

Morgan Lewis

# ***FAST BREAK: FALSE CLAIMS AFTER ESCOBAR***

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# Pre-*Escobar* Landscape

- Two types of false claims—factually false and legally false.
  - Factually False Claims involve claims where there is an 'an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.'
- Two types of Legally False Claims – Express and Implied
  - Express False Certification Theory - applies when a government contractor falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment
  - Implied False Certification Theory – posits that whenever a contractor submits a claim the government contractor impliedly certifies that it has complied with all underlying statutes, regulations, and contract terms.
- Circuit Courts were split over whether Implied False Certification was a legitimate FCA theory of liability.

# ***US ex rel. Escobar v. Universal Health Services*** **(Background)**

- In *Escobar*, plaintiffs alleged that a health care provider submitted reimbursement claims for counseling and other mental health services but failed to disclose material violations of regulations governing the treating professionals' qualifications and licensing requirements.
- The district court dismissed, holding relator had failed to state a claim because the alleged regulatory violations were not an express condition of payment.
- The 1st Circuit reversed, holding every submission of a claim implicitly represents compliance with relevant regulations and any undisclosed violation of a precondition of payment renders a claim false within the meaning of the FCA.

# The Supreme Court's Decision

- First, “at least in certain circumstances, the implied false certification theory can be a basis for liability.”
- To be applicable:
  - (1) the claim must “make[] ***specific representations*** about the goods or services provided”; and
  - (2) “the defendant’s failure to disclose noncompliance with ***material*** statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”
- Materiality “look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.”

# The Supreme Court's Decision *cont'd*

- The court instructed lower courts that “The materiality standard is demanding. The False Claims Act is not ‘an all-purpose antifraud statute,’ or a vehicle for punishing garden-variety breaches of contract or regulatory violations.”
- What Factors To Consider?
  - A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment.
  - Nor is it sufficient that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.
  - The fact that a regulation is labeled as a “condition of payment is relevant, but not dispositive of the materiality inquiry.”

# Initial Reaction to *Escobar*

- Government and Relator's Bar Claimed Victory!
  - Implied Certification is Approved!

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SUPREME COURT ISSUES TREMENDOUS VICTORY TO WHISTLEBLOWERS IN AFFIRMING THAT "HALF-TRUTHS" CAN MAKE A CLAIM FOR PAYMENT FALSE OR FRAUDULENT

## Supreme Court Issues Tremendous Victory to Whistleblowers in Affirming that "Half-Truths" Can Make a Claim for Payment False or Fraudulent

## But Questions Remained After *Escobar*

- How will courts analyze “materiality”?
- What is the scope of the “specific representations” that a contractor must have made?
- Does it matter if the government knew of the allegations and continued to pay?
- Or if the government knew the contractor was actually not compliant?
- Can this be decided at the Motion to Dismiss or Summary Judgment stage? Or does it need to go to a jury?

# Government's View of *Escobar*

- In briefs in current False Claims Act cases, the United States has argued that, following *Escobar*:
- “Material” means “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”
  - This is a flexible standard which allows the government to argue that compliance with a variety of regulations would influence its decision to pay.
- Materiality is determined through a holistic assessment of the tendency or capacity of the undisclosed violation to affect the government decision maker. The government need not demonstrate that the government would actually refuse payment.



# Defendant's Arguments About *Escobar*

- In post-*Escobar* cases, defendants have argued that:
- Merely alleging that a defendant violated a condition of payment or simply that the government would have denied payment if it had known of the noncompliance is insufficient to state a claim post-*Escobar*.
- A complaint must explain “**why**” the government would not have paid had it known of the non-compliance.
- General statements of compliance with “all applicable statutes and regulations” is not a specific enough representation to trigger the implied certification theory.

# ***Escobar* is a Victory for Defendants?**

- Courts have dismissed relator and government complaints at the motion to dismiss stage and summary judgment.
  - *US v UnitedHealth Group* (C.D. Cal.) – district court dismisses government's Complaint in intervention. (First time DOJ had joined a suit alleging Medicare Advantage fraud). The complaint "include[d] only conclusory allegations that [UnitedHealth's] conduct was material, and fails to allege that [Medicare] would have refused to make risk adjustment payments to [UnitedHealth] if it had known the facts about [UnitedHealth's] alleged involvement with the Healthcare Partners' chart review process."
  - *United States v. Par Pharm. Companies, Inc.*, (N.D. Ill.) court grants summary judgment to defendant pharmacy against United States finding claims were not false simply because the government overpaid, as such an assertion glosses over the requirement that there must be a false or misleading statement.

# Materiality is a FACT SPECIFIC Inquiry

- *United States v. Triple Canopy Inc.* (4th Cir.)
  - Triple Canopy, was awarded a contract to provide security services in Iraq. They agreed that its employees would pass a marksmanship test and that it would maintain marksmanship scorecards in personnel files, though neither requirement was an express precondition of payment. Triple Canopy hired guards, who could not pass the marksmanship test, but submitted claims and placed falsified scorecards in each employee's personnel file
  - The court concluded that Triple Canopy's falsifying the marksmanship scorecards suggested that Triple Canopy knew the requirement was material. The ability of a guard to shoot straight is material to the contract.
  - But the court acknowledged Escobar's "demanding" materiality standard and recognized it was not "sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." Instead a condition is material when "a reasonable person would realize [its] imperative."

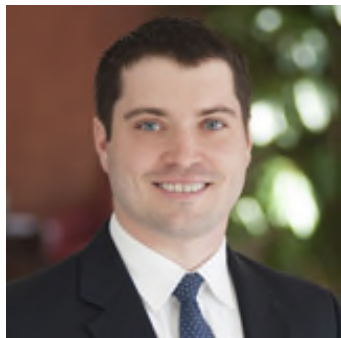
# Courts of Appeals Are Looking to Government Knowledge

- Courts are often looking at what the government did to determine materiality –
  - *United States ex rel. McBride v. Halliburton Co.* (D.C. Cir.) “courts need not opine in the abstract when the record offers insight into the government’s actual payment decisions”
  - *United States ex rel. Petratos, et al. v. Genentech Inc.*, (3rd Cir.) – “a misrepresentation is not ‘material to the Government’s payment decision,’ when the relator concedes that the Government would have paid the claims with full knowledge of the alleged noncompliance.”
  - *U.S. ex rel. Nelson v. Sanford–Brown Ltd* (7th Cir.) – At most, Relator had offered evidence that the government would have been entitled to decline payment based on alleged misrepresentations. Evidence showed that the government agency responsible for making payment decisions had already examined the defendant’s records and concluded that no penalties were warranted so summary judgment should be affirmed.
- But it’s not always sufficient:
  - *United States ex rel. Campie v. Gilead Sciences, Inc.* (9th Cir.) - “to read too much into the FDA’s continued approval—and its effect on the government’s payment decision—would be a mistake”

# What Should HealthCare Providers Do?

- The lack of a bright-line standard regarding how to view “materiality” creates real compliance challenges.
- When analyzing potential FCA liability, consider:
  - What affirmative statements are you making when you certify compliance?
  - Is the government aware of the practices at issue? Does the government continue to pay?
  - How is the regulation/provision labeled? Is it called a “condition of payment”?
  - Is the requirement central to your agreement with the government?
- Cases can and will be dismissed at the early stages, and before discovery, based on a failure to properly plead materiality.

# Thanks!



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John Cosgriff represents health care and life science clients in government investigations and litigation matters, and provides regulatory and compliance guidance to providers, including many large and small hospices, home health agencies, hospitals, physician groups, and pharmacies. John primarily defends clients in complex criminal, civil and administrative fraud and abuse matters before US Attorneys' Offices, the HHS Office of Inspector General, and state MFCUs. These cases typically involve alleged violations of the False Claims Act, the Anti-Kickback Statute, the Federal Food Drug and Cosmetic Act, and the Stark law.

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Featuring Andy Ruskin and Lauren Groebe

➤ Thursday November 30, 3:00 PM (EST)