

FALSE CLAIMS ACT LITIGATION POST-*ESCOBAR*

The US Supreme Court's 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* significantly affected the way courts evaluate claims under the False Claims Act (FCA) and has wide-reaching implications for FCA litigants. The landmark decision unanimously upheld the implied false certification theory of liability under the FCA, but also made the FCA's materiality requirement stricter. *Escobar* has generated much debate since its release and opened the doors to further litigation regarding the proper interpretation of its holdings.



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The False Claims Act (FCA) remains a powerful tool for combatting fraud against the government (see *Box, Overview of the False Claims Act*). Last year saw the continued robust use of the statute in suits brought by the government and by private plaintiffs on behalf of the government (known as relators or *qui tam* plaintiffs).

The Department of Justice (DOJ) recently announced that it collected \$3.7 billion from FCA awards and settlements in 2017. Of these recoveries, the government paid relators over \$392 million. (DOJ Press Release, *Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017* (Dec. 31, 2017), available at justice.gov.) Even though the total amount the government recovered is about \$1 billion less than its record-breaking recovery in 2016, it reflects the government's continued aggressive pursuit of FCA claims.

Notably, settlements and judgments in *qui tam* cases in which the government declined to intervene totaled roughly \$590 million, eclipsing relators' previous record haul in 2015 by almost \$80 million (see DOJ Fraud Statistics — Overview (Jan. 11, 2017), available at justice.gov).

Perhaps the most significant recent development in FCA litigation is the impact of the Supreme Court's 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* (136 S. Ct. 1989 (2016)). In *Escobar*, the Supreme Court adopted the implied false certification theory of liability under the FCA, which is based on the premise that a defendant that submits a claim to the government impliedly certifies that it has complied with applicable legal requirements (such as statutory, regulatory, or contractual requirements), even without making an express statement of compliance. A defendant that does not comply with a relevant requirement can then be found liable under the FCA even without having expressly certified compliance in the claim.

While *Escobar* resolved a circuit split over the validity of the implied certification theory of FCA liability, the decision left various questions unanswered, especially over what constitutes materiality under the FCA and whether defendants may be liable for implied false certifications that are not based on specific representations in a claim.

Against this backdrop, this article:

- Reviews the Supreme Court's decision in *Escobar* and how the circuit courts have construed *Escobar's* implied certification ruling and guidance on materiality.
- Examines other FCA-related issues *Escobar* raised that may impact future FCA litigation.
- Highlights key takeaways and practical considerations for counsel defending against claims based on the implied certification theory of FCA liability.



Search [Understanding the False Claims Act](#) for more on the FCA, including the key liability provisions, differences between *qui tam* and non-*qui tam* cases, potential defenses, damages and penalties, and corollary state FCAs.

THE ESCOBAR DECISION AND SUBSEQUENT RULINGS

In *Escobar*, the relators were parents who brought a *qui tam* suit against Universal Health Services (UHS), a healthcare services provider, after their daughter died while being treated at a mental health facility owned and operated by a subsidiary of UHS. The relators alleged that UHS, acting through the subsidiary, submitted several reimbursement claims to Medicaid in which UHS failed to disclose that the facility's employees who diagnosed and treated their daughter lacked qualifications and licenses to provide mental health counseling and prescribe drugs, in violation of applicable regulations. The government declined to intervene. (*Escobar*, 136 S. Ct. at 1997-98.)

The reimbursement claims included specific payment codes corresponding to services the staff provided and identification codes corresponding to specific job titles held by the facility's staff members, who obtained these codes from the government by misrepresenting their qualifications. At issue was whether UHS could be liable under the FCA for misrepresenting its compliance with Medicaid's mental health facility requirements when submitting claims to Medicaid. (*Escobar*, 136 S. Ct. at 1997-98.)

The Supreme Court held that UHS's submission of claims designating payment codes for specific counseling services without disclosing the violations of the staff and licensing requirements constituted actionable misrepresentations under the FCA. In reaching this conclusion, the Court held that the implied certification theory may provide a basis for FCA liability in some circumstances, including where:

- The claim submitted to the government not only requests payment, "but also makes specific representations about the goods or services provided."
- The defendant's "failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."

The Court rejected UHS's contention that liability can arise based only on undisclosed violations of conditions that the government has expressly designated as conditions of payment. The Court noted that, traditionally, fraud has "long encompassed certain misrepresentations by omission," and includes "more than just claims containing express falsehoods." (*Escobar*, 136 S. Ct. at 1999, 2001.)

At the same time, as discussed further below, the Court articulated a rigorous standard for materiality, requiring the plaintiffs to demonstrate the defendant's actual knowledge that its noncompliance was material (see below *Post-Escobar Cases Interpreting the Materiality Requirement*).

Since the *Escobar* decision, several circuit courts have addressed the specific representation and materiality requirements in FCA cases. The post-*Escobar* cases show that while defendants are now subject to a broader theory of FCA liability, plaintiffs will likely face a significant burden in meeting a stricter materiality standard.

POST-ESCOBAR CASES INTERPRETING THE SPECIFIC REPRESENTATION REQUIREMENT

Escobar settled that an FCA defendant that makes a "specific representation" may be liable under the implied certification

theory. However, the Supreme Court arguably left open the question of whether liability may also attach if a defendant did not make a specific representation, but merely requested payment for goods or services that did not comply with statutory, regulatory, or contractual requirements.

Courts in post-*Escobar* cases continue to grapple with the application and scope of the specific representation requirement. Some circuit courts have allowed FCA claims to proceed even without a specific representation in a claim, while others have rejected plaintiffs' implied certification theory in those circumstances.

Plaintiffs' Implied Certification Theory Upheld

The following circuit courts have adopted a broader approach to the specific representation requirement:

- **First Circuit.** In *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, the relators alleged that DePuy sold to healthcare providers a hip replacement device that materially differed from the device the Food and Drug Administration (FDA) had approved. Doctors and patients who bought the defective device later submitted claims to the government for payment. The First Circuit reversed the district court's dismissal of the complaint, holding that, under *Escobar*, the allegations were actionable. Further, in addressing whether the relators' implied false certification theory had been pled with the requisite particularity (see below *FRCP 9(b)'s Heightened Pleading Standard*), the court held that DePuy's representation to unsuspecting buyers that the device was a particular FDA-approved product, rather than a defective variant, constituted a specific misrepresentation. (865 F.3d 29, 37-41 (1st Cir. 2017).)
- **Fourth Circuit.** In *United States ex rel. Badr v. Triple Canopy, Inc.*, the relators' claims were based on a contract under which Triple Canopy, a government security contractor, would provide security services at a US airbase in Iraq. The contract required the guards to meet several marksmanship requirements, including passing a US Army qualification course. Triple

Canopy knowingly hired individuals who did not meet the contractual requirements and falsified their certifications before submitting invoices that characterized them as "guards." The Fourth Circuit reversed the district court's dismissal of the complaint, finding that even though Triple Canopy's invoices contained no specific misrepresentations on their face, they included the kind of "half-truths" that the Supreme Court intended to target in *Escobar* because they implied that the government was receiving the services of guards with the appropriate marksmanship qualifications. (857 F.3d 174, 175-76, 178 (4th Cir. 2017).)

- **Ninth Circuit.** In *United States ex rel. Campie v. Gilead Sciences, Inc.*, the relators alleged that a drug maker submitted claims for reimbursement from government programs for adulterated drugs as if they were FDA-approved, when in fact they were not manufactured according to FDA requirements. In reversing the district court's dismissal of the claims, the Ninth Circuit endorsed a broad reading of *Escobar's* specific representation standard. The court held that by submitting claims for payment or reimbursement for certain known brand-name drugs, the defendant represented that the drugs were FDA-approved, manufactured at approved facilities, and not adulterated or misbranded. (862 F.3d 890, 901-03 (9th Cir. 2017).)

Plaintiffs' Implied Certification Theory Rejected

The Ninth Circuit reached a different outcome from *Campie* in *United States ex rel. Kelly v. Serco, Inc.*, a case that preceded *Campie*. The relator in *Kelly* alleged that the defendant, a government contractor, submitted public vouchers to the government that were constructed using a cost-tracking format that violated certain regulatory guidelines, even though the relevant federal agencies had approved the cost-tracking format the defendant used. The relator argued that the defendant's submission of the vouchers constituted an implied false certification that its services met the regulatory guidelines. (846 F.3d 325, 328-29 (9th Cir. 2017).)

The Supreme Court arguably left open the question of whether liability may attach if a defendant did not make a specific representation, but merely requested payment for goods or services that did not comply with statutory, regulatory, or contractual requirements.

In affirming a grant of summary judgment for the defendant, the court found that the relator failed to show any specific misrepresentation in the submitted claims regarding the services provided. The court clarified that the FCA attaches liability to only the claim for payment and not the underlying fraudulent activity. (*Kelly*, 846 F.3d at 332-33.)

Although *Kelly* appears to construe narrowly *Escobar's* specific representation standard, the court's decision likely rests on its determination that the alleged violations failed to meet *Escobar's* materiality standard due to the government's prior approval of the cost-tracking method the defendant used (see *Kelly*, 846 F.3d at 334; see below *Dismissed Based on Lack of Materiality*).

Additionally, the Seventh Circuit, which had rejected the implied certification theory of FCA liability before *Escobar*, reconsidered its 2015 opinion in *United States v. Sanford-Brown, Ltd.* on remand following the Supreme Court's decision, and found no basis to change the outcome of its prior ruling. *Sanford-Brown* involved a suit brought by a relator against a provider of higher education services, alleging that the provider's recruiting and retention practices resulted in false claims for federal subsidies. In again upholding the district court's rulings against the relator, the Seventh Circuit found that the relator's claims under the implied certification theory failed because the relator did not:

- Allege that the defendant made any representations in connection with its claims for payment, let alone false or misleading representations.
- Meet *Escobar's* materiality standard because it offered no evidence that the government's decision to pay would be any different if it had known about the alleged violations (see below *Dismissed Based on Lack of Materiality*).

(See *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016) (*Sanford-Brown II*) (affirming on different grounds 788 F.3d 696 (7th Cir. 2015)); see also *United States ex rel. Lisitza v. Par Pharm. Cos.*, 2017 WL 3531679, at *1, *12-13 (N.D. Ill. Aug. 17, 2017) (dismissing an FCA claim based on alleged noncompliance with a regulatory scheme because the claims at issue did not contain specific representations and regulatory violations were distinct from specific claims regarding the provision of goods or services).)

POST-ESCOBAR CASES INTERPRETING THE MATERIALITY REQUIREMENT

In holding that a misrepresentation must be material to the government's payment decision to be actionable under the FCA, the Supreme Court in *Escobar* appears to have recognized that the implied certification theory without such a standard could render the FCA an all-purpose fraud statute. The Court emphasized that the materiality standard is "rigorous" and "demanding," explaining specifically that:

- A misrepresentation is not material simply because the government:
 - designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment; or
 - would have the option to decline to pay if it knew of the defendant's noncompliance.
- Materiality cannot be found where the defendant's noncompliance is minor or insubstantial.
- If the government pays a claim in full despite its actual knowledge that certain requirements were violated, that is "strong evidence" that those requirements are immaterial.

(*Escobar*, 136 S. Ct. at 1996, 2003.)

A number of circuit courts have rested their post-*Escobar* materiality analyses on one of these factors. In particular, circuit courts seem likely to consider misrepresentations on claims for payment immaterial if the government continued to pay the claims despite having knowledge of the misrepresentation.

Dismissed Based on Lack of Materiality

In 2017, the following circuit courts disposed of FCA actions by finding misrepresentations on claims for payment immaterial:

- **D.C. Circuit.** In *United States ex rel. McBride v. Halliburton Co.*, a relator alleged that the defendant, which maintained recreation centers for US troops during the Iraq war, inflated data on the numbers of troops who supposedly used the facilities each day to justify excessive staffing levels and personnel costs. The court found the inflated numbers were immaterial because the government investigated the allegations and continued to make payments. (848 F.3d 1027, 1029, 1033-34 (D.C. Cir. 2017).)

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Overview of the False Claims Act

The FCA (31 U.S.C. §§ 3729-3733) creates liability for conduct involving fraud on the government. Among other important provisions, the statute:

- Identifies seven specific types of prohibited conduct. The two liability provisions most often used in FCA litigation are:
 - the false claims provision, which creates liability for knowingly presenting, or causing to be presented, a false or fraudulent claim for payment (31 U.S.C. § 3729(a)(1)(A)); and
 - the false statement provision, which creates liability for knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim (31 U.S.C. § 3729(a)(1)(B)).
- Requires a defendant to act “knowingly.” Courts have applied a broad knowledge standard in FCA cases.
- Imposes liability on contractors and other third parties.
- Gives rise to liability for certain false implied statements.
- Imposes significant damages and penalties, such as:
 - mandatory treble damages (which may be reduced to mandatory double damages if the defendant self-discloses fraudulent activity); and
 - mandatory civil penalties of up to \$21,563 per false claim.
- Includes strong whistleblower incentives.



Search [Understanding the False Claims Act](#) for more on the FCA.

- **First Circuit.** Although the court in *Nargol* allowed certain claims to proceed based on the implied certification theory (see above *Plaintiffs’ Implied Certification Theory Upheld*), it upheld the dismissal of other claims because the violations were immaterial. Citing *Escobar*, the court held that the materiality standard was not met where the FDA learned that a manufacturer may have misrepresented the safety and effectiveness of its device but failed to withdraw or even suspend its approval or payments. (*Nargol*, 865 F.3d at 34-36.)
- **Third Circuit.** In *United States ex rel. Spay v. CVS Caremark Corp.*, the relator alleged that the defendant used “dummy prescriber IDs” when submitting to the Centers for Medicare and Medicaid Services (CMS) records of prescriptions dispensed to Medicare recipients. The court found that this practice was a workaround to prevent legitimate claims from being automatically rejected by the government’s computer system. The court concluded that the alleged violations were immaterial under *Escobar* because CMS was aware of the defendant’s practice yet routinely reimbursed claims. (875 F.3d 746, 764-65 (3d Cir. 2017).)
- **Fifth Circuit.** In *United States ex rel. Harman v. Trinity Industries, Inc.*, a case that proceeded to trial, the relator alleged that the federal highway guardrails the defendant manufactured did not conform to existing regulatory specifications. However, the government continued to reimburse claims for the guardrails with “full knowledge” of the relator’s assertions of the product’s purported deficiencies. The court explained that the relator failed to meet the “substantially” increased burden set by *Escobar* to prove materiality where the government continued making payments after learning of an alleged fraud, and therefore entered judgment as a matter of law in favor of the defendant. (*Harman*, 872 F.3d 645, 650-52, 663-65, 668 (5th Cir. 2017), petition for rehearing denied Nov. 14, 2017; see also *Abbott v. BP Exploration & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017) (holding that there was strong evidence of immateriality

where the government investigated allegations that the defendant did not comply with various regulations related to an offshore oil rig and continued to permit the oil rig to operate.)

- **Seventh Circuit.** In addition to finding no evidence of a specific misrepresentation made by the defendant in *Sanford-Brown II* (see above *Plaintiffs’ Implied Certification Theory Rejected*), the Seventh Circuit determined that the relator in that case failed to establish materiality. The court emphasized that the contracting government agency continued to do business with the defendant company after discovering that the company was not actually in compliance with certain regulations. The court also noted that the relator could not show any evidence that the government’s decision to pay the claims would have been different had it actually known of the alleged noncompliance beforehand. (*Sanford-Brown II*, 840 F.3d at 447-48.)
- **Ninth Circuit.** As noted above, the Ninth Circuit held in *Kelly* that a relator’s claims were immaterial where the government accepted and paid delivery vouchers despite knowing that the vouchers were technically noncompliant with certain federal contracting requirements (see above *Plaintiffs’ Implied Certification Theory Rejected*). Moreover, the court cited as further evidence of immateriality that the government ultimately rescinded the contractual requirements at issue because they “provided minimal benefit and were not cost-justified.” (*Kelly*, 846 F.3d at 334.)

Materiality Standard Satisfied

In *Campie*, the Ninth Circuit denied the defendant’s motion to dismiss, even though the FDA had continued to approve the drug the defendant produced after the agency became aware of the alleged noncompliance (*Campie*, 862 F.3d at 906-07).

Acknowledging that, post-*Escobar*, it would ordinarily consider violations to be immaterial where the government is aware of

Industries Likely to See Increased FCA Litigation

The Supreme Court's ruling in *Escobar* has significant implications for industries that regularly submit claims, directly or indirectly, to federal agencies. These groups include:

- **Pharmaceutical and healthcare companies.** The healthcare industry (including drug manufacturers, hospitals, pharmacies, laboratories, and physicians) are subject to numerous regulations and much of their business involves indirect reimbursement from federal Medicare and Medicaid programs, opening a potential trove of frivolous implied false certification cases under the FCA. These companies are key targets of FCA claims. Indeed, 2017 was the eighth consecutive year that the government's recovery of healthcare fraud judgments and settlements exceeded \$2 billion (see DOJ Press Release, *Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017* (Dec. 31, 2017), available at justice.gov).
- **Defense contractors.** Companies in the defense industry routinely contract with federal agencies and must adhere to various contractual requirements and regulations. Defense contractors should be aware that they increasingly have become a target for DOJ-led FCA suits. In 2017, the government instituted 19 cases against defense contractors, up from nine in 2016 and seven in 2015 (see DOJ Fraud Statistics — Department of Defense (Dec. 19, 2017), available at justice.gov). *Qui tam* relators similarly continue

to target the defense sector and instituted 28 new cases over the last year.

- **Certain product manufacturers.** Product manufacturers supporting the vast federal government bureaucracy could be implicated in implied false certification actions, given the myriad of complex federal contracting rules and specifications involved in federal purchase orders. Given the rate of change in the technology industry, for example, companies providing technology to the government could be subject to more claims over non-conforming technology products and services provided to federal agencies. This is particularly of concern under the Ninth Circuit's present pleading interpretation of materiality in *Campie*, which held that evidence that the government had paid noncompliant claims similar to those subject to a relator's suit would not necessarily demonstrate a failure to plead materiality.
- **Mortgage brokers.** Companies in the mortgage industry continue to be targets of FCA actions, given the government's aggressive use of the statute to pursue fraud in mortgage lending. These actions are based on the certification requirements on documentation required by the Department of Housing and Urban Development (HUD) for Federal Housing Administration qualified mortgages and other HUD lending programs.

noncompliance but continues to pay, the court explained that it let the allegations proceed because:

- The defendant should not be able to use fraudulently obtained FDA approval as "a shield against liability for fraud."
- There may be "many reasons" why the FDA continued to reimburse claims for the drug and did not withdraw the drug's approval.

(*Campie*, 862 F.3d at 906.)

Notably, the defendant in *Campie* has petitioned the Supreme Court to review the Ninth Circuit's holding, arguing that the defendant should be entitled to a presumption of immateriality where there is evidence that the government views the alleged noncompliance underlying an FCA claim as immaterial (such as by continuing to approve and pay for the allegedly non-conforming products) (*Gilead Scis., Inc. v. United States ex rel. Campie*, No. 15-16380 (Dec. 26, 2017)).

OTHER OPEN ISSUES AFTER ESCOBAR

Besides questions about how to apply the implied certification theory, the *Escobar* opinion and subsequent circuit court cases have left open several other issues that FCA litigants will likely face in the coming years, including those relating to:

- The heightened pleading requirement for fraud claims under Federal Rule of Civil Procedure (FRCP) 9(b).
- The Seventh Circuit's causation standard under the FCA.

FRCP 9(b)'S HEIGHTENED PLEADING STANDARD

As the First Circuit noted in *Nargol*, circuit courts have varied in their views of what FRCP 9(b) requires in a *qui tam* action, and a consensus has yet to develop among the circuits on "whether, when, and to what extent a relator must state the particulars of specific examples of the type of false claims alleged" (*Nargol*, 865 F.3d at 38).

Generally, FRCP 9(b)'s heightened pleading requirement for fraud claims requires an FCA relator to identify and allege "the essential particulars of at least some actual false claims," including:

- The false statement.
- The amounts involved.
- The persons or entities involved in submitting the claims.
- The goods or services provided.
- The dates of the claims.
- The amounts paid on the claims.

(See *Nargol*, 865 F.3d at 38-39 (citing *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1312 n.21 (11th Cir. 2002)).)

Escobar's holding on implied certification likely will generate uncertainty regarding whether litigants have met FRCP 9(b)'s heightened pleading requirement for fraud claims. Because the implied certification theory does not require relators to identify explicit false statements about a condition for payment, it is easier to identify a category of claims subject to federal program reimbursement that could be actionable based on the omissions underlying the claims for payment. This is particularly true for claims submitted through third parties rather than directly to the government by the defendant. In those cases, relators may be able to rely on factual inferences and statistical evidence to allege that the claims submitted by the third parties to the government were false rather than pleading details about each false claim. (See *Nargol*, 865 F. 3d at 39-40.)

Given the materiality standard *Escobar* articulated, relators will still be required to allege facts showing that the misrepresentation or omission was material to the government's payment decision. Additionally, under the scienter test the Supreme Court appears to have suggested in *Escobar*, the relators will need to allege the defendant knew that the violations were material to the government's decision and that it knowingly committed those violations (see *Escobar*, 136 S. Ct. at 1996). A failure to plead any one of these factors could result in dismissal of the action.

SEVENTH CIRCUIT'S CAUSATION STANDARD

For years, the Seventh Circuit, unlike every other circuit, had applied a "but for" causation standard to FCA actions. However, in *United States v. Luce*, the Seventh Circuit revisited this standard and, overruling a 25-year-old precedent, adopted proximate cause as the appropriate causation standard (873 F.3d 999, 1014 (7th Cir. 2017)).

The Seventh Circuit's "but for" doctrine originated in *United States v. First National Bank of Cicero*, in which the court found a proximate cause analysis to be "unduly restrictive." Instead, the Seventh Circuit held that a simpler test was necessary under which a plaintiff merely needed to demonstrate that the government would not have paid a claim "but for" the false statement. (957 F.2d 1362, 1374 (7th Cir. 1992).)

By contrast, the proximate cause analysis that the Third Circuit adopted in *United States v. Hibbs* required "a causal connection [to] be shown between loss and a fraudulent conduct" (568 F.2d 347, 349 (3d Cir. 1977)). In the wake of *Hibbs*, many courts applied common law tort principles to determine whether a defendant's conduct was a "substantial factor" in causing the government to make a payment on a false claim and whether the government's payment was a "foreseeable and natural consequence" of a defendant's conduct (see, for example, *United States ex rel. Brown v. Celgene Corp.*, 226 F. Supp. 3d 1032, 1037 (C.D. Cal. 2016); *United States ex rel. Schiff v. Marder*, 208 F. Supp. 3d 1296, 1312-13 (S.D. Fla. 2016); *United States ex rel. Franklin v. Parke-Davis*, 2003 WL 22048255, at *4 (D. Mass. Aug. 22, 2003)).

The Seventh Circuit acknowledged that *Escobar* did not directly address causation but considered the Supreme Court's statement that "absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." At common law, a fraudulent misrepresentation is

actionable if it results in losses that are "within the foreseeable risk of harm that it creates." Therefore, the Seventh Circuit joined the other circuits in adopting the proximate cause standard in FCA cases. (*Luce*, 873 F.3d at 1011-12, 1014.)

While *Escobar's* ruling on the implied certification theory may introduce a category of claims previously precluded in the Seventh Circuit, the circuit's adoption of the proximate cause standard should bar claims that could have been brought only under the broader "but for" approach. Defendants in FCA cases should consider challenging relators' causation theories under the FCA at both the pleading and summary judgment stages.

KEY TAKEAWAYS

The post-*Escobar* decisions issued in 2017 likely reflect only the beginning of many judicial opinions interpreting *Escobar's* ruling on the implied certification theory and related issues.

Because the Seventh Circuit had not adopted the implied certification theory before *Escobar*, counsel should expect that circuit to look for an opportunity to provide more guidance on the theory in future cases. Additionally, the Ninth Circuit is expected to issue an opinion in 2018 in *United States ex rel. Rose v. Stephens Institute*, which may help clarify that circuit's application of the implied certification theory under *Escobar* (No. 17-15111 (9th Cir., filed Jan. 20, 2017)).

Whether or not *Escobar* will lead to a significant increase in *qui tam* suits under the FCA remains uncertain. Relators may be emboldened by the Supreme Court's adoption of the implied certification theory of liability. However, the Court effectively restricted claims under this theory by subjecting them to a rigorous and demanding materiality standard. So far, the number of FCA *qui tam* actions has actually decreased slightly since *Escobar*. In 2017, about 30 fewer *qui tam* cases were filed than in 2016 (see DOJ Fraud Statistics – Overview, available at justice.gov).

Further, besides the circuit courts' embrace of *Escobar's* rigorous materiality standard, another recent development appears to indicate a broad policy shift towards curtailing frivolous FCA litigation. Reversing its prior position, in January 2018, the Fraud Section of the DOJ issued a memo to its civil litigators, instructing them to seek dismissal of certain *qui tam* actions brought under the FCA, instead of merely declining to intervene. The DOJ has always had the right to seek dismissal of *qui tam* cases, but has rarely exercised it. The memo lists seven non-exhaustive factors its attorneys should consider when evaluating whether to seek dismissal of a *qui tam* action. (See Memorandum from Michael D. Granston, Director, Fraud Section of the Commercial Litigation Branch, DOJ (Jan. 10, 2018), available at justice.gov).

Nevertheless, FCA liability remains a significant risk for companies conducting business with the government (see *Box, Industries Likely to See Increased FCA Litigation*). In light of *Escobar* and its progeny, counsel should consider how:

- Courts will construe the specific representation requirement.
- Defendants can effectively challenge plaintiffs' theories of materiality.
- Government contractors' FCA compliance programs and practices will be impacted.

PRACTICE NOTES

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SPECIFIC REPRESENTATION STANDARD

The specific representation standard articulated in *Escobar* will likely present the most difficulty for courts deciding claims based on the implied certification theory. No clear interpretation of this standard has emerged. Courts have variously ruled that a specific representation is required for a claim under the implied certification theory to proceed and that it is not (see above *Post-Escobar Cases Interpreting the Specific Representation Requirement*).

As discussed above, in 2017, the Fourth Circuit in *Badr* and the Ninth Circuit in *Campie* rejected what they described as “crabbed” or “circumscribed” views of the type of misrepresentation that could be actionable under *Escobar*. Those courts allowed claims to proceed based on theories that the defendants had sought direct or indirect reimbursement from the government for services and products that did not meet contractual or regulatory requirements, even though there was no express certification regarding those requirements made at the time of invoicing. Therefore, the Fourth and Ninth Circuits extended the implied certification theory’s scope arguably beyond *Escobar*, as even in *Escobar*, the payment claims were submitted with payment codes falsely marked by the provider.

It remains to be seen whether other circuit courts will interpret *Escobar*’s specific representation standard as merely sufficient or, rather, as necessary for a successful claim under the implied certification theory.

CHALLENGES TO MATERIALITY

Even though defendants may now face a broader theory of FCA liability, the demanding materiality requirement set out in *Escobar* likely will prevent frivolous *qui tam* litigation. *Escobar* suggests that evidence showing that the government routinely continued to pay claims despite its awareness that the defendant did not comply with statutory, regulatory, or contractual requirements strongly indicates that the alleged violations were immaterial (see above *Post-Escobar Cases Interpreting the Materiality Requirement*).

Defendants should routinely consider whether plaintiffs have sufficiently pled materiality. In those cases that proceed to discovery, defendants should seek evidence of immateriality, including entering their own evidence, where available. At the same time, defendants should be mindful of the Ninth Circuit’s holding in *Campie*, which maintains that the government’s knowledge of violations does not automatically render the violations immaterial. Defense counsel should consider that the government may have other motives for paying the claims, even if they were based on misrepresentations (for example, in

CVS, the government was concerned with promptly delivering necessary drugs to patients).

FCA COMPLIANCE PROGRAMS

Government contractors’ compliance departments should be aware of the actual conditions for payment or reimbursement of claims by the government and should attempt to assess the risk of noncompliance with those conditions. Heightened attention should be paid to applicable provisions of the Federal Acquisition Regulations (FAR), which require government contractors to make numerous representations and certifications, both at the time of bids and during performance of the contract, as those could become the basis for implied false certification claims. The compliance department should work with the internal audit department, or other internal control function, to ensure that annual testing of compliance with the conditions takes place. In addition to actual compliance, they should seek to demonstrate and document the company’s good faith efforts to ensure compliance.

The authors would like to thank John Haigh, a law clerk at Weil, Gotshal & Manges LLP, for his assistance in preparing this article.

