
November 2015

Material Solutions: Rectifying United States v. Natale and the Meaning of "Material"

Vaughn Bentley

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>



Part of the [Health Law and Policy Commons](#)

Recommended Citation

Vaughn Bentley, *Material Solutions: Rectifying United States v. Natale and the Meaning of "Material"*, 17 DePaul J. Health Care L. (2015)
Available at: <https://via.library.depaul.edu/jhcl/vol17/iss2/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

MATERIAL SOLUTIONS: RECTIFYING *UNITED STATES V. NATALE* AND THE MEANING OF “MATERIAL”

Vaughn Bentley

INTRODUCTION

In the summer of 2013, the United States Seventh Circuit Court of Appeals decided a case under a sparsely litigated statute, False Statements Relating to Health Care Matters, or § 1035. The appeal in the case, *United States v. Natale*, centered around the meaning of the term “material” as used in the statute. The Court ultimately decided the term covered post-operative surgical reports that had never been submitted for payment from Medicare. There was no planned audit of the surgeon, so it is likely Medicare would never have seen the reports outside of this lawsuit.

This ruling has significantly shifted what constitutes a “material statement” under § 1035. It also represents a departure from what has been found to be material in the past under the statute § 1035, and what § 1035 was designed to mirror, § 1001. Moving forward, either the Seventh Circuit or the Supreme Court should look to overrule this decision, either by using the meaning given by another Circuit or simply reverting back to the pre-*Natale* standard. Doing so will better protect surgeons and encourage detailed post-operative reports, leading to higher quality patient care.

I. *NATALE* – JUST THE FACTS

A. Introduction

To fully understand the implications and reasons for the solutions proposed, it is important to understand both the factual and procedural history of the *Natale* case. Due to the complicated surgical procedures involved¹ and the highly technical proceedings,² it is easy to get lost without

¹ This case involves two separate types of arterial grafts as well as a new technique for placing the grafts, as discussed *infra*.

fully appreciating the circumstances leading up to this ruling. This section will first go through the factual background of the case and second the procedural history of the case.

B. Factual Background

Dr. John Natale focused on repairing complex aortic aneurysms.³ Repairing aortic aneurysms involves repairing the walls of the aorta, the main artery exiting the heart, and the associated arteries.⁴ These surgeries involve two types of grafts: tube or bifurcated.⁵ A tube graft is a synthetic tube, which replaces the weakened arterial wall.⁶ This graft is used when the section of the artery needing to be repaired does not branch out into iliac arteries.⁷ A bifurcated graft is used when the arterial section does branch off.⁸ The bifurcated graft is a much more complex surgery because the bifurcated graft is shaped like an upside down “Y”.⁹ Renal grafts tend to be among the most complex aneurysm repairs due to the need to clamp the renal arteries and attach the branching iliac arteries to the synthetic graft rather than the natural artery.¹⁰ Natale was brought up on charges of performing simple artery grafts but using the CPT (current procedural terminology) codes for the more complex suprarenal aortic aneurysm.¹¹

C. Procedural History

Natale was charged with two counts of health care fraud, one count of mail fraud, and two counts of making false statements relating to health care matters.¹² The bases for these charges were discrepancies in Natale’s operative reports.¹³ Another surgeon treating a former patient of Natale’s found Natale had claimed in his report to have performed a bifurcated graft when a CT scan indicated a tube graft instead.¹⁴ Operative reports are

² This case also involves a highly technical appeal concerning what arguments could and could not be made, as discussed *infra*.

³ See *United States v. Natale*, 719 F.3d 719, 722-23 (7th Cir. 2013) *cert. denied*, 134 S. Ct. 1875 (2014).

⁴ *Id.* at 722.

⁵ *Id.*

⁶ *Id.* at 724.

⁷ *Id.*

⁸ *Id.*

⁹ Natale, 719 F.3d at 724.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 725.

¹³ *Id.*

¹⁴ *Id.* at 726-27.

generally used only by physicians in making post-operative treatment decisions and are not seen by Medicare during the billing process.¹⁵ During an audit, however, Medicare can request to review these documents.¹⁶ Medicare never requested the reports in *Natale* and did not indicate there was any ongoing audit against Natale.¹⁷

At trial, Natale presented evidence that he was using a technique the CPT codes did not recognize, which the Court termed the “Rush technique.”¹⁸ This technique, which involved folding over the arterial walls when placing a tube graft, was more complex than the simple tube graft procedure and more in line with the complexity of a bifurcated graft.¹⁹ Natale was acquitted of the health care fraud and mail fraud charges, but found guilty on the false statements charge.²⁰ Natale then appealed this decision based on jury instruction error.²¹

II. WHAT “MATERIAL” DOES AND DOESN’T MEAN

A. Introduction

This case brought up two separate statutes: False Statements Relating to Health Care Matters (§ 1035) and Statements or Entries Generally (§ 1001).²² Natale was charged and convicted under § 1035.²³ Since this is not a widely litigated statute in the Seventh Circuit, the Court had to use the language and analysis of § 1001 to determine what the elements of § 1035 are.²⁴ This section will detail: (1) what § 1035 requires; (2) what § 1001 requires; (3) the legislative history of § 1035; (4) what the Seventh Circuit in *Natale* claims “material” for the purposes of § 1035 requires; and (5) what other Circuit Courts have held “material” for the purpose of § 1035 requires.

¹⁵ Natale, 719 F.3d at 727.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 728.

¹⁹ Natale, 719 F.3d at 727-28.

²⁰ *Id.* at 728.

²¹ *Id.*

²² *Id.* at 733.

²³ *Id.* at 725.

²⁴ *Id.* at 732-33.

B. § 1035 – False Statements Relating to Health Care Matters

Natale was specifically charged under § 1035(a)(2), which states “Whoever, in any matter involving a health care benefit program, knowingly and willfully... makes any materially false, fictitious, or fraudulent statements or representations... in connection with the delivery of or payment for health care benefits...”²⁵ The court identified four elements required for a conviction under § 1035: (1) a false, fictitious, or fraudulent statement; (2) the statement is material; (3) the statement is knowingly and willfully made; and (4) the statement is made in connection with the delivery of or payment for health care benefits.²⁶

Natale’s appeal primarily concerned the meaning of material and whom the statement is material to.²⁷ The actual text of the statute is unclear on the matter.²⁸ The Court finds the statutory text provides two plausible definitions: (1) material to the health care benefit program or (2) material to the delivery.²⁹ The statute is silent on what “material” actually means.³⁰ Due to the lack of prior decisions in the Seventh Circuit and the ambiguity of § 1035, the Court turns to a similarly worded statute, § 1001, and the legislative history of § 1035.³¹

C. § 1001 – Statements or Entries Generally

The analogous statute the Court uses is § 1001(a)(2), which punishes “... whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully... makes any materially false, fictitious, or fraudulent statement or representation....”³² Unlike, § 1035, there is no ambiguity over whom the statements must be material to because § 1001 lacks the “in connection to...” language.³³ The Court looks to this as a clue over which interpretation of § 1035 should prevail.³⁴

²⁵ 18 U.S.C.A. § 1035 (West 2014).

²⁶ Natale, 719 F.3d at 733.

²⁷ *Id.* at 735-39.

²⁸ *See* § 1035 (“materially false” does not provide clues as to whether the statement needs to be material to delivery or material to the program).

²⁹ Natale, 719 F.3d 719 at 735.

³⁰ *See* § 1035 (no definitions provided besides “healthcare benefit program”).

³¹ Natale, 719 F.3d at 735.

³² 18 U.S.C.A. § 1001(a)(2) (West, 2014).

³³ *Compare* § 1035 with § 1001 (§ 1035 adds in language over “in connection to...” to establish a jurisdiction).

³⁴ Natale, 719 F.3d 719 at 735-36.

The Court also looks to § 1001 for the definition of “materially.”³⁵ Generally, there are two ideas of interpretation for what “materially” includes: (1) actual reliance and (2) natural tendency.³⁶ “Actual reliance” refers to requiring the person or agency to actually rely on the statement.³⁷ “Natural tendency,” the view taken by the Court in *Natale*,³⁸ refers to only requiring the statement have a “natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was addressed.”³⁹ This generally mirrors what most circuits have held, the statement or fact does not need to actually influence the agency, it must only be capable of doing so.⁴⁰ For example, a false statement made to a grand jury only needs to be able to influence the grand jury’s decision, not necessarily exert any influence. The Court does not hold this to be dispositive, however, and goes on to consider the legislative history of § 1035.⁴¹

D. Legislative History of § 1035

At first, § 1035 had no “material” requirement.⁴² After the bill left the House, the Senate added in the material language,⁴³ which mirrored § 1001.⁴⁴ It was not until the Conference Committee added the “in connection with” and “materially” language in the present version both appeared.⁴⁵ The Conference Committee pulled the “materially” language from the Senate version of the bill,⁴⁶ so the court in *Natale* attaches this meaning so the statements must be “material to a health care program”.⁴⁷

³⁵ *Natale*, 719 F.3d 719 at 735.

³⁶ *United States v. Lupton*, 620 F.3d 790 (7th Cir. 2010).

³⁷ *Id.*

³⁸ *Natale*, 719 F.3d at 735.

³⁹ *Lupton*, 620 F.3d at 806.

⁴⁰ See *United States v. Notarantonio*, 758 F.2d 777 (1st Cir. 1985); *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985); *United States v. Puente*, 982 F.2d 156 (5th Cir. 1995); *United States v. Dedhia*, 134 F.3d 802 (6th Cir. 1998); *United States v. Keller*, 730 F. Supp. 151 (N.D. Ill. 1990); *United States v. Baker*, 200 F.3d 558 (8th Cir. 2000); *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States v. Self*, 2 F.3d 1071 (10th Cir. 1993); *United States v. Grizzle*, 933 F.2d 943 (11th Cir. 1991); *United States v. Pereira*, 463 F. Supp. 481 (E.D.N.Y. 1978); (all using this definition of material for § 1001).

⁴¹ *Natale*, *supra* note 1, at 736-37.

⁴² Health Insurance Portability and Accountability Act of 1996, H.R. 3103, 104th Cong., § 244(a) (1996) (as passed by the House on Mar. 28, 1996).

⁴³ H.R. 3031, 104th Cong., § 544(a) (as amended and enacted by the Senate on Apr. 23, 1996).

⁴⁴ Compare H.R. 3031, 104th Cong., § 544(a) (as amended and enacted by the Senate on Apr. 23, 1996) (“[I]n any matter involving a health care program, knowingly and willfully... makes any materially false, fictitious, or fraudulent statement or representation”) with § 1001(a)(2) (“[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government... knowingly and willfully... makes any materially false, fictitious, or fraudulent statement or representation”).

⁴⁵ H.R. Conf. Rep. No. 104-736, at 259 (1996).

⁴⁶ H.R. Conf. Rep. No. 104-736, at 259 (1996).

⁴⁷ *Natale*, 719 F.3d at 737.

E. "Materiality" According to the Court

The Court claims to adopt the same meaning of "material" present in § 1001 for § 1035.⁴⁸ Once applied, however, the difference becomes clear. Natale never had to submit his operative reports to Medicare, and Medicare made no indication they ever would have asked for them.⁴⁹ This is a departure from what the court has done with § 1001 in the past. The court, in the cases it cites and other cases in the Circuit, has required the agency to actually receive the statement.⁵⁰ This has never been explicit, but is instead a unifying theme in the cases.⁵¹ *Natale* represents a departure from not only what the Seventh Circuit has held, but also what every other Circuit Court has held.⁵²

F. Other Circuits Views

Other circuits have generally agreed actual reliance is not a requirement for a statement to be "material."⁵³ The Third Circuit has taken a holistic view, requiring the court to look at the entirety of the circumstances.⁵⁴ The Fifth Circuit looks to whether the functioning of an agency would be materially affected to determine materiality.⁵⁵ The Fourth Circuit has read in a requirement of submission without actual reliance, essentially the naturalistic view from § 1001.⁵⁶

⁴⁸ Natale, 719 F.3d at 737.

⁴⁹ *Id.* at 727.

⁵⁰ See *Kungys v. United States*, 485 U.S. 759, 770 (1988); *United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010); *United States v. Turner*, 551 F.3d 657, 663 (7th Cir. 2008); *United States v. Gully*, 992 F.2d 108 (7th Cir. 1993); *United States v. DiFonzio*, 603 F.2d 1260 (7th Cir. 1979);).

⁵¹ *Id.*

⁵² See *United States v. Notarantonio*, 758 F.2d 777 (1st Cir. 1985); *United States v. Pereira*, 463 F. Supp. 481 (E.D.N.Y. 1978); *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985); *United States v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993); *United States v. Puente*, 982 F.2d 156 (5th Cir. 1995); *United States v. Dedhia*, 134 F.3d 802 (6th Cir. 1998); *United States v. Keller*, 730 F. Supp. 151 (N.D. Ill. 1990); *United States v. Baker*, 200 F.3d 558 (8th Cir. 2000); *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States v. Self*, 2 F.3d 1071 (10th Cir. 1993); *United States v. Grizzle*, 933 F.2d 943 (11th Cir. 1991) (all requiring submission of a claim implicitly to constitute "material" under § 1001).

⁵³ See *United States v. Notarantonio*, 758 F.2d 777 (1st Cir. 1985); *United States v. Pereira*, 463 F. Supp. 481 (E.D.N.Y. 1978); *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985); *United States v. Puente*, 982 F.2d 156 (5th Cir. 1995); *United States v. Dedhia*, 134 F.3d 802 (6th Cir. 1998); *United States v. Keller*, 730 F. Supp. 151 (N.D. Ill. 1990); *United States v. Baker*, 200 F.3d 558 (8th Cir. 2000); *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States v. Self*, 2 F.3d 1071 (10th Cir. 1993); *United States v. Grizzle*, 933 F.2d 943 (11th Cir. 1991) (all using this definition of material for § 1001).

⁵⁴ *United States v. Quirk*, 167 F. Supp. 462 (D.C. Pa. 1958), *aff'd* 266 F.2d 26 (3d Cir. 1958).

⁵⁵ *United States v. Beer*, 518 F.2d 168 (5th Cir. 1975).

⁵⁶ *United States v. Newton*, 452 F. App'x 288 (4th Cir. 2011) (evidence of submission of a statement that was false and had capacity to influence was sufficient for a conviction under § 1001(a)(2)).

The Fifth Circuit has taken the most liberal view, at least until *Natale*, in allowing for the statement to be ignored, never read, or even unbelievable.⁵⁷ However, implicit in this decision is the submission of the statement to the agency. The statement can be ignored or never read, but it must still be submitted.⁵⁸ The Sixth Circuit has also set the bar relatively low, but still requires the statement to be “made,” or submitted to the agency.⁵⁹ While the *Natale* decision could be seen to be in line with these decisions on a cursory look, it has caused a large shift in no longer requiring submission of the claim. The “capable of influence” requirement under the natural tendency test has been expanded to include any statement with the remote chance of influencing the agency.

III. HOW *NATALE* CHANGES THE GAME

A. Introduction

Natale has the potential for wide-reaching effects in health care. This decision broadens the “material” requirement of § 1035 in such a way as to open the door to more litigation in the future. This section details how the *Natale* decision can have potential effects on four areas: (1) the meaning of “material” under § 1035; (2) the meaning of “material” under § 1001; (3) discouraging detailed reports following surgery, lessening patient care; and (4) increasing the number of *qui tam* actions brought under the False Claims Act.

B. Potential Effects of the Current Rule on § 1035

Natale has the biggest potential for an effect on § 1035 litigation in the Seventh Circuit. Since the court found non-submission sufficient for conviction,⁶⁰ they have widened the breadth of § 1035. While this most obviously affects post-operative reports, it also reaches to any documentation Medicare can request, even if they do not require the documentation for payment. For example, according to the Medicare billing rules, a teaching surgeon must be present during key portions of the surgery.⁶¹ For a single surgery, the teaching surgeon’s presence may be demonstrated in

⁵⁷ *United States v. Abraham*, 678 F.3d 370 (5th Cir. 2012).

⁵⁸ *Id.*

⁵⁹ *United States v. White*, 270 F.3d 356 (6th Cir. 2001).

⁶⁰ *Natale*, 719 F.3d at 727.

⁶¹ 12 Medicare Billing Rules § 100.1.2(A).

the medical records.⁶² The teaching surgeon is not required to enter in any information, however.⁶³ It is not hard to imagine a situation where a teaching surgeon is incorrectly noted as present through the entire surgery for the sake of time. Under the *Natale* standard, this could lead to a conviction for whoever prepared the report. Even if the surgeon was present for the key portions of the surgery, the fact that he was not present during any portion could be seen as material to the payment of the claim. This is especially true if the time the teaching surgeon was absent is on the cusp of being considered a key portion of the surgery.

C. Potential Effects of the Current Rule on § 1001

The rule under *Natale* can potentially reach farther than just § 1035. Since the court drew so heavily on what “material” means in § 1001,⁶⁴ this could signal a change in how the court will view “material” in § 1001 litigation. If the court adopts the standard from *Natale* into § 1001 litigation, the scope of § 1001 will be greatly broadened. Since under the *Natale* standard, submission of the statement is not required, an individual who plans on lying to any branch of the government, but does not, could be convicted under § 1001. While the government would still need to learn of the planned lie, with recent data breaches this is not unfathomable.⁶⁵ Even though the *Natale* standard as applied to § 1001 is only dicta, it should still be considered when looking to change the meaning.

D. Potential Effects of the Current Rule on Patient Care

The current ruling discourages physicians to be specific in post-operative reports, which could lead to a lower quality of care for the patient. *Natale* claimed the discrepancies in his reports were the result of how many patients he saw and being careless.⁶⁶ While one potential upside of the ruling could be increased care in these reports, the more likely outcome will be surgeons being as vague as possible. This was, in fact, argued in various amicus briefs filed in the *Natale* case.⁶⁷ The court claims the intent

⁶² *Id.* at § 100.1.2(A)(1).

⁶³ *Id.*

⁶⁴ *See Id.* at 735-36.

⁶⁵ *See generally* WIGGIN AND DANA, <http://www.wiggin.com/15520> (last visited Dec. 18, 2014); Anthony Brino, *Security Experts Warn of Increasing Data Breaches and Privacy Risks*, GOVERNMENT HEALTH IT (Nov. 26, 2012), available at <http://www.govhealthit.com/news/underwriting-experts-warn-increasing-data-breaches-and-privacy-risks> (data breaches have been increasing in number over recent years).

⁶⁶ *Natale*, 719 F.3d at 738

⁶⁷ *Id.* at 739.

requirement in § 1035 would be a shield against such a result.⁶⁸ Considering the uptrend in *qui tam* cases⁶⁹ and the penalties of conviction under § 1035⁷⁰, surgeons should not view this as such. Innocent mistakes may not be believed to be such by the jury. Surgeons in areas of expertise that are in particularly high demand, who must see high numbers of patients, should view this as a reason to take notes that are much more vague. Doing otherwise is to risk indictment as a result of poor paperwork.

By discouraging these reports to be specific, patient care could suffer. Since the reports are primarily used to guide post-operative treatment,⁷¹ from a patient-care standpoint they should be as detailed as possible. A detailed report can guide a physician who has a high volume of patients, or better yet assist a new physician if the old physician is no longer available. The *Natale* rule places patient-care and physician safety at odds with each other.

E. Potential Effects of the Current Rule on Qui Tam Actions

This could also have the effect of increasing the number of *qui tam* actions filed. The Supreme Court has already acknowledged the primary motivation for *qui tam* suits is financial.⁷² The case in *Natale* was brought by a competing surgeon,⁷³ and taken in light of the financial motivation, could be seen as a surgeon wishing to take a competitor out of the market. Under a pre-*Natale* ruling, surgeons would be safe so long as they were not in violation of other fraud statutes, such as the False Claims Act or Anti-Kickback Statute. Now, if a surgeon notices any discrepancies in another's post-operative reports, they can bring a *qui tam* action which could

⁶⁸ *Id.*

⁶⁹ See generally Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under Health Reform Law*, 116 PENN. ST. L. REV. 77 (2011); Brian C. Betner et al., *DOJ Announces That 2014 Sees Record FCA Recoveries and Whistleblower Lawsuits*, LEXOLOGY (November 22, 2014), available at http://www.lexology.com/library/detail.aspx?g=44b942c1-557b-44a1-aeda-5da92574821d&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+Federal+section&utm_campaign=Chicago+Bar+Association+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2014-11-27&utm_term; Scott Becker, JD, CPA & Molly Gamble, *The Growth of Healthcare Fraud Qui Tam Lawsuits*, BECKER'S HOSPITAL REVIEW (November 26, 2013), <http://www.beckershospitalreview.com/legal-regulatory-issues/the-growth-of-healthcare-fraud-qui-tam-lawsuits.html>; Kathy B. Weinman & Jennifer M. Ryan, *Qui Tam Actions Against Pharmaceutical Companies*, COLLORA LLP <http://www.colloralp.com/law-articles/white-collar/qui-tam-pharmaceutical.aspx> (last visited Dec. 18, 2014) (all supporting the idea that *qui tam* actions have increased and will continue to increase under the False Claims Act).

⁷⁰ Conviction under § 1035 is a felony with a maximum penalty of 5 years in prison. 18 U.S.C. § 1035.

⁷¹ *Natale*, 719 F.3d at 738.

⁷² See *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997) (“[*Qui tam* relators] are motivated primarily by prospects of monetary reward rather than the public good.”).

⁷³ *Natale*, 719 F.3d at 727.

result in a conviction under § 1035. The *qui tam* action does not even need to succeed, as it will still tie the physician up in costly litigation and slander the surgeon's name. This motivates surgeons to bring potentially frivolous *qui tam* suits at an even more alarming rate.

This motivation may be strengthened in light of recent legislation and litigation. In Illinois, the House of Representatives is considering amending The Department of Professional Regulation Law of the Civil Administrative Code of Illinois to streamline the revocation of physician licenses in cases of Medicare and Medicaid Fraud and Abuse.⁷⁴ Under this amendment, any physician convicted of a crime falling under Medicare Fraud and Abuse, will automatically lose his or her license.⁷⁵ This eliminates the administrative process to determine whether the physician will lose his license,⁷⁶ which can result in a settlement without loss of license.⁷⁷ Competing surgeons will now have a stronger incentive to turn in physicians under this law, as it will result in less competition if a *qui tam* action succeeds.

In Illinois, this incentive is only strengthened when considered in light of recent cases. Judge Flaum of the Seventh Circuit broadened the reach of the Anti-Kickback Statute (AKS) in a recent decision.⁷⁸ In *Patel*, the Seventh Circuit reasoned even a certification or re-certification for care would be considered a referral for the purposes of AKS.⁷⁹ This greatly broadened the reach of AKS, to now apply virtually any time a physician receives money from a hospital, even if the physician does not direct patients to the hospital.⁸⁰ While this decision could be deserving of a comment of its own, it is worth noting Judge Flaum seems intent on further expanding the reach of fraud and abuse statutes.

This expansion is troubling for surgeons when considered in light of *Hayashi v. Illinois Department of Financial and Professional Regulation*. In *Hayashi*, a group of physicians had their licenses suspended after they were convicted of battery or sexual abuse offenses.⁸¹ The court in *Hayashi* held a statute enacted after the physicians' conviction providing

⁷⁴ H.R. 1359, 99th Gen. Assemb. (Ill. 2015).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 68 Admin § 1285.225.

⁷⁸ *United States v. Patel*, No. 14-2607 (7th Cir. Feb. 10, 2015), available at <http://www.healthlawpolicymatters.com/files/2015/02/Patel-7th-Cir2015-02-10.pdf> (Judge Flaum also decided *Natale*).

⁷⁹ *Id.* at 23.

⁸⁰ *Id.* at 19.

⁸¹ *Hayashi v. Illinois Dept. of Financial and Professional Regulation*, 2014 IL 116023, ¶ 5-9 (Oct. 17, 2014).

for automatic loss of license was still applicable to the physicians.⁸² The court found the language of the statute, that a physician “has been convicted,” made the statute applicable.⁸³ The court further held this was not a retroactive statute, meaning it passed constitutional muster.⁸⁴ Since the proposed bill in the house has similar language to the statute in *Hayashi*,⁸⁵ it is not much of a stretch for the Illinois courts to find the proposed statute will apply to any physician licensed in Illinois who has ever been convicted of a Medicare or Medicaid fraud crime. This includes those under § 1035. This gives surgeons a very strong incentive to bring even more *qui tam* actions, as their competitors could permanently lose their license even if this legislation is passed after the competitors’ conviction.

IV. SOLUTIONS

A. Introduction

The current standard for materiality under *Natale* is too broad. As it stands, a *qui tam* suit could unearth documents that lead to a separate conviction even when the *qui tam* action fails.⁸⁶ By not requiring a statement to be submitted to Medicare, only the possibility of submission, the court has created a lot of vulnerability for physicians that did not exist before.

The Seventh Circuit may be unlikely to act, however, as they denied a rehearing *en banc* in *Natale*. This potentially represents the judges support this view and are unlikely to overturn the case in the foreseeable future. However, they may also be waiting for a case with facts better suited for clarifying the ruling. Similar problems exist within the Supreme Court, as *certiorari* was denied in the *Natale* case. The Supreme Court may simply be waiting for more input from the circuits on the differences between § 1035 and § 1001 and how materiality should be reflected in each. Since § 1035 is sparsely litigated, it may be some time before either court has the opportunity to rehear the issues present in *Natale*.

Either the Seventh Circuit or the Supreme Court can correct this ruling by clarifying or overruling *Natale*. Congress can amend the lan-

⁸² *Id.* at ¶ 52.

⁸³ *Id.* at ¶ 19.

⁸⁴ *Id.* at ¶ 26.

⁸⁵ Compare Ill. H.B. 1359 (“...has been adjudicated”) with *Hayashi*, 2014 IL 116023 at ¶ 17 (“...has been convicted”).

⁸⁶ See generally Cohen, *supra* note 69; Brian C. Betner, *supra* note 69 (all supporting the idea that *qui tam* actions have increased and will continue to increase under the False Claims Act).

guage of the statutes in play as well. There are five possible solutions: (1) a rule based on the Fourth Circuit view; (2) a rule based on the Third Circuit view; (3) revert back to the pre-*Natale* rule; (4) a new rule better reflecting the requirements of § 1035; or (5) Congress can clarify the meaning of material within § 1035 and § 1001.

B. Rule Based On The Fourth Circuit

The Fourth Circuit has articulated a standard that would preserve the pre-*Natale* view of the seventh circuit while still maintaining the idea the statement must be submitted to the agency. In *United States v. Newton*, the court broke down conviction under § 1001 into three elements: (1) the defendant made a false statement to a government agency; (2) the defendant acted knowingly and willfully; and (3) the statement was material.⁸⁷ This breakdown has survived recent litigation as well.⁸⁸

By separating submission of the statement from materiality, the court could allow for the traditional “natural tendency” to stand while still upholding the idea that submission is required. This give the court the most discretion to further shape the meaning of “material” and expand upon this meaning while not having to worry about balancing the “natural tendency” test with submission. This action should be attractive to the Supreme Court if they do not trust the lower courts to be able to adequately balance the two in the future. Since this removes submission from consideration and instead draws the bright line rule, it would be most attractive to those who want to decrease the number of actions brought against surgeons. From a public policy standpoint, creating a bright line standard would not allow for much change outside of amending the statute. While this does reign in judges who may wish to legislate from the bench, it may not reflect future situations. These considerations should be taken into account when shaping a rule from the Supreme Court.

Ruling this way would also encourage surgeons to keep filling out the post operative reports as they have been. By requiring submission of the reports to constitute criminal activity, the court is keeping the status quo. Rather than having the courts change this standard, leave it to CMS or Congress to require submission of the reports for payment, rather than only requesting them in an audit. This avoids issues of judicial activism

⁸⁷ *Newton*, 452 F. APP'X at 291-92.

⁸⁸ See *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012) (not overturning or limiting *Newton* even when the circuit had the opportunity).

and allows surgeons the peace of mind to know whether these post-operative reports will likely be seen.

C. Rule Based On The Third Circuit

The courts could adopt the view from the Third Circuit. The Third Circuit uses a holistic view when evaluating materiality to determine if the statement would pass the natural tendency test.⁸⁹ The court has taken the view of looking at the potential effects of the statement.⁹⁰ For situations factually similar to *Natale*, where the agency never requests the statement and cannot show they were planning on requesting the statement, this would logically lead to the statement being “immaterial.” Since the agency cannot show the statements had the effect of being capable of influencing a decision unless requested, the statements cannot be material.

This would allow courts to balance the competing interests at play. The government could still bring actions while the surgeons would be protected from conviction for reports the agency may never request. Instead, the court would balance the two by taking a holistic view. By not drawing a bright line between “submission” and “non-submission,” the court retains discretion to whether the statements were likely to be requested. For example, if the agency could show they were in the process of auditing or the surgeon had a very high likelihood of an audit the reports could be considered “material.” This rule would provide the best result for the government, the surgeons, and the court itself.

D. Revert Back To The Old Rule

Either the Supreme Court or the Seventh Circuit could simply revert back to the pre-*Natale* standard, which implicitly requires submission of the claim. This, however, leaves the door open to future unrest. By making the requirement of submission only implied, future courts are able to reinstate the *Natale* standard. The court should only look to this option if they are unsure whether the Fourth Circuit or third circuit would better suit the purpose of § 1035.

This is the most realistic change from the Seventh Circuit. The court would not be completely changing the standard, instead only overruling one case. However, if the Supreme Court were to get involved, they

⁸⁹ Quirk, 167 F. SUPP. at 462.

⁹⁰ See *United States v. Moyer*, 674 F.3d 192 (3d Cir. 1992) (court looked to how defendant’s statements to the FBI could have influenced the FBI agents to redirect their attention for § 1001 conviction).

may want more guidance for the lower courts. The pre-*Natale* standard in the seventh circuit was very vague and open-ended. The court may see this as being too open-ended and not advocating for the best interests of the surgeons. Considering the Supreme Court has already denied *certiorari* in the *Natale* case, it is very unlikely the court will seek to establish the pre-*Natale* standard. Instead, they are more likely to use the *Natale* standard or the standard from another circuit.

E. New Rule Better Reflecting § 1035

If the courts are the ones to fix this problem, they should implement a rule that takes the best pieces of each circuit. Adopting this rule would account for the policy implications of each rule and work best to counteract the downsides of each. This rule would separate out submission from the “material” requirement, as done in the Fourth Circuit,⁹¹ while using a balance test to determine whether a statement is material, as seen in the Third Circuit.⁹² If submission were a requirement that could only be overcome by a strong showing of materiality of the statement, the court best balances the interests of the surgeons and the government.

The surgeons’ interests are served by this rule as submission of a statement is separated out from whether a statement is considered material. This allows surgeons to continue filling out post-operative reports as they have been. Only if audited would the surgeons be liable for the information in the reports. In this case, simple mistakes are less likely to lead to convictions, as they may have in this case.

By using a balance test, the government can be assured if a statement is truly material it will lead to a conviction. For example, overcoming the submission requirement by showing the surgeon would have been audited would allow the government to proceed in cases otherwise dismissed for a technicality. While this approach does lead to both the surgeons and the government only having part of their interests served, it is a compromise each side should look to make.

This court solution does the most to serve the interests of public policy. By blunting the potential effects of the rule in *Natale*, the courts can create good will with the public, reduce their own dockets, and limit liability for all other industries.

This rule separates “material” from the submission requirement. Doing so can blunt the effects the current rule could have on patient care.

⁹¹ Newton, 452 F. APP’X at 291-92.

⁹² Quirk, 167 F. Supp. at 462.

Since physicians will not be as enticed to be vague in the post-operative reports, patient-care could improve, or at least remain the same. This kind of effect has the potential to create a great deal of good will with the public. However, surgeons will still not be incentivized to lie in post-operative reports. CMS can still request the reports in an audit, and creating a balancing test where a strong showing of materiality can overrule the need for submission will still allow the government to bring suits without fear of losing on a technicality.

A rule separating the material and submission requirements will not incentivize *qui tam* actions by other surgeons. Since *qui tam* actions are already expected to increase,⁹³ the current rule may lead to large dockets for the federal courts and large case-loads for the Attorney General's Office with potentially no trade-off. As discussed *supra*, surgeons will be incentivized to bring frivolous lawsuits against other surgeons. Such lawsuits take up valuable time and assets of the surgeon being charged and the federal government, who may investigate the case before discovering it is frivolous. Such suits should be discouraged, as the proposed rule does. Finally, this rule limits liability for all industries governed by § 1001. As discussed *supra*, the current *Natale* rule may expand liability for § 1001. Since § 1001 governs all industries, and even criminal trials, the current rule expands liability for all by never requiring submission for a statement to be material. A criminal defendant who writes plans to lie in testimony, going so far as to write the testimony down, but ultimately tells the truth may be found in violation of § 1001 under *Natale*. A rule limiting this liability is in the obvious interest of everyone.

F. Amendment to the Act by Congress

Finally, Congress could pass an amendment, clarifying the meaning of material in § 1035. This solution would be the most effective, as the Supreme Court has refused to speak on the issue⁹⁴ and the circuits are currently split on the issue.⁹⁵ This would be the first time § 1035 has been

⁹³ See D. Michael Crites, *Patient Protection and Affordable Care Act Increases Potency of Qui Tam Suits Under the False Claims Act*, THE NATIONAL LAW REVIEW (Aug. 5, 2010), available at <http://www.natlawreview.com/article/patient-protection-and-affordable-care-act-increases-potency-qui-tam-suits-under-false-claims>.

⁹⁴ See *United States v. Natale*, 134 S. Ct. 1875 (2014) (denying petition for certiorari).

⁹⁵ Compare *Natale* 719 F.3d 719 (holding there is no submission requirement for a statement to be considered "material"), with *Newton*, 452 F. APP'X 288 (holding submission is a separate requirement entirely from "material"), and *Quirk*, 167 F. SUPP. 462 (holding the appropriate test is a balancing test to determine if submission is required for a statement to be "material").

amended since its inception in 1996.⁹⁶ Congress should look to add a definition of “material” clearly establishing submission of a statement as a separate requirement from whether a statement is “material” absent extraordinary factors. This definition would carry all of the advantages of the rule of suggested *supra* in section V(E), but additional advantages as well.

The law should be amended to read:

(c) As used in this section, the term “material” means “a statement that has the natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed.” A statement can only be considered material if it has been submitted to the decisionmaking body, absent extraordinary circumstances.

This structure follows the definition for “health care benefit program” within § 1035 without requiring an amendment to 18 U.S.C. § 24, which the “health care benefit program” references. By not changing the definition under § 24, titled “Definitions relating to Federal health care offense,” Congress can blunt the effect of their change. If Congress were to amend § 24 to this reading, it would also change the meaning for any statute containing “material” for federal health care offenses. This could have unintended consequences, altering the meaning of statutes which are not begging for the same changes.

Another key advantage of this amendment is that it would settle the circuit split. Since the Supreme Court has declined to take action, this may be the only hope to avoid different standards across the country. Currently, a cardiologist who performs grafts in both Southern Illinois and Missouri may find himself facing separate standards.⁹⁷ This situation is not far off, considering the economic realities of the areas.⁹⁸ Congress should seek to avoid this issue for obvious reasons.

Finally, Congress is leaving some room open for the courts for interpretation. By not setting the limits on “extraordinary circumstances,” Congress leaves the courts room to sort out the intricacies. This allows the

⁹⁶ Compare 18 U.S.C. § 1035 (2013), with 18 U.S.C. § 1035 (1996) (there are no changes in the statutory language).

⁹⁷ Illinois is in the Seventh Circuit while Missouri is in the Fifth Circuit.

⁹⁸ See Joanna Ganning et al., *Southern Illinois Income and Employment*, DEPT. OF URBAN AND REGIONAL PLANNING & DEPT. OF NATURAL RESOURCES AND ENVIRONMENTAL SCIENCES AT UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, available at <http://research.aces.illinois.edu/sites/research.aces.illinois.edu/files/SIRAP/final/IncomeandEmployment.pdf> (last visited February 27, 2015); *Demographics*, KIRKSVILLE REGIONAL ECONOMIC DEVELOPMENT INC., <http://www.k-redi.com/demographics/> (last visited Feb. 27, 2015) (the median income in Southern Illinois is \$ 30,3846 and the median income in Northeast Missouri is \$33,639).

courts to decide on a case-by-case basis what will overcome the requirement of submission. Congress would still be limiting the court by using the phrase “extraordinary circumstances.” The plain meaning of this phrase would suggest it requires more than the fact the statement could have been asked for. Instead, it would seemingly require evidence of an upcoming audit or similar circumstances. Placing these kinds of comments in the committee report would help solidify these requirements.

The downside of relying on an amendment is that Congress must act. Based on recent years, Congress is not likely to pass any law soon.⁹⁹ Further, this would limit the amount of money the Federal government could reclaim for the Medicare trust. If the AARP or another lobbying group for the elderly were to get word of this, the law would likely fail.¹⁰⁰ Cuts to Medicare have not been politically popular in recent years with either the Democrats or Republicans.¹⁰¹ Since this would limit the ability of the federal government to re-collect money from Medicare, it may be seen in the same light. The only group in clear support of this change would be the American Medical Association, the American Cardiology Association, and American Surgical Association. However, these three groups would have a great deal of political pushback to overcome.

V. CONCLUSION

The Supreme Court, the Seventh Circuit, or Congress should look to correct the error from *Natale* by adopting the fourth circuit view. Doing so will allow the courts to shape what “material” means while still requiring the submission of a claim. The most likely rule for the Supreme Court to adopt would be from the Third Circuit, which takes a holistic view. This allows the court discretion and does not have the same bright line submission requirement the fourth circuit does. The best rule for either court to

⁹⁹ See Philip Bump, *The 113th Congress is Historically Good at Not Passing Bills*, THE WASHINGTON POST (July 9, 2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/> (the 113th Congress passed the fewest number of laws since 1973 and there has been a general downward trend since the 95th Congress in 1979).

¹⁰⁰ Older individuals are more likely to vote than younger and AARP is the largest lobbying group in the United States. Further, the AARP made a great deal of money by opposing Medicare Cuts in the Patient Protection and Affordable Care Act. See Robert H. Binstock, PhD, *Older People and Voting Participation: Past and Future*, 40 THE GERONTOLOGIST, NO. 1, 18 (2000); Avik Roy, *How the AARP Made \$2.8 Billion by Supporting Obamacare's Cuts to Medicare*, FORBES (Sept. 22, 2012 12:13am), available at <http://www.forbes.com/sites/aroy/2012/09/22/the-aarps-2-8-billion-reasons-for-supporting-obamacares-cuts-to-medicare/>.

¹⁰¹ Sandy Fitzgerald, *Democrats Joining Republicans in Protest Over Medicare Advantage Cuts*, NEWSMAX (Apr. 6, 2014 5:36pm), available at <http://www.newsmax.com/Newsfront/medicare-advantage-cuts-oppose/2014/04/06/id/563935/>.

adopt is the rule proposed in this paper. The Seventh Circuit could also simply overrule *Natale* and revert back to the pre-*Natale* standard. Finally, Congress could amend the statute to clarify the meaning of material. Overall, something must be done to shield surgeons from the ruling under *Natale*.