FBA Qui Tam Section Publishes Fraud in the Inducement article by Attorneys Archibald and Critikos

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Fraud in the Inducement: The Collision of Causation, Confusion, Common Law, and Common Sense
By Lynzi J. Archibald and Peter J. Critikos III

Federal courts have long recognized fraud in the inducement (also referred to as simply "fraudulent inducement") ("FITI") as an actionable theory of recovery under the False Claims Act ("FCA"). However, while loosely rooted in § 3729(a)(1)(A), the FCA is silent as to this cause of action, leaving federal courts to establish the necessary elements based on the common law.

Under other FCA theories, such as garden-variety presentment claims, FCA claimants must prove causation at the liability stage, but only "presentment causation" (*i.e.*, that a defendant caused a claim to be presented); "damage causation" (*i.e.*, that the fraud actually caused the Government to suffer damages), on the other hand, need only be proven to recover damages (not to establish liability). But, unlike other FCA claims, as the term "inducement" itself implies, some showing as to the effect on or action by the Government must occur ***at the liability stage*** for FITI claims. Additionally, unlike other FCA elements, such as scienter and materiality, the FCA does not define causation or provide instruction regarding the appropriate causation standard to be applied.

The combination of a lack of statutory guidance under the FCA and the unique common law requirements of FITI claims has resulted in confusion and conflict regarding how (and even whether) the causation element should be applied. Without additional clarity (either from controlling precedent or statutory amendment), varying FITI causation standards will likely continue to proliferate, and a keen understanding of the existing precedential landscape on this issue will be essential to FITI litigants regardless of the jurisdiction in which they practice.

1. **FCA FITI Claims were Initially Recognized by the Supreme Court in 1943.**

In its 1943 decision, *United States ex rel. Marcus v. Hess*,[1] the Supreme Court held that contractors' collusive bidding to secure underlying contracts triggered FCA liability, reasoning that:

> [b]y their conduct, the respondents thus ***caused*** the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been ***executed as the result of*** the fraudulent bidding. 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 P.W.A. into the joint fund for the benefit of respondents.[2]

While the *Hess* Court's language certainly suggested that FITI claims must include some causative element, it did not elaborate on what that standard might entail, and the FCA does not provide statutory guidance on this issue. Per the Supreme Court's decision in *Escobar*, when confronted with interpreting the FCA on issues where the statute itself is silent, federal courts are to look to the common law.[3]

2. **Subsequent Materiality and Causation Confusion.**

Following *Hess*, many federal courts declined to consider or decide whether causation is a necessary element of FITI claims, separate and distinct from materiality, while others simply lumped causation and materiality together without further comment.[4]

For example, in 2005, in *A+ Homecare*, the Sixth Circuit adopted a natural tendency test for the materiality element of FITI claims, emphasizing that, for a claim to be material, it need only have the *natural tendency* to influence the Government.[5] The Court then held that "a false statement within a claim can only serve to make the entire claim itself fraudulent if that statement *is* ***material to causing*** the Government to pay the fraudulent claim."[6] Importantly, the Court did not address whether a separate causation element is also required (or, if so, how these elements would interact or differ). However, the Court's reasoning implied that because damage causation is not required to prove liability for other FCA claims, it is not (or should not be) required in the FITI context either:

> [E]valuating materiality based on the potential effect rather than actual result is more consistent with the underlying purpose of the FCA. The United States Supreme Court has broadly interpreted the statute to cover all fraudulent ***attempts*** to cause the Government to pay out sums of money. We have similarly held that recovery under the FCA is not dependent upon the government's sustaining monetary damages.[7]

Five years later, in *United Technologies*, the Sixth Circuit affirmed the application of the natural tendency test for materiality, noting that "[l]iability ***does not depend on whether the government relied in fact on the false statement to pay out the claim***. The [FCA], unlike the Truth in Negotiations Act, does not contain an affirmative defense if the government does not rely on a false statement."[8] This decision further suggested that the effect on the Government (*i.e.*, causation) is irrelevant to FITI liability.[9]

In 2017, the D.C. District Court explained that FITI claims lie when false statements "induced the government to make the initial contract . . . ."[10] The Court went on to explain that the resulting claims for payment are only considered false under a FITI theory "if the prior false statements [during contracting] ***caused*** the government to award the contract . . . ."[11] The Court then appeared to acknowledge (but not resolve) the confusion surrounding materiality and causation, noting that "[s]ome courts also refer to this causation requirement as materiality."[12]

The D.C. District Court revisited the elements of FITI claims twice in 2020, but through dueling decisions that failed to provide clarity on this issue. In *Morsell*, the Court described the fraudulent inducement theory as requiring "that a claim be submitted under a contract ***procured by fraud***."[13] But when the defendant argued that plaintiffs "cannot establish a ***causal link*** between [defendant's allegedly false statements] and . . . contract formation,"[14] the Court evaluated this argument under the natural tendency standard for materiality and made no mention of any causation requirement for FITI claims.[15] It was therefore sufficient that the statements at issue "would tend to influence" or "have the potential to impact" or were "capable of influencing" the contracting decision.[16]

Eight months later, in *Honeywell*, the same Court stated, in the FITI context, that "[i]n essence, the ***essential element*** of inducement or reliance ***is one of causation***. [The government] must show that the false statements upon which [it] relied . . . ***caused [it] to award the contract at the rate that it did***."[17] The Court then held that causation requires a showing of proximate cause, and thus that plaintiffs must prove "some direct relation between the injury asserted and the injurious conduct alleged."[18] However, the Court also described the proximate cause standard as requiring proof that the injury asserted "would not have come about if the defendant's misrepresentations had been true" (a description which appears more akin to actual or "but-for" causation).[19]

3. **The D.C. Circuit Explicitly Adopts an Actual Causation Standard.**

In 2021, perhaps in an attempt to provide clarity following the *Morsell* and *Honeywell* decisions, the D.C. Circuit decided *Cimino*, which directly addressed whether a FITI claimant must prove causation, and if so, what standard applies.[20] Though the relator argued that causation was not required for FITI claims, the *Cimino* Court disagreed, explaining that

> At common law, causation is an integral part of fraudulent inducement, which is a species of fraud. Fraudulent inducement occurs when a party is induced through fraudulent misrepresentations to enter a contract. The ordinary meaning of inducement incorporates

> a causation requirement. To "induce" means to bring about, bring on, produce, *cause*, give rise to. As the government explains, fraudulent inducement has a built-in causation requirement. If a fraudster's misrepresentations do not cause a party to enter a contract, no fraudulent inducement has occurred.
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> Although related, materiality and causation are not the same. The FCA defines materiality as having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. Causation here refers to whether fraud in fact caused the government to enter into a contract. To be sure, both materiality and causation require considering the effect of a defendant's fraud on the government's decision to enter a contract. But a statement could be material—that is, capable of influencing the government's decision to enter a contract—without causing the government to do so. Fraudulent inducement requires materiality and causation, separate elements that we cannot conflate.[21]
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> Importantly, the *Cimino* Court also rejected relator's argument that only proximate causation must be proven.[22] The Court first explained that the causation inquiry "focuses on actual causation, which we determine under a but-for standard,"[23] but later clarified that "like other torts, fraud requires both actual and proximate cause."[24]

Though the *Cimino* Court certainly provided some much-needed clarity regarding the FITI elements, some confusion remained regarding the appropriate causation standard. Specifically, the Court required proof of actual causation based on its claim that "it is a well-established principle that actual cause precedes any analysis of proximate cause."[25] However, the Court's only cited support for this "well-established principle" was Dobbs Law on Torts § 198. The *Cimino* Court's reliance on this section of Dobbs appears misplaced because this section pertains to negligence claims, not fraud-based claims.[26] Tellingly, in the sections of this source which pertain to fraud-based claims, Dobbs does not require application of an actual (*i.e.*, but-for) causation standard.[27] Instead, Dobbs appears to apply only a proximate causation standard to fraud-based claims.[28] It remains to be seen whether other federal courts will adopt *Cimino*'s holding, particularly given the apparent conflict between its findings and their cited support.[29]

4. **The Sixth Circuit Appears to Apply a Proximate Causation Standard.**

In contrast to the actual causation standard applied in *Cimino* just a year earlier, the Sixth Circuit appears to have adopted a proximate causation standard.[30] In *Wolf Creek*, the Sixth Circuit held that the relator had adequately alleged the requirement elements of a FITI claim: falsity, scienter, materiality, and causation.[31] When discussing causation, the Court held that relator had alleged the "existence of a ***causal link*** between [defendant's] false estimates and [the government's] reliance on those estimates," thereby sufficiently demonstrating causation.[32]

Though *Wolf Creek*'s discussion of causation is admittedly brief, and the Sixth Circuit certainly could have explicitly identified the applicable causation standard by name, the language utilized by the Court, specifically its requirement that relator demonstrate a "causal link," indicates that the Sixth Circuit applied a proximate cause standard rather than an actual or "but-for" standard. It remains unclear whether *Wolf Creek* will persuade other federal courts to do so given the lack of common law analysis in the decision.[33]

Additionally, it bears noting that, like the *Cimino* Court, the *Wolf Creek* Court also cited a source for its decision which was not precisely on point. Specifically, the Court claimed that "[w]e have . . . stated that ***whether the Government relied*** on the allegedly false statements ***is relevant to the causation inquiry***."[34] The Court cited its 2015 *United Technologies* decision as the source of this purported previous statement; however, this decision appears to address causation only in the damages context, not as an element of FITI liability. On the other hand, in the Sixth Circuit's 2010 *United Technologies* decision, the Court did consider whether reliance is required for FITI liability and explicitly held the exact opposite: "Liability does not depend on whether the government relied in fact on the false statement to pay out the claim."[35]

5. **FITI Going Forward.**

The *Cimino* and *Wolf Creek* decisions highlight the difficulties federal courts have had and will continue to have in defining the elements of FITI actions. While seemingly no longer conflating the materiality and causation elements, the issue of whether to apply an actual and/or proximate causation standard remains unresolved and will require a much deeper dive into the common law roots of FITI claims (and causation in the fraud context) than any federal court has engaged in to date.

Additionally, one cannot help but wonder whether, if causation requires *actual inducement*, but materiality requires only *the potential to induce*, FITI's materiality element has effectively been subsumed by its causation element. In other words, is it even possible for a false

statement to actually influence the Government's decision but at the same time *not be capable of influencing* this decision? While common sense counsels that the answer is "no," and thus that the materiality element should succumb to the more demanding causation element, no court has ever considered this issue, much less decided it.

Given the conflicting holdings of *Cimino* and *Wolf Creek*, as well as their respective not-quite-on-point citations, the lack of subsequent precedent evaluating or comparing these decisions, and the absence of case law considering what the future holds for materiality given the general acceptance of the separate and seemingly subsuming causation standard, the required FITI elements and applicable standards are far from decided. Until these issues are directly addressed, either through new controlling precedent or Congressional intervention, litigants should approach the process of pleading and proving FITI claims with great care (and with a close eye on the tedious web of existing precedent summarized above).

Footnotes:

[1] 317 U.S. 537, 542–43 (1943).

[2] *Id.* at 543–44 (emphasis added).

[3] *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176, 187 (2016) ("It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses."); *id.*at 187–88 (holding that a misrepresentation by omission constitutes a "false or fraudulent claim" under the FCA because "common-law fraud has long encompassed certain misrepresentations by omission."); *id.* at 193 (explaining that it need not determine whether the definition of materiality is derived from the FCA language or the common law, as the FCA language "descends from common law antecedents" and then summarizing the same).

[4] *See, e.g.*, *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006) (framing the materiality inquiry for FITI claims as a "causal rather than temporal connection," stating further that "[i]f a false statement is integral to a causal chain leading to payment," then it is material.) (citing *U.S. ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005)); *U.S. ex rel. Longhi v. United States*, 575 F.3d 458, 470–71 (5th Cir. 2009) (recognizing causation element for fraudulent inducement, but not discussing the standard as parties agreed that causation element had been satisfied).

[5] *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.*, 400 F.3d 428, 445 (6th Cir. 2005).

[6] *Id.* at n.12 (emphasis added).

[7] *Id.* at 446 (internal citations and quotations omitted) (emphasis in original).

[8] *United States v. United Techs. Corp.*, 626 F.3d 313, 321 (6th Cir. 2010) (emphasis added).

[9] Notably, this case concerned FCA claims submitted under a FITI theory *and* under a false records theory, and it is not entirely clear whether the Court's statements regarding reliance are related to one or both theories. However, it is clear that the Court does not apply any causation requirement to either theory, explaining that the actual basis for the Government's decision to pay or contract does not matter so long as the underlying false statements satisfy the natural tendency test. *See id.*

[10] *United States v. DynCorp Int'l, LLC*, 253 F. Supp. 3d 89, 105 (D.D.C. 2017).

[11] *Id.* at 107 (emphasis added).

[12] *Id.*

[13] *U.S. ex rel. Morsell v. Symantec Corp.*, 471 F. Supp. 3d 257, 300 (D.D.C. 2020) (emphasis added).

[14] *Id.* at 301 (emphasis added).

[15] *Id.* at 301–03.

[16] *Id.* at 302–03.

[17] *United States v. Honeywell Int'l Inc.*, 502 F. Supp. 3d 427, 459 (D.D.C. 2020) (emphasis added).

[18] *Id.* at 473.

[19] *Id.*

[20] *U.S. ex rel. Cimino v. Int'l Bus. Machs. Corp.*, 3 F.4th 412 (D.C. Cir. 2021).

[21] *Id.* at 418–19 (internal citations and quotations omitted).

[22] *Id.* at 421 (rejecting application of proximate cause standard under substantial factor test); *but see also* n.3 (appearing to leave open the possibility that the substantial factor test may be appropriate ***if*** "there are multiple sufficient causes, and . . . each of two or more causes would be sufficient, standing alone, to cause the plaintiff's harm.") (internal citations and quotations omitted).

[23] *Id.* at 418.

[24] *Id.* at 420.

[25] *Id.* (citing Dan B. Dobbs, et al., DOBBS' LAW OF TORTS § 198 (2d ed. June 2020 update)).

[26] *See id.*

[27] *See id*. at § 664 (listing, as a requirement for fraud or fraudulent misrepresentation claims, that the misrepresentation "proximately causes harm" without any mention of but-for causation).

[28] *See id.* at § 671 (requiring reliance as proof of causation for fraud-based claims, but noting that the plaintiff need only enter into a transaction "in whole or in part" because of the representation and that the plaintiff "may rely on several things, but the defendant's representation must be one of them") (citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 976–77 (1997) ("It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct . . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.") (quoting Restatement Second of Torts § 546, cmt. b)).

[29] Only two courts outside of the D.C. Circuit have cited *Cimino* in the context of FITI claims, both adopting *Cimino's* holding (either in whole or in part). *See U.S. ex rel. Marsteller v. Tilton*, 556 F. Supp. 3d 1291, 1301–03 (N.D. Ala. 2021) (citing *Cimino* for elements of FITI claim but not discussing causation standard to be applied); *U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, No. 2:15-CV-02245, 2022 WL 297093, at *7 (E.D. Cal. Feb. 1, 2022) (citing *Cimino* for both FITI elements *and* actual causation standard).

[30] *See U.S. ex rel. USN4U, LLC v. Wolf Creek Fed. Servs., Inc.*, 34 F.4th 507 (6th Cir. 2022).

[31] 34 F.4th at 514 (citations omitted).

[32] *Id.* (emphasis added).

[33] Only two courts have cited *Wolf Creek* in the context of FITI claims, but both were within the Sixth Circuit and neither addressed the causation standard in detail. *See United States v. Postal Fleet Servs., Inc.*, No. 1:19-CV-01900, 2024 WL 1765593, at *17, n.9 (N.D. Ohio Apr. 24, 2024) (citing *Wolf Creek* as requiring proof of causation for FITI claims, but declining to address causation because scienter and materiality were not plausibly alleged); *U.S. ex rel. Griffis v. EOD Tech., Inc.*, No. 3:10-CV-204, 2024 WL 4921608, at *11 (E.D. Tenn. Sept. 13, 2024) (citing *Wolf Creek* as requiring proof of causation, *i.e.*, proof that "the false statement caused the government to enter a contract with the defendant and pay the claim at issue," but not discussing causation further as decision was based on other grounds).

[34] *Id.* at 518 (citing *United Techs.*, 782 F.3d at 727–28).

[35] *United Techs.*, 626 F.3d at 321.