176 F.3d 776 (1999)

Edwin P. HARRISON, Plaintiff-Appellant, and United States of America, Party in Interest, v. WESTINGHOUSE SAVANNAH RIVER COMPANY, Defendant-Appellee.

No. 98-1037.

United States Court of Appeals, Fourth Circuit.

Argued October 28, 1998.
Decided May 17, 1999.

B. *The False Claims Act*

Originally passed during the Civil War in response to overcharges and other abuses by defense contractors, Congress intended that the False Claims Act, 31 U.S.C.A. §§ 3729-3733 (West Supp.1998), and its *qui tam* action would help the government uncover fraud and abuse by unleashing a "posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir.1992). The first substantial amendments to the False Claims Act came in 1986. *See* S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. In the 1986 amendments, Congress sought to broaden the availability of the False Claims Act to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government." *Id.* Congress was acting, in part, in response to judicial decisions taking a restrictive approach to the False Claims Act. *See id.* at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

The False Claims Act allows private litigants to bring actions on behalf of the government against anyone who, *inter alia:*

> (1) knowingly presents, or causes to be presented, [to the government] a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; or
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> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid. *785 31 U.S.C.A. § 3729(a); 31 U.S.C.A. § 3730(b).

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The term "knowingly" has a special meaning within the context of the False Claims Act:

> "knowing" and "knowingly" mean that a person, with respect to information—
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> (1) has actual knowledge of the information;
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> (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.

31 U.S.C.A. § 3729(b).

Liability under each of the provisions of the False Claims Act is subject to the further, judicially-imposed, requirement that the false statement or claim be material.[7] Materiality depends on "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." *United States ex rel. Berge v. Bd. of Trustees of Univ. of Ala.,* 104 F.3d 1453, 1459 (4th Cir.), *cert. denied,* ___ U.S. ___, 118 S.Ct. 301, 139 L.Ed.2d 232 (1997) (quoting *United States v. Norris,* 749 F.2d 1116, 1122 (4th Cir.1984)). Materiality is a mixed question of law and fact. *See id.* at 1460.

The Supreme Court has cautioned that the False Claims Act was not designed to punish every type of fraud committed upon the government. *See United States v. McNinch,* 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958). In order for a false statement to be actionable under the False Claims Act it must constitute a "false or fraudulent claim." "[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the `claim for payment.'" *United States v. Rivera,* 55 F.3d 703, 709 (1st Cir.1995). Therefore, a central question in False Claims Act cases is whether the defendant ever presented a "false or fraudulent claim" to the government.

Interpreting the last word of the phrase is fairly easy. The False Claims Act states that a claim "includes any request or demand ... for money or property" where the government provides any portion of the money or property requested. 31 U.S.C.A. § 3729(c). In other words, the False Claims Act at least requires the presence of a claim—a call upon the government fisc—for liability to attach.

Taking the phrase "false or fraudulent claim" in its entirety, though, is more complicated, because the phrase has become a term of art. The district court would only find a false claim where a demand for payment is itself false or fraudulent (presumably for services not performed or for an incorrect amount). The district court flatly rejected the possibility that False Claims Act liability could rest on false statements submitted to the government to gain approval for a subcontract. The district court relied on two cases for this approach, *United States v. McNinch,* 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958), and *United States ex rel. Thompson v. Columbia/HCA Healthcare* *786 *Corp.,* 938 F.Supp. 399 (S.D.Tex.1996) (additional history below).

The district court's narrow interpretation of the phrase "false or fraudulent claim" is incorrect. First, there are problems with the cases relied upon by the district court. *McNinch* was decided under a criminal version of the False Claims Act and the Court explicitly relied on a rule of lenity-type analysis in reaching its interpretation of the statute. *McNinch,* 356 U.S. at 598, 78 S.Ct. 950. The current statute is not criminal, and so a rule of lenity approach is no longer appropriate. Also, *McNinch* was a very narrow holding reflecting the facts of that case. No request for payment from the government had yet been made when *McNinch* was decided, and the Court left open the question whether the False Claims Act would apply if and when a claim on the government fisc was made. *Id.* at 599 n. 6, 78 S.Ct. 950. Subsequent cases confirm that the act which did not violate the False Claims Act in the factual context of *McNinch* does lead to False Claims Act liability when the government fisc is finally called upon. *See* *United States v. Rivera,* 55 F.3d at 707, and cases cited therein. The second case relied upon by the district court, *Thompson,* had already been vacated when the district court relied upon it. *See* *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F.3d 899 (5th Cir.1997), *aff'g in part and vacating in part* 938 F.Supp. 399 (S.D.Tex. 1996).

Second, and more importantly, the district court's approach is in contradiction to the legislative history of the statute and to many courts, including the Supreme Court, that have addressed the issue.

According to Congress, after the 1986 amendments the False Claims Act should be broadly construed:

> each and every claim submitted under a contract, loan guarantee, or other agreement *which was originally obtained* by means of false statements or other corrupt or fraudulent conduct, *or in violation of any statute or applicable regulation,* constitutes a false claim.

S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274 (emphases added). The courts have implemented the principles embodied in the above-quoted passage in a variety of ways.

1. *False Certification Cases*

A number of courts in a variety of contexts have found violations of the False Claims Act when a government contract or program required compliance with certain conditions as a prerequisite to a government benefit, payment, or program; the defendant failed to comply with those conditions; and the defendant falsely certified that it had complied with the conditions in order to induce the government benefit. Courts have allowed False Claims Act claims to go forward based on false certifications with respect to compliance with environmental standards, *see* *United States ex rel. Fallon v. Accudyne Corp.,* 880 F.Supp. 636, 638 (W.D.Wis.1995); false certifications of compliance with the non-discrimination requirements of the Fair Housing Act and with an affirmative action plan, *see* *United States v. Incorporated Village of Island Park,* 888 F.Supp. 419, 434-36, 440-41 (E.D.N.Y.1995); false certifications of compliance with the Medicare anti-kickback and anti-self-referral statutes, *see* *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F.3d 899, 902; *United States ex rel. Pogue v. American Healthcorp., Inc.,* 914 F.Supp. 1507, 1509 & 1513 (M.D.Tenn.1996); and false certifications of compliance with rules for continuing adherence to the requirements of a Small Business Administration minority contracting program, *see* *Ab-Tech Construction, Inc. v. United States,* 31 Fed.Cl.429 (1994), *aff'd,* 57 F.3d 1084 (Fed.Cir.1995).[8] The courts in these cases *787 will not find liability merely for non-compliance with a statute or regulation. *See, e.g.,* *Thompson,* 125 F.3d at 902. The Fifth Circuit has emphasized that liability for a false certification will lie only if compliance with the statutes or regulations was a *prerequisite* to gaining a benefit, and the defendant affirmatively certified such compliance: "where the government has conditioned payment of a claim upon a claimant's certification of compliance with ... a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation." *Thompson,* 125 F.3d at 902. *Accord* *United States ex rel. Joslin v. Community Home Health of Md., Inc.,* 984 F.Supp. 374, 383-84 (D.Md. 1997).[9]

2. *Fraud-in-the-Inducement Cases*

Another set of cases involves False Claims Act liability for claims that would not be false under the district court's interpretation of the statute—the fraud-in-the-inducement[10] cases. In these cases, courts, including the Supreme Court, found False Claims Act liability for each claim submitted to the government under a contract, when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct. The most prominent of these cases is *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). In that case, the Supreme Court found contractors liable under the False Claims Act for claims submitted under government contracts which the defendants obtained via collusive bidding. *Id.* at 542, 63 S.Ct. 379.[11] The Court found that each claim submitted under the contracts constituted a false or fraudulent claim:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the [government].... The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.

Id. at 543-44, 63 S.Ct. 379. Based on this language, courts have found False Claims Act violations in other bid-rigging situations, *see, e.g., United States v. CFW Construction Co., Inc.,* 649 F.Supp. 616, 618 (D.S.C.1986), *dismissed on other grounds,* 819 F.2d 1139 (4th Cir.1987); when a contract *788 was originally obtained based on false information or fraudulent pricing, *see United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416, 1420 (9th Cir.1991); *United States ex rel. Windsor v. DynCorp, Inc.,* 895 F.Supp. 844, 850-51 (E.D.Va.1995); *United States v. General Dynamics Corp.,* 19 F.3d 770, 772 & 775 (2d Cir.1994) (defendant liable for submitting inflated cost estimates in subcontract submitted for approval to government); or when a contract was obtained by a false representation about the ability to perform the contract, *cf. United States ex rel. Schwedt v. Planning Research Corp.,* 59 F.3d 196, 199 (D.C.Cir.1995) (court did not reach the question, but suggested it would have upheld such a theory had it been properly presented). *But see United States v. Shaw,* 725 F.Supp. 896 (S.D.Miss. 1989) (no False Claims Act liability for loans obtained through bribes).

Contrary to the district court's decision, in many of the cases cited above the claims that were submitted were not in and of themselves false. In each of the false certification cases the actual "claim" submitted was not false. In *Island Village* the HUD housing was actually constructed at fair cost and HUD-qualified purchasers actually moved in; and in *Thompson* and *Pogue* the medical services were actually necessary and provided at fair costs. In *Marcus, CFW,* and *DynCorp,* the work contracted for was actually performed to specifications at the price agreed. False Claims Act liability attached, however, because of the fraud surrounding the efforts to obtain the contract or benefit status, or the payments thereunder.

As the above cases illustrate, the district court's interpretation of the phrase "false or fraudulent claim" was erroneous. The phrase "false or fraudulent claim" in the False Claims Act should be construed broadly. The False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.... [T]he Court has consistently refused to accept a rigid, restrictive reading...." *United States v. Neifert-White Co.,* 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) (citation and footnotes omitted). The False Claims Act "reaches beyond `claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233, 88 S.Ct. 959. Thus, any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach. The test for False Claims Act liability distilled from the statute and the sources discussed above is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a "claim").