794, 2016 WL 6823321 (D.S.C. Nov. 18, 2016)	11/18/2016	D.S.C.	4th Cir.	Government Contracts	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled an implied certification claim in its complaint alleging that defendant airline fraudulently submitted claims for payment for repair work that was not in compliance with internal policies and industry standards. Though relator alleged violations of internal policies and industry standards, he did not include any evidence that these were incorporated into defendant's contract. Consequently, relator could not meet the requirements of an implied certification theory because it "failed to tether any of the broad allegations of a fraudulent scheme to an actual claim that [defendant] submitted to the government."
United States ex rel. Escobar v. Universal Health Services, Inc., 842 F.3d 103 (1st Cir. 2016)	11/22/2016	1st Cir.	1st Cir.	Health Care	Materiality	Appeal from Dismissal	Claims Proceed	The government sufficiently pled materiality in its complaint alleging that defendant health care provider fraudulently submitted claims for Medicaid reimbursement that did not comply with Massachusetts Medicaid regulations. <i>Escobar</i> requires a "holistic" approach to materiality "with no one factor being necessarily dispositive." Three factors together demonstrate materiality. First, regulatory compliance was a condition of payment. Second, the relevant regulations were "the very essence" of the contractual relationship. Finally, there was no evidence that the government paid claims despite having knowledge of defendants' violations.
United States v. Luce, No. 11 C 05158, 2016 WL 6892857 (N.D. Ill. Nov. 23, 2016)	11/23/2016	N.D. Ill.	7th Cir.	Financial Services	Materiality	Summary Judgment (Government Motion)	Claims Granted	The government sufficiently demonstrated materiality with respect to its claim that defendant mortgage servicer fraudulently submitted housing loan applications that violated U.S. Department of Housing and Urban Development ("HUD") and Federal Housing Administration regulations requiring disclosure of criminal history. The materiality decision was not based merely on a "condition of payment," but on the "actual behavior" of HUD. HUD debarred defendant upon learning of his false certifications.

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United States ex rel. Beauchamp v. Academi Training Center, Inc., 220 F. Supp. 3d 676 (E.D. Va. 2016)	11/30/2016	E.D. Va.	4th Cir.	Government Contracts	Implied Certification; Materiality	Motion for Judgment on the Pleadings	Claims Proceed	Relator adequately alleged an implied certification claim in its complaint alleging that defendant security company fraudulently billed the U.S. Department of State by impliedly certifying compliance with contractual weapon qualifications requirements. "[B]y using payment and other codes that conveyed weapons qualifications information without disclosing defendant's many alleged violations of the contract's weapons qualifications requirement, defendant's claims constituted misrepresentations." On materiality, "common sense" shows that the government's payment decision is affected by whether the weapons were built in accordance with weapons qualifications requirements.
United States v. Savannah River Nuclear Solutions, LLC, No. 1:16-cv-00825-JMC, 2016 WL 7104823 (D.S.C. Dec. 6, 2016)	12/6/2016	D.S.C.	4th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Proceed	The government sufficiently pled materiality in its complaint alleging that defendant nuclear waste disposal contractor fraudulently submitted claims for payment to the U.S. Department of Energy by certifying compliance with contractual provisions that all costs were "allowable." Two factors were used to demonstrate materiality. First, "common sense" suggested that the alleged "unallowability" of certain personnel costs would influence the government's payment decision. Second, defendants' alleged conduct in "covering up" costs suggested they were material. Statements were material even though they were made to a third party and not to the government because the third party had an obligation to forward that information to the government.
United States ex rel. Johnson v. Golden Gate National Senior Care, LLC, 223 F. Supp. 3d 822 (D. Minn. 2016)	12/9/2016	D. Minn.	8th Cir.	Health Care	Materiality	Summary Judgment	Claims Proceed	Relator adequately pled materiality in its complaint alleging that defendant occupational therapy service provider fraudulently submitted Medicare claims in connection with services provided to nursing home patients by certifying compliance with Medicare regulations. Defendant argued that the regulatory violations constitute "conditions of participation" and "not conditions of payment," but this distinction "is not dispositive of the FCA's materiality requirement." Instead, courts must "engage in a fact-intensive inquiry." Thus, "fact issues remain" as to materiality.
United States ex rel. Tessler v. City of New York, No. 14 CV-6455 (JMF), 2016 WL 7335654 (S.D.N.Y. Dec. 16, 2016)	12/16/2016	S.D.N.Y.	2d Cir.	Health Care	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relators inadequately plead an implied certification claim in its complaint alleging that defendant impliedly and fraudulently submitted claims to the federal government by failing to recertify "at least a thousand" Medicare recipients. Relator failed "to identify a sufficiently 'specific' representation about the services provided." On scienter, the relator's complaint supported an inference that defendant acted "through mistake or system error." This does not "remotely support" the inference that defendant "knew (or was reckless in not knowing) that it was causing false claims to be presented."
D'Agostino v. ev3, Inc., 845 F.3d 1 (1st Cir. 2016)	12/23/2016	1st Cir.	1st Cir.	Health Care	Materiality	Appeal from Dismissal	Claims Dismissed/Denied	Relator inadequately pled materiality in its complaint alleging that (1) defendant medical device manufacturer fraudulently caused the Food and Drug Administration ("FDA") to approve its device by making misrepresentation and (2) hospitals have sought reimbursement from the federal government through the Centers for Medicare and Medicaid Services ("CMS"). Ultimately, the court recognized that FCA should not be used as a vehicle to "second-guess" FDA judgments. But even if an FCA claim could proceed, relator inadequately demonstrated materiality. Relator failed to make the necessary allegations showing that defendant's misrepresentations "actually" caused the FDA to grant approval it would not have otherwise granted. Furthermore, the fact that the CMS has continued to reimburse despite allegations "casts serious doubt on the materiality of the fraudulent representations."

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United States ex rel. Williams v. City of Brockton, No. 12-cv-12193-IT, 2016 WL 7428187 (D. Mass. Dec. 23, 2016)	12/23/2016	D. Mass.	1st Cir.	State/Local Government	Materiality	Motion to Dismiss	Claims Proceed	Relator adequately pled materiality in its complaint alleging that defendant police department fraudulently obtained funding from the U.S. Department of Justice by certifying compliance with statutory, regulatory, and contractual requirements related to anti-discrimination. Relator adequately alleged materiality under non-discrimination provisions because they go "to the very essence of the bargain" of the DOJ's decision to provide funding and "compliance is an express condition of payment." Relator also alleged materiality with respect to provisions requiring police departments to maintain the budgeted number of officers after receiving funding; despite relator's failure to "identify the statutes that underlie those requirements," relator alleged that the government has barred payment for violating these requirements.
United States ex rel. Brown v. Celgene Corp., 226 F. Supp. 3d 1032 (C.D. Cal. 2016)	12/28/2016	C.D. Cal.	9th Cir.	Health Care	Implied Certification; Materiality	Summary Judgment	Some Claims Dismissed/Denied; Some Claims Proceed	Relator adequately pled an implied certification claim in its complaint alleging that defendant pharmaceutical company promoted non-medically accepted uses of two drugs, causing physicians to prescribe those drugs for off-label uses, which naturally and foreseeably led to claims being presented to government healthcare programs. <i>Escobar</i> "leaves undisturbed" the Ninth Circuit cases holding that "a claim is 'false' if it is statutorily ineligible for reimbursement." On materiality, it is "highly 'relevant'" that Medicaid Part D regulations only allow for reimbursement for a "medically accepted indication." <i>Escobar</i> "does not foreclose that a statutory requirement may be so central to the functioning of a government program that noncompliance is material as a matter of law."
United States ex rel. Kelly v. Serco, Inc., 846 F.3d 325 (9th Cir. 2017)	1/12/2017	9th Cir.	9th Cir.	Government Contracts	Implied Certification; Materiality	Appeal from Summary Judgment to Defense	Claims Dismissed/Denied	Relator inadequately did not demonstrate an implied certification claim that defendant, a technology and project management services provider, fraudulently submitted claims for payment to the U.S. Department of Defense by impliedly certifying compliance with contractual provisions on cost reporting. Since relator only disputed the cost reporting "format" and did not pinpoint specific misrepresentations in those reports, defendant's implied certification claim failed. Materiality was also not demonstrated because the government had previously accepted these reports.
United States ex rel. Worthy v. Eastern Maine Healthcare Systems, No. 2:14-cv-00184-JAW, 2017 WL 211609 (D. Me. Jan. 18, 2017)	1/18/2017	D. Me.	1st Cir.	Health Care	Materiality	Motion to Dismiss	Claims Proceed	Under the First Circuit's "holistic approach" to materiality, which looks to "1) whether regulatory compliance was a condition of payment; 2) the centrality of the requirement to the regulatory program; and 3) whether the government pays claims despite actual knowledge that certain requirements were violated," relator sufficiently alleged plausible claims that defendant health care provider's violations of Medicare bundling rules were in violation of the FCA. The court particularly found compelling that the government had previously investigated violations of the "three day" and "same day" billing rules as fraud, as this showed that the violation of such rules was "sufficiently important" to the government to be material under the FCA. In addition, relator had sufficiently alleged that the three-day rule was a condition of payment under certain circumstances and that Medicare would not have paid the claims if it had known of the violations of either rule.
United States ex rel. Mateski v. Raytheon Co., No. 2:06-cv-03614-ODW(KSx), 2017 WL 1954942 (C.D. Cal. Feb. 10, 2017)	2/10/2017	C.D. Cal.	9th Cir.	Government Contracts	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relator's "largely incomprehensible" complaint failed to allege specific representations about the alleged fraud committed by defendant in its claims for payment based on statements about the status of a weather satellite program and technological defects. Although <i>Escobar</i> did not address "whether claims for payment must always contain specific representations about the underlying services" and prior 9th Circuit precedent established that claims for payment alone, even without specific representations, could form the basis for FCA liability, the most recent 9th Circuit FCA decision in <i>United States ex rel. Kelly v. Serco, Inc.</i> , 846 F.3d 325 (9th Cir. 2017), suggested that "mere claims for payment no longer suffice under an implied certification theory." As such, " <i>Escobar</i> , as interpreted by <i>Kelly</i> , requires that the claim contain specific representations to be actionable." Relator failed to allege any specific representations made by defendant in its claims for payments and 9th Circuit precedent does not relax FCA pleading standards based on relator's lack of knowledge of billing practices.

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United States ex rel. Landis v. Tailwind Sports Corp., 234 F. Supp. 3d 180 (D.D.C. 2017)	2/13/2017	D.D.C.	D.C. Cir.	Other	Implied Certification	Summary Judgment	Claims Proceed	Relying on a pre- <i>Escobar</i> D.C. Circuit decision, the court held that relator need only show that the "contractor withheld information about its noncompliance with material contractual requirements." <i>Escobar</i> had explicitly reserved judgment on whether "all claims for payment implicitly represent that the billing party is legally entitled to payment," but the D.C. Circuit had previously held in <i>United States v. SAIC</i> , 626 F.3d 1257 (D.C. Cir. 2010), that "a claim for payment need not include express contractual language specifically linking compliance to eligibility for payment" in order to attach liability under an implied certification theory. In this case, the government had alleged sufficient evidence that Lance Armstrong and his team withheld information about the team's drug use and that the anti-doping provisions of the sponsorship agreements with the U.S. Postal Service were material to its decision to make payments under the agreements.
United States ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017)	2/17/2017	D.C. Cir.	D.C. Cir.	Government Contracts	Materiality	Appeal from Summary Judgment to Defense	Claims Dismissed/Denied	Under <i>Escobar's</i> "rigorous" materiality standard, the relator had inadequate evidence that allegedly inflated headcount data impacted the defendant's billings to the government and the government's decision to pay under contract to maintain recreation centers for U.S. troops at military camps in Iraq.
Bishop v. Wells Fargo & Co., 137 S. Ct. 1067 (2017)	2/21/2017	SCOTUS	SCOTUS	Financial Services	Implied Certification	Appeal from Dismissal	Claims Proceed	Supreme Court granted petition for certiorari from the Second Circuit, vacating and remanding the decision below in light of the <i>Escobar</i> ruling. The Second Circuit had affirmed an E.D.N.Y. decision to dismiss a FCA claim alleging that defendant bank had knowingly falsely certified that it was in compliance with banking laws and regulations when it claimed eligibility for preferential interest rates from the Federal Reserve. The district court and circuit court had relied on prior circuit precedent in <i>Mikes v. Straus</i> , 274 F.3d 687 (2d Cir. 2001), which had placed limitations on implied certification liability.
United States ex rel. Kolchinsky v. Moody's Corp., 162 F. Supp. 3d 186 (S.D.N.Y. 2017)	3/2/2017	S.D.N.Y.	2d Cir.	Financial Services	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator was unable to meet the materiality requirement under <i>Escobar</i> when "the relator's chronology suggests that the Government knew of the alleged fraud, yet paid the contractor anyway." There had been credible public reports regarding inaccuracies in Moody's credit ratings for residential mortgage-backed securities and collateralized debt obligations, and Congress had launched an investigation into the alleged fraud and its effect on the 2007-2008 financial crisis, yet the government had continued to pay Moody.
United States v. Quicken Loans Inc., No. 16-cv-14050, 2017 WL 930039 (E.D. Mich. Mar. 9, 2017)	3/9/2017	E.D. Mich.	6th Cir.	Financial Services	Materiality	Motion to Dismiss	Claims Proceed	Under <i>Escobar's</i> "holistic approach" to materiality, the government plausibly alleged that defendant's alleged violation of FHA underwriting requirements when underwriting, approving, and endorsing mortgage loans for FHA insurance. Although the complaint did not allege that the underwriting requirements were an express condition of payment or that the Government has refused to pay claims in cases involving noncompliance with the requirements, the complaint does support an inference that FHA would not have insured the loans at issue if it had known of the noncompliance, based on allegations that a lender's certification of compliance with the FHA requirements is a prerequisite to the endorsement of FHA insurance and defendant's officials knew the FHA would not have endorsed the loans for mortgage insurance had it know of the violations.
United States ex rel. Barko v. Halliburton Co., 241 F. Supp. 3d 37 (D.D.C. 2017)	3/14/2017	D.D.C.	D.C. Cir.	Government Contracts	Implied Certification	Summary Judgment	Claims Dismissed/Denied	Relator did not plead an implied certification claim based on defendant's alleged anticompetitive bidding practices for procuring subcontractors for government contracts, including allegations that defendant's employees received bribes or kickbacks from subcontractors. While compliance with anti-kickback laws or contractual provisions could be material to the government's decision to pay under <i>Escobar</i> , the relator failed to present evidence of bribes, kickbacks, or other noncompliance with applicable regulations or contract provisions.
Abbott v. BP Exploration & Production, Inc., 851 F.3d 384 (5th Cir. 2017)	3/14/2017	5th Cir.	5th Cir.	Energy	Materiality	Appeal from Summary Judgment to Defense	Claims Dismissed/Denied	Relator did not create a genuine dispute of material fact as to whether defendant's alleged regulatory violations in building and maintaining a semi-submersible floating oil production facility in the Gulf of Mexico were material under <i>Escobar</i> . Relator's allegations had sparked an investigation by the Department of the Interior that ultimately found no grounds to suspend operations of the facility or revoke defendant's status as its operator.

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United States ex rel. Emanuele v. Medicor Associates, -- F. Supp. 3d ----, No. 10-245 Erie, 2017 WL 1001581 (W.D. Penn. Mar. 15, 2017)	3/15/2017	W.D. Penn.	3d Cir.	Health Care	Materiality	Summary Judgment	Claims Proceed	The materiality standard of <i>Escobar</i> was met with respect to relator's allegations that defendants submitted false Medicare claims based on referrals from defendants that violated the Stark Act and the Anti-Kickback Act, when the Stark Act expressly prohibits Medicare from paying claims that do not satisfy its requirements, the writing requirements allegedly violated by defendants "go to the very essence of the bargain between the government and health care providers with respect to Stark Act compliance," and public records suggest that health care providers have paid penalties after self-reporting similar violations on at least nine occasions since 2009.
United States ex rel. Al-Sultan v. The Public Warehousing Co., --- F. Supp. 3d ----, No. 1:05-CV-2968-TWT, 2017 WL 1021747 (N.D. Ga. Mar. 16, 2017)	3/16/2017	N.D. Ga.	11th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Proceed	The government's complaint in intervention adequately pled materiality with respect to claims that defense contractor and its supplier participated in a scheme to inflate the price of food supplied for American soldiers in Iraq, notwithstanding the defendants' <i>Escobar</i> -based government knowledge defense that (1) the contractor's proposal disclosed the supplier's role in the contract, (2) the government continued to pay invoices after the filing of the relator's original complaint, and (3) a government officer approved the challenged invoices as "fair and reasonable." Because the United States claimed that defendants had "lied" to the government about the true nature of their dealings, the government could not have knowledge of the alleged misrepresentation unless it was aware of the defendants' "deception"; even if the government did have the requisite knowledge, that did not undermine materiality because the continued execution of the contracts was "essential" to the "important government interest" of procuring "necessary supplies for American troops in an active theater of war." Additionally, pleading materiality with particularity does not depend on "the presence or absence of the magic word 'material' in connection with a fact" when a complaint pleads facts that "by their nature support a finding of materiality."
United States ex rel. Berkowitz v. Automation Aids, No. 13 C 08185, 2017 WL 1036575 (N.D. Ill. Mar. 16, 2017)	3/16/2017	N.D. Ill.	7th Cir.	Government Contracts	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled an implied certification claim in its complaint alleging that defendant fraudulently sold goods to the General Services Administration by impliedly certifying compliance with the Trade Agreements Act. Though <i>Escobar</i> affirmed that an FCA case can be based upon an implied certification theory, the government must do more than "simply alleg[e]" implied certification to satisfy the particularity requirement of Rule 9(b). Indeed it is often "tougher" to satisfy Rule 9(b) for implied certification cases because "usually it will be easier to set forth the specific details of a fraud scheme that is premised on affirmative lies than it is to sufficiently allege the specifics of a scheme based on material omissions."
United States ex rel. Jacobs v. Bank of America Corp., No. 1:15-cv-24585-UU, 2017 WL 2361943 (S.D. Fla. Mar. 21, 2017)	3/21/2017	S.D. Fla.	11th Cir.	Financial Services	Implied Certification; Materiality	Motion to Dismiss	Claims Proceed	Defendant banks allegedly knowingly filed misleading promissory notes bearing rubber-stamped endorsement signatures (which were not authorized by the signatories) in order to obtain foreclosure judgments and repayment of mortgage insurance claims. Under <i>Escobar</i> 's materiality standard, a fraudulent promissory note that had been used to unlawfully foreclose mortgages would have a "natural tendency to influence" the government's decision to pay an insurance claim.
United States ex rel. Schimelpfenig v. Dr. Reddy's Laboratories Ltd., No. 11-4607, 2017 WL 1133956 (E.D. Penn. Mar. 27, 2017)	3/27/2017	E.D. Penn.	3d Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator's claim, as pled, fell short of <i>Escobar</i> 's two-step implied certification standard by failing to allege "that Defendants made specific representations about their products that would, in conjunction with Defendants' failure to disclose noncompliance with the [statutes], render their claims 'misleading half-truths' subject to FCA liability." The complaint also failed to adequately plead materiality under <i>Escobar</i> ; "Beyond broad conclusory statements, the [Complaint] does little to allege the materiality of [statutory] compliance to the Government's decision to accept Defendants' claims for reimbursement."

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United States ex rel. Wood v. Allergan, Inc., --- F. Supp. 3d ---, No. 10-CV-5645 (JMF), 2017 WL 1233991 (S.D.N.Y. Mar. 31, 2017)	3/31/2017	S.D.N.Y.	2d Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Proceed	Although <i>Escobar</i> modified the standard for implied false certification theory under the FCA, part of the 2001 Second Circuit decision in <i>Mikes v. Straus</i> , 274 F.3d 687 (2d Cir. 2001), remains good law, namely that “falsity may arise from the defendant’s submission of a claim for payment that does not include a specific representation about the goods or services provided, coupled with noncompliance with a material payment requirement.” <i>Escobar</i> and <i>Mikes</i> together “stand for the proposition that liability can be predicated on a false representation of compliance with a federal statute or regulation or prescribed contractual term, so long as compliance with that regulation is ‘material’ to the government’s payment decision.” The court further noted that any fear of such a rule being too broad so as to attach fraud liability to any “contractors who file claims for payment without disclosing every instance of regulatory noncompliance” were countered by the “rigorous” materiality standard under <i>Escobar</i> . In the present suit, compliance with the Anti-Kickback Statute (“AKS”) was material to reimbursements under Medicare and Medicaid, as the law now explicitly provides that claims violating the AKS would be false or fraudulent, Medicare and Medicaid Provider Applications designate compliance as a precondition for payment, and the government has actively pursued FCA investigations and cases against those who violate the AKS.
United States ex rel. Quartararo v. Catholic Health System of Long Island Inc., No. 12-CV-4425 (MKB), 2017 WL 1239589 (E.D.N.Y. Mar. 31, 2017)	3/31/2017	E.D.N.Y.	2d Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss / Summary Judgment	Claims Dismissed/Denied	Relator did not plead FCA claims based on defendant nursing home’s alleged scheme to submit false reimbursement claims to the Department of Health (“DOH”) based on outdated and inaccurate reimbursement rates and to misuse Medicare and Medicaid funds for non-Medicaid and non-Medicare purposes. Submitting outdated reimbursement rates did not violate a material condition for reimbursement because DOH continued reimbursing the nursing home “despite understanding that the Nursing Home was using an outdated rate.” Defendant’s alleged misuse of Medicare and Medicaid funds did not fall under the implied certification theory; although the language of the regulation referenced a condition of payment to be compliance with “a Federal Health Program” and relator plausibly alleged that Defendants knew that “DOH would refuse the Nursing Home’s reimbursement claims if it was aware of Defendant’s . . . violations,” relator failed to connect the misappropriation of funds and alleged fraudulent scheme to any particular reimbursement claim.
United States ex rel. Westrick v. Second Chance Body Armor, Inc., No. 04-0280 (PLF), Unites States v. Toyobo Co., No. 07-1144 (PLF) (D.D.C. Mar. 31, 2017)	3/31/2017	D.D.C.	D.C. Cir.	Government Contracts	Implied Certification	Reconsideration of Summary Judgment to Defendants	Claims Dismissed/Denied	<i>Escobar</i> and the subsequent D.C. Circuit ruling in <i>United States ex rel. McBride v. Halliburton Co.</i> , 848 F.3d 1027 (D.C. Cir. 2017), expanded implied false certification theory to now permit “liability to attach to material misrepresentations concerning noncompliance with ‘statutory, regulatory, or contractual requirements,’” not just misrepresentations regarding “material contract requirements.” However, the initial ruling only examined contractual provisions, so the expansion in <i>Escobar</i> did not change the determination that the three other contractual provisions were not material to the government’s decision to pay defendant body armor makers for defective bulletproof vests. The final extracontractual provision, a “catalog guarantee” of ballistics performance of the vests could continue to go to trial, as before, as it was material.
United States ex rel. Doe v. Heart Solutions PC, No. CV143644SRCCLW, 2017 WL 1234130 (D.N.J. Apr. 3, 2017)	4/3/2017	D.N.J.	3d Cir.	Health Care	Materiality	Summary Judgment (Government Motion)	Claims Granted	The government proved materiality with respect to its claim that defendant health care provider fraudulently submitted claims for Medicare reimbursement which did not comply with Medicare regulations requiring medical services to be supervised by a licensed neurologist. Defendant’s misrepresentations were material under <i>Escobar</i> because Medicare “attached importance” to the claims that physicians were supervising the tests and “would not have paid [defendant] had it known the truth.”

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United States ex rel. Brown v. Pfizer, Inc., No. CV 05-6795, 2017 WL 1344365 (E.D. Penn. Apr. 12, 2017), stay granted, motion to certify appeal granted, 2017 WL 2691927 (E.D. Penn. June 22, 2017)	4/12/2017	E.D. Penn.	3d Cir.	Health Care	Materiality	Motion to Dismiss	Claims Proceed	Relators adequately pled materiality in their complaint alleging that defendant pharmaceutical company made false statements to the FDA for approval of its anti-fungal medicine in order to induce Medicare and Medicaid payments. Defendant sought to defeat materiality by arguing that the government continued to pay for the medicine despite knowledge of the allegations against defendant. However, while the government's continued payment of a claim "despite actual knowledge" of a violation is "strong evidence" that the requirement is not material, "mere knowledge of allegations regarding noncompliance is insufficient to prove actual knowledge of noncompliance." Thus, continued payment in the face of mere allegations is "insufficient to establish that relators' claims fail for lack of materiality."
United States ex rel. Grabcheski v. American International Group, Inc., 687 Fed. App'x 84 (2d Cir. 2017) (summary order)	4/18/2017	2d Cir.	2d Cir.	Financial Services	Materiality	Appeal from Dismissal	Claims Dismissed/Denied	Assuming the relator had sufficiently alleged a knowing false statement related to agreements the defendant entered with the Federal Reserve Bank of New York, the relator failed to allege facts demonstrating materiality when the 0.4% difference in the value of the agreements due to the alleged misrepresentation was "minor" and "insubstantial" under <i>Escobar</i> .
United States ex rel. Scutellaro v. Capitol Supply, Inc., No. 10-1094 (BAH), 2017 WL 1422364 (D.D.C. Apr. 19, 2017)	4/19/2017	D.D.C.	D.C. Cir.	Government Contracts	Implied Certification; Materiality	Summary Judgment (Government Motion)	Claims Proceed	In suit alleging false claim based on implied certification that products sold to federal agencies were manufactured in compliance with the Trade Agreements Act ("TAA") and Buy American Act, government and relator were not entitled to summary judgment on materiality. An issue of material fact existed because, on the one hand, the GSA regional office gave defendant "exceptional" rates on its "report cards" and never marked defendant down for TAA non-compliance, even though, on the other hand, the GSA New York office sent defendant regular notices for contract breaches, culminating in a Cure Notification Letter, citing TAA non-compliance.
United States v. Lang, No. 7:16-CV-305-BO, 2017 WL 1449674 (E.D.N.C. Apr. 21, 2017)	4/21/2017	E.D.N.C.	4th Cir.	Other	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	The government inadequately pled an implied certification claim in its complaint alleging that defendant fraudulently accepted social security disability benefits to which she was not entitled. The government did not allege that defendant was not eligible for benefits when they were first awarded. Instead, the government alleged defendant continued to access funds after she began to "engage in substantial gainful activity and was no longer entitled to benefits." At most, accessing these funds could be considered a demand for payment, but the government did not "identify any specific misrepresentations made by defendant" when the benefits were received and thus the government could not prove an implied certification claim under <i>Escobar</i> .
United States ex rel. Hall v. LearnKey, Inc., No. 2:14-cv-379-PMW, 2017 WL 1592472 (D. Utah Apr. 28, 2017)	4/28/2017	D. Utah	10th Cir.	Government Contracts	Implied Certification; Materiality	Summary Judgment (Cross Motions)	Claims Dismissed/Denied	Defendant, who received funding from the U.S. Department of Veterans Affairs ("VA") to provide video training courses to disabled veterans, did not knowingly submit materially false claims under <i>Escobar</i> for allegedly unqualified courses or unreimbursable employee bonuses. Defendant accurately described its courses and charges to the VA in course catalogues and invoices, and the VA routinely enrolled veterans in the defendant's courses and paid the defendant's invoices.
United States ex rel. Petratos v. Genentech, Inc., 855 F.3d 481 (3d Cir. 2017)	5/1/2017	3d Cir.	3d Cir.	Health Care	Materiality	Appeal from Dismissal	Claims Dismissed/Denied	[Note: Covington represents the defendants.] Relator was unable to meet the materiality standard in a suit challenging defendant's alleged concealment of a drug's health risks in Medicare claims that allegedly resulted in noncompliance with the statutory condition to be medically "reasonable and necessary." The "mere fact that [the Medicare statute] is a condition of payment, without more, does not establish materiality" under the FCA. In both failing to plead any factual allegations that "knowledge of the violation could influence the government's decision to pay" and conceding that the government had continued to pay the claims with such knowledge, relator's case was "doom[ed]." Additionally, the materiality inquiry is not focused on whether the "misrepresentations were material to the physician's determinations" as the initial recipient of the false claim, as <i>Escobar</i> exclusively refers to the government as the recipient of the false claim: "[S]ince the Government decides on payment, it is the Government's materiality decision that ultimately matters."

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United States ex rel. Oberg v. Pennsylvania Higher Education Assistance Agency, No. 1:07-cv-00960, 2017 WL 1758074 (E.D. Va. May 3, 2017)	5/3/2017	E.D. Va.	4th Cir.	Education	Materiality	Motion for Judgment on the Pleadings	Claims Proceed	In non-intervened case brought by a relator alleging that student loan company engaged in improper billing practices, defendant sought judgment on the pleadings arguing relator had not met <i>Escobar's</i> high materiality standard. Construing defendant's motion as one for reconsideration of the court's pre- <i>Escobar</i> denial of a Rule 12(b)(6) motion to dismiss, court concluded that <i>Escobar</i> did not merit reconsideration because: (1) it clarified, but did not redefine, the statutory definition of materiality under the FCA; and (2) it revolved around an implied false certification theory, whereas the instant case alleged express false certifications.
United States ex rel. Badr v. Triple Canopy, Inc., 857 F.3d 174 (4th Cir. 2017)	5/16/2017	4th Cir.	4th Cir.	Government Contracts	Implied Certification; Materiality	Appeal from Dismissal	Claims Proceed	On remand from the U.S. Supreme Court for further consideration in light of <i>Escobar</i> , the government in intervention stated an implied certification claim against the defendant for alleged falsification of marksmanship test results for guards hired under contract to provide security services at Al Asad Airbase in Iraq. The defendant's invoices for time worked by the guards constituted an actionable misrepresentation that defendant had complied with core contract requirements. Both "common sense" and allegations that defendant went to great lengths to cover up the noncompliance demonstrated that the marksmanship requirements were material, as did the government's decisions not to renew defendant's base contract and to intervene in the litigation after learning about the allegations.
United States v. Dyncorp International, --- F. Supp. 3d ---, No. 16-1473 (ESH), 2017 WL 2222911 (D.D.C. May 19, 2017)	5/19/2017	D.D.C.	D.C. Cir.	Government Contracts	Implied Certification; Materiality	Motion to Dismiss	Claims Proceed	The D.C. Circuit's "broader statement of implied certification theory" in <i>United States v. SAIC</i> , 626 F.3d 1257 (D.C. Cir. 2010), remains good law after <i>Escobar</i> , such that the government can make out an implied certification claim "by demonstrating that (1) a contractor withheld information about its noncompliance with contractual or regulatory requirements; and (2) those contractual or regulatory requirements were material." In the instant case, the government successfully alleged that, with respect to a contract involving training for the Iraqi police force, defendant billed the government for cost-reimbursable charges that were unreasonable, in violation of FAR requirements; the defendant withheld information about the unreasonableness of its billings from the government; and the billings were "significantly higher than reasonable" and therefore material.
United States ex rel. Cairns v. D.S. Medical, L.L.C., No. 12-CV-00004 AGF, 2017 WL 2269006 (E.D. Mo. May 23, 2017)	5/23/2017	E.D. Mo.	8th Cir.	Health Care	Implied Certification	Summary Judgment (Government Motion)	Claims Proceed	The government had not met the standard for summary judgment on alleged false claims for Medicare/Medicaid reimbursement based on Anti-Kickback Statute ("AKS") violations. Although a violation of the AKS can form the basis of an FCA claim, the government had failed "to establish adequate factual support" for each element of the underlying AKS violation for each defendant.
United States ex rel. Perry v. Pacific Maritime Industries Corp., No. 13cv2599-LAB (JMA), 2017 WL 2348930 (S.D. Cal. May 30, 2017)	5/30/2017	S.D. Cal.	9th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled materiality in his complaint arguing that defendant produced and sold doors for Navy ships without informing the Navy that it had failed to comply with a weight requirement. The relator pointed to an "an old and ambiguous military provision" as proof that the doors needed to adhere to a specific weight, but that provision could be interpreted other ways. Because defendants made "a good faith call" on the weight requirement, a failure to adhere to the supposed requirement could not be a material omission. The omission was also not material because the government accepted the doors despite the fact that the Defense Contract Management Agency had not conducted a review. The government's decision with respect to the doors was analogous to an agency accepting parts despite actual knowledge of a violation.
United States ex rel. Hinkle v. Caris Healthcare LP, No. 3:14-CV-212-TAV-HBG, 2017 WL 3670652 (E.D. Tenn. May 30, 2017)	5/30/2017	E.D. Tenn.	4th Cir.	Health Care	Materiality	Motion to Dismiss	Claims Proceed	The government adequately pled materiality in its complaint alleging that defendant hospice provider fraudulently submitted Medicare claims for payment on behalf of patients who were not terminally ill and were therefore ineligible for hospice care. These alleged violations were material because "requests for payment may only be made when supported by written certification of the patient's terminal illness" and the government "would not have paid defendants' claims for reimbursements had it known that the patients were not terminally ill."

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United States ex rel. Penelow v. Johnson & Johnson, No. 12-7758 (MAS) (LHG), 2017 WL 2367050 (D.N.J. May 31, 2017)	5/31/2017	D.N.J.	3d Cir.	Health Care	Materiality	Motion to Dismiss	Claims Proceed	Relators' FCA claims could proceed against one of the defendant pharmaceutical companies for allegedly improper marketing and kickback schemes promoting two HIV/AIDS drugs, which caused false claims to be submitted to the Medicare and Medicaid Programs. Relators adequately pled that drugs were not "reasonable and necessary," and thus were not eligible for Medicare/Medicaid reimbursement, under standards set forth by the 3rd Circuit in <i>United States ex rel. Petratos v. Genentech Inc.</i> , 855 F.3d 481 (3d Cir. May 1, 2017). Relators also sufficiently pled materiality by alleging that each of the challenged reimbursement claims "included false certifications rendering the claims 'ineligible for reimbursement'" and that "claims for prescriptions caused by [defendants'] misconduct are not reimbursable." In contrast to <i>Petratos</i> , "Relators have adequately pled that Defendants' misconduct would have caused the Government to refuse reimbursement."
United States ex rel. Curtin v. Barton Malow Co., No. CV 14-2584, 2017 WL 2453032 (W.D. La. June 6, 2017)	6/6/2017	W.D. La.	5th Cir.	Government Contracts	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled materiality with respect to its claim that defendant fraudulently sought payment from the government by impliedly certifying that it had complied with contractual requirement to use roofing panels that were covered by a warranty, when the roofing panels actually used were not. Roofing panels were just one of "many different materials" used in building construction, and relator did not argue that defendant failed to install the panels at all or that the panels were "of particular importance to the building being constructed." Relator's complaint that the panels were no longer under warranty constitutes merely a "garden-variety breach of contract."
United States ex rel. Florida Society of Anesthesiologists v. Choudhry, No. 8:13-cv-2603-T-27AEP, 2017 WL 2591399, 2017 WL 2604930 (M.D. Fla. June 14, 2017)	6/14/2017	M.D. Fla.	11th Cir.	Health Care	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Relator could not bring an implied certification claim under 31 U.S.C. § 3729(a)(1)(B)--implied certification claims can only be brought under 31 U.S.C. § 3729(a)(1)(A)--and Relator's theory of an implied false certification based on a violation of the Anti-Kickback Statute ("AKS") may no longer be viable, in light of a 2010 Amendment to the AKS.
United States ex rel. Jersey Strong Pediatrics, LLC v. Wanaque Convalescent Center, No. CV 14-6651-SDW-SCM, 2017 WL 2577544 (D.N.J. June 14, 2017)	6/14/2017	D.N.J.	3d Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled an implied certification claim in its complaint alleging that defendants fraudulently billed Medicare and Medicaid as primary payer despite the existence of alternative coverage, thereby violating secondary payer laws. Relator recognized that secondary payer laws were meant to make Medicaid/Medicare the "payer of last resort," but relator failed to specifically discuss whether the violation of secondary payer laws was material to the government's payment decision "in this context."
United States ex rel. O'Donnell v. America at Home Healthcare & Nursing Services, Ltd., No. 14-cv-1098, 2017 WL 2653070 (N.D. Ill. June 20, 2017)	6/20/2017	N.D. Ill.	7th Cir.	Health Care	Materiality	Motion to Dismiss	Claims Proceed	Relator adequately pled that the defendant had submitted claims for Medicare and Medicaid reimbursement with material omissions that it had improperly solicited patients, paid kickbacks in violation of the Anti-Kickback Statute, and referred patients in violation of the Stark Law. Importantly, "other courts have routinely found the various statements and regulations at issue to be central to the government's Medicare and Medicaid programs." In addition, the complaint did not suggest that the government had paid claims despite knowing of similar violations.
United States ex rel. Prather v. Brookdale Senior Living Communities, Inc., --- F. Supp. 3d ---, No. 3:12-cv-0764, 2017 WL 3034336 (M.D. Tenn. June 22, 2017)	6/22/2017	M.D. Tenn.	6th Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator inadequately pled a material omission, when it argued that the defendant had failed to inform Medicare that its home health services certification was untimely, and therefore in violation of federal regulation. Although the timing requirement was an express condition of payment, this is not dispositive under <i>Escobar</i> . Rather, CMS publications from the relevant time period that failed to mention the timing requirement showed it was not material.
United States ex rel. Dickson v. Bristol-Myers Squibb Co., No. 13-1039 (FLW)(LHG), 2017 WL 2780744 (D.N.J. June 27, 2017)	6/27/2017	D.N.J.	3d Cir.	Health Care	Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator failed to plead materiality in her claim that defendant pharmaceutical company misstated the effectiveness of its drug to physicians, thereby fraudulently causing the submission of false claims to Medicaid for reimbursement for that drug. <i>Escobar</i> imposed a heightened pleading standard for materiality. In pleading that every state provided automatic reimbursement for the drug, relator's complaint showed that representations of the physicians, and the alleged misrepresentations to those physicians, were immaterial.

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United States ex rel. A1 Procurement, LLC v. Thermcor, Inc., No. 2:15cv15, 2017 WL 2881350 (E.D. Va. July 5, 2017)	7/5/2017	E.D. Va.	4th Cir.	Government Contracts	Materiality	Summary Judgment	Claims Dismissed/Denied	Relator failed to satisfy the element of materiality on summary judgment, after claiming that defendants had made false statements to the Small Business Administration ("SBA") regarding their compliance with the 8(a) Business Development program. Documents showed that the SBA was aware of defendants' non-compliance and yet still granted 8(a) certification, proving defendants' alleged misstatements were not central to the 8(a) program. The regulatory scheme vested the SBA with the discretion to evaluate subjective factors, and finding materiality in this instance would take away that discretionary authority.
United States ex rel. Campie v. Gilead Sciences, Inc., 862 F.3d 890 (9th Cir. 2017)	7/7/2017	9th Cir.	9th Cir.	Health Care	Implied Certification; Materiality	Appeal from Dismissal	Claims Proceed	[Note: Covington represents the defendant.] The court determined that the relator's complaint was sufficient under Rule 8(a), but it did not assess the claims under the particularity standard of Rule 9(b)—as the district had not addressed that standard. According to relator, defendant had made false representations to the FDA about the ingredients in its drugs, and then submitted reimbursement requests which implied the drugs met FDA requirements. Although the alleged affirmative false statement had only been made to the FDA, the claim that an implied false statement had been made to payor agency could proceed. Moreover, although the FDA had approved the drug, the relator had still shown materiality due to a dispute about whether the FDA knew about the ingredients when it gave certification. Indeed, the court suggested the FDA's knowing approval of the drug might still not be grounds for dismissal.
United States ex rel. Nargol v. Depuy Orthopaedics, Inc., 865 F.3d 29 (1st Cir. 2017)	7/26/2017	1st Cir.	1st Cir.	Health Care	Materiality	Appeal from Dismissal	Claims Dismissed/Denied	Relator's claim based on alleged that medical device manufacturer had misrepresented the safety and effectiveness of the device in securing FDA approval was dismissed, because the FDA's decision not to take action "in the wake of Relators' allegations so as to withdraw or even suspend its approval of the [device] . . . renders a claim of materiality implausible." Under <i>Escobar</i> , "when an agency armed with robust investigatory powers to protect public health and safety is told what Relators have to say, yet sees no reason to change its position," this is "compelling" evidence that the supposed misrepresentation was not material. Relators' suggestion that Ninth Circuit's ruling in <i>United States ex rel. Campie v. Gilead Sciences, Inc.</i> , 862 F.3d 890 (9th Cir. July 7, 2017), dictates a contrary result is unpersuasive, as that Ninth Circuit ruling was neither controlling nor on all fours with the instant case. (In contrast, relator's alternative theory--that defendants passed off defective versions of the FDA-approved device on unsuspecting providers--did meet the minimum pleading requirements of Rule 9(b).)
RDA Construction Corp. v. United States, 132 Fed. Cl. 732 (2017)	7/27/2017	Fed. Cl.	Fed. Cir.	Government Contracts	Materiality	Opinion and Order After Bench Trial	Claims Dismissed/Denied	In contractor's lawsuit seeking an equitable adjustment in response to differing site conditions on construction project, the government could not sustain a FCA counterclaim that the contractor had submitted false invoices due to its failure to perform in accordance with specifications. The government had not proven materiality under <i>Escobar</i> , primarily because the government had continued to pay invoices despite actual knowledge that the contractor had not complied with certain contract specifications. Even with respect to other noncompliance about which the government had not known, including failure to promptly pay subcontractors in accordance with the terms of the Prompt Payment Act, the government had not borne its burden of proof in demonstrating materiality, and indeed had not even mentioned materiality in its brief.

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United States ex rel. Smith v. Carolina Medical Center, No. 11-2756, 2017 WL 3310694 (E.D. Penn. Aug. 2, 2017)	8/2/2017	E.D. Penn.	3d Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Proceed	Relator stated FCA claim based on allegations that the director of a clinic had been excluded from participating in Medicare and Medicaid, thereby rendering false the invoices for payment submitted by the clinic under those programs. Relator's "claims based on false statements in enrollment or application documents" support a fraud-in-the-inducement theory and therefore "need not rely on a theory of implied false certification . . . and need not meet the [implied false certification] standard laid out in <i>Escobar</i> ." The misrepresentation on the clinic's enrollment application was material, as demonstrated by laws that forbid payment to clinics controlled by excluded individuals, administrative guidance stating the same, and letters sent directly to the excluded individual. The continued payment of the clinic's invoices after the agency became aware of the allegation in this lawsuit did not outweigh the other evidence supporting materiality because "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance," and because even actual knowledge that certain requirements were violated "is not dispositive."
United States ex rel. Durkin v. County of San Diego, No. 15cv2674-MMA (WVG), 2017 WL 3315784 (S.D. Cal. Aug. 3, 2017)	8/3/2017	S.D. Cal.	9th Cir.	Government Contracts	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator failed to adequately plead falsity, scienter, or materiality in allegations that the defendants had made misrepresentations in applications for federal grant funding from the FAA. With respect to materiality, Relator had failed to meet <i>Escobar</i> 's "demanding" standard, which requires more than the government's designation of "compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment," as the complaint "merely concludes, with respect to every cause of action: 'The [agency] would not have provided the federal funding for the project had it been aware the foregoing was false.'"
United States ex rel. Mateski v. Raytheon Co., No. 2:06-cv-03614-ODW(KSx), 2017 WL 3326452 (C.D. Cal. Aug. 3, 2017)	8/3/2017	C.D. Cal.	9th Cir.	Government Contracts	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	The Ninth Circuit's post- <i>Escobar</i> ruling in <i>United States ex rel. Kelly v. Serco, Inc.</i> , 846 F.3d 325 (9th Cir. Jan. 12, 2017), requires the plaintiff advancing an implied certification claim to pinpoint "a specific representation the defendant made that implicitly certified its compliance with the material conditions of payment." Relator's general statements that defendant "falsely represented that [it] had performed the [contract] in conformity with the requirements and specifications," and that it "failed to disclose that [defendant] had not obtained the requisite approvals for major deviations from the mandatory requirement" were not sufficiently specific to satisfy Rule 9(b). Moreover, Relator's "bare bones," one-sentence allegation about materiality was not enough to satisfy Rule 9(b).
United States ex rel. Forcier v. Computer Sciences Corp., No. 12 Civ. 1750 (DAB), 2017 WL 3616665 (S.D.N.Y. Aug. 10, 2017)	8/10/2017	S.D.N.Y.	2d Cir.	Health Care	Implied Certification	Motion to Dismiss	Claims Dismissed/Denied	Following "the majority of district courts in [the Second] Circuit" by "interpret[ing] <i>Escobar</i> 's holding as creating affirmative limitations on implied false certification claims, such that liability may only attach where (1) the claim makes specific representations about the goods or services provided, and (2) the failure to disclose noncompliance with material legal requirements renders these representations misleading half-truths," the court held that the government failed to demonstrate that defendants' statements satisfied the second of these two prongs, and the statements were therefore not actionable under an implied false certification theory. (But a separate fraud-in-the-inducement claim survived the motion to dismiss.)
United States ex rel. Laporte v. Premiere Education Group, L.P., No. 11-3523, 2017 WL 3471163 (RBK/AMD) (D.N.J. Aug. 11, 2017)	8/11/2017	D.N.J.	3d Cir.	Education	Implied Certification; Materiality	Reconsideration of Denial of Motion to Dismiss	Claims Proceed	Where defendants' compliance with certain terms was a condition for eligibility to receive funds under Title IV of the Higher Education Act, defendants' subsequent requests for payment under Title IV, when defendants knew they were not in compliance with the terms of eligibility, amounted to "specific representations about the goods and services provided which constituted misleading half-truths." With respect to materiality, the court declined to reconsider its prior ruling that relators had "plead with sufficient particularity that the United States would have refused payment had it known of [defendants'] regulatory violations."

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United States ex rel. Lisitza v. Par Pharmaceutical Cos., No. 06 C 06131, 2017 WL 3531679 (N.D. Ill. Aug. 17, 2017)	8/17/2017	N.D. Ill.	7th Cir.	Health Care	Implied Certification	Summary Judgment	Claims Dismissed/Denied	The government had not established an implied certification claim against defendant pharmaceutical company for allegedly inducing national pharmacy chains to fill prescriptions, and obtain Medicaid reimbursements, for forms and dosages of drugs manufactured by defendant in lieu of less expensive generic drugs originally prescribed by medical providers. The government failed to identify any "specific representation with respect to the goods or services provided" that was rendered a "misleading half-truth" by defendant's alleged violation of Medicaid requirements related to physician authorization, medical necessity, and economical treatment. The reimbursement claim forms submitted contained a certification that the information provided was "true, accurate, and complete," but they did not affirm that the claimant had complied with all applicable laws and regulations; and, in contrast to <i>Escobar</i> , the reimbursement claim forms were not misleading as to what treatment was provided and how much it cost, even if defendants were in violation of Medicaid requirements that affected their legal entitlement to payment and that could give rise to liability or penalties under other provisions of law.
United States ex rel. Emanuele v. Medicor Associates, C.A. No. 10-245 Erie, 2017 WL 3675921 (W.D. Penn. Aug. 25, 2017)	8/25/2017	W.D. Penn.	3d Cir.	Health Care	Materiality	Reconsideration of Denial of Summary Judgment	Claims Proceed	The Third Circuit's decision in <i>United States ex rel. Petratos v. Genentech, Inc.</i> , 855 F.3d 481 (3d Cir. 2017), did not merit reconsideration of court's 3/15/17 opinion on summary judgment that plaintiffs had met <i>Escobar's</i> materiality standard. <i>Petratos</i> was not an "intervening change in the law" as it applied the same "demanding" and "rigorous" materiality standard under <i>Escobar</i> as did the court in its 3/15/17 opinion. Nor did <i>Petratos</i> , the facts of which were "largely inapposite," clarify existing law in a manner that rendered the court's 3/15/17 opinion clearly erroneous.
United States ex rel. Higgins v. Boston Scientific Corp., No. 11-cv-2453 (JNE/SER), 2017 WL 3732099 (D. Minn. Aug. 29, 2017)	8/29/2017	D. Minn.	8th Cir.	Health Care	Implied Certification; Materiality	Motion to Dismiss	Claims Dismissed/Denied	Relator's allegations "fit the mold" of <i>Escobar's</i> two-pronged implied certification theory, in that he alleged defendant "defrauded the FDA into approving and maintaining approval of [defibrillators it manufactured] as safe and effective"; "the devices would not have been approved had the FDA been fully informed"; "the devices were therefore not medically necessary as required for Medicare reimbursement"; and defendant "thus caused doctors to select their products and then to unwittingly falsely certify to the government that the devices were medically necessary in submitting their reimbursement claims." Relator's allegations also "appear calculated to meet" <i>Escobar's</i> "demanding" materiality standard. Notwithstanding, relator failed to plead fraud with particularity under Rule 9(b), so the complaint was dismissed with leave to amend.
United States ex rel. Kolchinsky v. Moody's Corp., No. 12cv1399, 2017 WL 3841866 (S.D.N.Y. Sept. 1, 2017)	9/1/2017	S.D.N.Y.	2d Cir.	Financial Services	Materiality	Reconsideration of Dismissal	Claims Dismissed/Denied	The court's 3/2/17 decision dismissing relator's claims took full account of <i>Escobar's</i> materiality standard and was consistent with <i>Grabcheski v. American International Group, Inc.</i> , 687 Fed. App'x 84 (2d Cir. 2017), the only Second Circuit decision to date to interpret <i>Escobar</i> , and so reconsideration was not warranted. Relator's argument that <i>Escobar</i> required a "holistic approach" to materiality misconstrued the Supreme Court case; although the First Circuit used the "holistic approach" language in <i>United States ex rel. Escobar v. Universal Health Services, Inc.</i> , 842 F.3d 103 (1st Cir. 2016), on remand from the Supreme Court, that holding was not binding on the court and was not an appropriate basis for reconsideration.
United States ex rel. Bishop v. Wells Fargo & Co., --- F.3d ---, No. 15-2449, 2017 WL 3902729 (2d Cir. 2017) (per curiam)	9/7/2017	2d Cir.	2d Cir.	Financial Services	Implied Certification; Materiality	Appeal from Dismissal	Claims Proceed	<i>Escobar</i> overruled the requirements of <i>Mikes v. Straus</i> , 274 F.3d 687 (2d Cir. 2001), that (1) "implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid" and (2) an expressly false claim is "a claim that falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." Remand to the district court was appropriate for consideration of whether relator's allegations that defendants "falsely certified their compliance with banking laws in order to borrow money at favorable rates from the Federal Reserve System" met <i>Escobar's</i> materiality standard.

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United States ex rel. King v. Solvay Pharmaceuticals, Inc., --- F. 3d ----, No. 16-20259, 2017 WL 4003473 (5th Cir. Sept. 12, 2017)	9/12/2017	5th Cir.	5th Cir.	Health Care	Materiality	Appeal from Summary Judgment to Defense	Claims Dismissed/Denied	After concluding relator's claims that defendant pharmaceutical manufacturer induced false Medicaid claims through off-label marketing and kickback scheme to promote three drugs could not survive summary judgment on causation, the court stated in dicta, citing <i>Escobar</i> : "The parties suggested at oral argument that Medicaid pays for claims without asking whether the drugs were prescribed for off-label uses or asking for what purpose the drugs were prescribed. If this is true, given that it is not uncommon for physicians to make off-label prescriptions, we think it unlikely that prescribing off-label is material to Medicaid's payment decisions under the FCA."
United States v. Americus Mortgage Corp., No. 4:12-cv-02676, 2017 WL 4083589 (S.D. Tex. Sept. 14, 2017)	9/14/2017	S.D. Tex.	5th Cir.	Financial Services	Materiality	Motion for Judgment as a Matter of Law	Claims Granted	At trial, the United States presented sufficient evidence of materiality to support its FCA claims based on false statements made by defendants to secure HUD insurance on mortgage loans issued by unauthorized "shadow branches." Documentary evidence and trial testimony included "detailed analyses of various HUD requirements" violated by defendants and explained "the importance of these requirements" and "why these requirements were necessary for HUD to make an informed decision," including testimony from a fourteen-year HUD employee that HUD will not approve applications for insurance on loans originated by non-registered branches.
United States ex rel. Jersey Strong Pediatrics, LLC v. Wanaque Convalescent Center, No. 14-6651-SDW-SCM, 2017 WL 4122598 (D.N.J. Sept. 18, 2017)	9/18/2017	D.N.J.	3d Cir.	Health Care	Materiality	Motion to Dismiss	Claims Proceed	Relator sufficiently pled an implied certification claim in its complaint alleging that defendants fraudulently billed Medicare and Medicaid as primary payer despite the existence of alternative coverage, in violation of secondary payer laws. Relator met its burden to plead materiality by alleging that secondary payer laws face penalties for failing to gather accurate information to determine if Medicare/Medicaid is the primary payer for a patient; claims are "consistently/continually/automatically" denied if alternative, primary benefits are available; and the government contracts with "private auditors to strictly enforce secondary payment laws to prevent improper payments."