Expert Q&A on Trends and Developments in False Claims Act Litigation

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An expert Q&A with Lori L. Pines and Konrad L. Cailteux of Weil, Gotshal & Manges LLP on several unsettled areas in False Claims Act (FCA) litigation that lawyers must understand to properly defend against FCA claims. It discusses recent trends and developments in FCA case law and offers key takeaways for practitioners. The authors would like to thank Blake Steinberg, a law clerk in the firm's Litigation Department, for his contributions to this article.

What is the significance of the US Supreme Court's 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*?

In *Escobar*, the Supreme Court adopted the implied false certification theory of liability under the False Claims Act (FCA). This theory is based on the premise that a defendant that submits a claim for payment 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. The Supreme Court found that the implied certification theory could 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."

(136 S. Ct. 1989, 1999, 2001 (2016).)

Escobar resolved a long-standing circuit split over the validity of the implied certification theory of FCA liability. Since *Escobar*, however, courts have grappled with:

- Whether defendants may be liable for implied false certifications that are not based on specific representations in a claim.
- What factual circumstances satisfy the materiality standard.

For more on *Escobar* and how it has been construed by the circuit courts, see Article, False Claims Act Litigation Post-Escobar.

How are courts interpreting *Escobar*'s specific representation requirement?

Courts in some circuits interpret the specific representation requirement broadly, allowing FCA **claims** to proceed under the implied certification theory even 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 (see, for example, *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 37-41 & n.9 (1st Cir. 2017); *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 175-76, 178 (4th Cir. 2017) (finding that even though the invoices at issue contained no specific representations on their face, they included the kind of "half-truths" that the Supreme Court intended to target in *Escobar*)).

Courts in other circuits require strict compliance with the specific representation requirement (see, for example, *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1109 (11th Cir. 2020) (declining to find liability for Medicaid fraud because the **relator** failed to connect the absence of care plans to specific representations regarding the services provided); *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1017-18 (9th Cir. 2018); *United States ex rel. Whatley v. Eastwick Coll.*, 657 F. App'x 89, 94 (3d Cir. 2016) (stating in *dicta* that liability under the implied **false** certification theory attaches when both conditions of the specific representation standard are satisfied); see also *United States v. Pfizer Inc.*, 2019 WL 1200753, at *6 (N.D. Ill. Mar. 14, 2019); *United States ex rel. Sibley v. Delta Reg'l Med. Ctr.*, 2019 WL 1305069, at *14 (N.D. Miss. Mar. 21, 2019); but see *United States ex rel. Simpson v. Bayer Corp.*, 376 F. Supp. 3d 392, 407 (D.N.J. 2019) (holding that a relator need not necessarily allege specific representations to succeed on an implied **false** certification **claim** and explaining that *Whatley*'s mere invocation of *Escobar*'s language was not enough to conclude that the circuit categorically prohibits FCA liability in the absence of specific representations)).

Addressing conflicting language in two earlier Ninth Circuit decisions, the Ninth Circuit in *Rose* confirmed that relators must establish both a specific representation and a failure to disclose noncompliance with material statutory, regulatory, or contractual requirements under its prior post-*Escobar* precedent. The court reluctantly issued its decision, stating that if it were analyzing *Escobar* anew, it would rule differently because *Escobar* did not state that satisfying those two conditions was the only way to establish liability under an implied **false** certification theory. However, the court stated that because it was bound by the circuit's precedent, relators must satisfy both conditions, unless and until the court, ***en banc***, interprets *Escobar* differently. (*Rose*, 909 F.3d at 1018.)

How are courts interpreting *Escobar*'s materiality requirement?

In *Escobar*, the Supreme Court held that a misrepresentation must be material to the government's payment decision to be actionable under the FCA and set out factors that are relevant to determining whether this "demanding" standard has been met (136 S. Ct. at 2003-04). The factors identified in *Escobar* included:

- **The government's payment is expressly conditioned on compliance with a particular statutory, regulatory, or contractual requirement**. The satisfaction of this factor alone, however, may not be sufficient for a finding of materiality. (See, for example, *United States v. Strock*, 982 F.3d 51, 59, 62 (2d Cir. 2020) (in a case where the defendant allegedly installed a service-disabled veteran (SDV) as a puppet owner of a company eligible for federal government contracts with the sole purpose of funneling contract work to the defendant's own company, finding that this factor was satisfied because the government expressly designated SDV-owned small business status as a condition of contract eligibility, which weighed in favor of a finding that misrepresenting compliance with the SDV-owned status requirement was material); *Ruckh*, 963 F.3d at 1109 (stating that the relator's "scant evidence" supported only the conclusion that this factor was satisfied, but not the other two factors, which is not sufficient to establish materiality).)

- **The government pays a claim despite knowing that certain requirements were violated.** Evidence that the defendant knows that the government consistently refuses to pay **claims** in cases based on noncompliance with the

particular statutory, regulatory, or contractual requirement weighs in favor of a materiality finding. Conversely, evidence that the government pays a particular **claim** (or regularly pays a particular type of **claim**) in full despite its actual knowledge that certain requirements were violated weighs against a materiality finding. (See, for example, *United States ex rel. Lemon v. Nurses To Go, Inc.*, 924 F.3d 155, 162-63 (5th Cir. 2019) (in a case alleging improper billing practices of hospice care providers in violation of Medicare requirements regarding certifications, finding that this factor was satisfied because the complaint alleged that the government has taken criminal and civil enforcement action against other hospice providers that submitted payment requests without appropriate certifications, indicating that the government considered the violations substantial and would have denied payment if it knew about them).)

- **The defendant's noncompliance is not minor or insubstantial.** Courts have described this factor as whether the noncompliance goes to the "essence of the bargain." (See, for example, *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 834-37 (6th Cir. 2018) (finding that the defendant's noncompliance with a timing requirement in seeking to obtain Medicare reimbursement went to the essence of the bargain because the government had emphasized the timing requirement as a fraud prevention mechanism).)

(*Escobar*, 136 S. Ct. at 2003-04.)

Whether the materiality standard has been satisfied is a fact-intensive inquiry. Courts have considered all or some combination of these three factors in their analysis, with some circuits applying the factors as a three-part test. (See, for example, *United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533, 541-45 (10th Cir. 2020); *Lemon*, 924 F.3d at 160-63; *United States ex rel. Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019); *Prather*, 892 F.3d at 831-37; see also *United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 F. App'x 237, 241-42 (5th Cir. 2020) (indicating that the district court applied the three materiality factors).) No one factor is dispositive, and courts may give one factor more weight than another (see, for example, *Strock*, 982 F.3d at 59-65; *Ruckh*, 963 F.3d at 1109).

What issues do FCA litigants face in meeting the heightened pleading standard under Federal Rule of Civil Procedure (FRCP) 9(b)?

In applying FRCP 9(b)'s heightened pleading standard to FCA **claims**, courts have required pleadings to identify the who, what, when, where, and how of the charged misconduct, including what is **false** or misleading and why (see, for example, *United States ex rel. Vatan v. QTC Med. Servs., Inc.*, 721 F. App'x 662, 664 (9th Cir. 2018)). However, because the implied certification theory does not require relators to identify explicit **false** statements about a condition for payment, the *Escobar* holding has generated uncertainty regarding whether litigants have met the FRCP 9(b) standard. A potential circuit split has emerged regarding the level of detail required in an FCA complaint.

Some courts have held that an FCA complaint may allege facts showing a scheme to submit **false claims**, along with "reliable indicia" that lead to a strong inference that **false claims** were submitted (see, for example, *United States ex rel. Strubbe v. Crawford Cnty. Mem'l Hosp.*, 915 F.3d 1158, 1164 (8th Cir. 2019) (stating that a relator can also satisfy FRCP 9(b) by pleading the "particular details of a scheme to submit **false claims** paired with reliable indicia that lead to a strong inference that **claims** were actually submitted") (quoting *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 917-18 (8th Cir. 2014)); *United States ex rel. Silingo v. Wellpoint, Inc.*, 904 F.3d 667, 678-79 (9th Cir. 2018); *United States ex rel. Grant v. United Airlines*, 912 F.3d 190, 197 (4th Cir. 2018) (stating that FRCP 9(b) requires that the complaint provide "some indicia of reliability" to support the allegation that an actual **false claim** was presented to the government) (citing *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013)); *United States ex rel. Chorches v. American Medical Response, Inc.*, 865 F.3d 71, 81-86, 89, 93 (2d Cir. 2017); *Foglia v. Renal Ventures Management, LLC*, 754 F.3d 153, 156-58 (3d Cir. 2014)).

For example, the Second Circuit in *Chorches*, while downplaying the existence of a potential circuit split on the issue, found that FRCP 9(b) was satisfied even though the complaint did not provide details regarding actual bills submitted to the government because the relator made plausible allegations that led to a strong inference that specific **claims** were indeed submitted and that information about the details of the **claims** submitted were peculiarly within the defendant's knowledge (865 F.3d at 81-86, 89, 93; but see *United States ex rel. Gelbman v. City of New York*, 790 F. App'x 244, 247-49 (2d Cir. 2019) (distinguishing the facts of the case from *Chorches* and finding in part that the complaint failed to satisfy the FRCP 9(b) pleading requirements because it did not address why the plaintiff lacked personal knowledge of the contents of the expense reports submitted to the government)).

Other courts have held that an FCA complaint must contain "representative samples" of the alleged fraudulent conduct to satisfy FRCP 9(b) (see, for example, *Prather*, 892 F.3d at 830; *Carrel v. AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1277 (11th Cir. 2018) (affirming the district court's dismissal of the relators' fraud **claims** because, although they alleged "a mosaic of circumstances" consistent with their accusations that the defendant made **false** **claims**, they failed to allege with particularity that these "factors ever converged and produced an actual **false** **claim**")).

Given the courts' varying approaches, it is critical for FCA litigants to examine the case law in the relevant jurisdiction to help inform their evaluation of whether a complaint pleads sufficient details to satisfy FRCP 9(b).

For more on pleading fraud with particularity and other grounds for moving to dismiss an FCA complaint, see Practice Note, Understanding the **False** **Claims** **Act**: Moving to Dismiss an FCA Complaint.

Are there any other open issues in FCA litigation that have given rise to a circuit split?

A circuit split has recently emerged as to whether disagreement between medical **experts** can establish falsity to support FCA liability.

In *United States v. AseraCare, Inc.*, the Eleventh Circuit considered the circumstances under which a **claim** for hospice treatment under Medicare may be deemed **false** under the FCA. The government in *AseraCare* alleged that, in the view of the government's **expert** witness, the patients at issue were not terminally ill as required to be eligible for Medicare hospice benefits and that therefore the defendant's **claims** to the contrary were **false** under the FCA. The court held that a clinical judgment of terminal illness warranting hospice benefits under Medicare cannot be deemed **false** under the FCA where there is a reasonable disagreement between medical **experts** as to the accuracy of that judgment because differences of opinion do not reflect an objective falsehood. (938 F.3d 1278, 1281, 1296-97 (11th Cir. 2019).)

The Third Circuit in *United States ex rel. Druding v. Care Alternatives*, however, rejected this reasoning. The relators in *Druding* alleged that a hospice care provider improperly admitted patients who were ineligible for hospice care and directed employees to alter those patients' certifications in Medicare reimbursement **claims**. As in *AseraCare*, the parties' **experts** disagreed on the patients' eligibility. The Third Circuit reversed the district court's decision, which adopted *AseraCare*'s reasoning and granted **summary judgment** for the defendant. The Third Circuit found that at the summary judgment stage, conflicting **expert** testimony about the validity of hospice certifications was sufficient to raise a dispute of material fact concerning whether the relators met the FCA's falsity requirement. The Third Circuit concluded that a **claim** may be **false** under the FCA based on a theory of legal falsity where it fails to comply with statutory and regulatory requirements. (952 F.3d 89, 95-101 (3d Cir. 2020).) The defendant filed a petition for a writ of ***certiorari*** on the issue, which the Supreme Court recently declined to hear (*Care Alternatives v. United States*, 2021 WL 666386 (U.S. Feb. 22, 2021)).

The Ninth and Tenth Circuits have similarly endorsed a legal falsity approach (see, for example, *Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1117-19 (9th Cir. 2020) (holding that a physician's certification that inpatient hospitalization was "medically necessary" can be **false** or fraudulent where, for example, the opinion is not honestly

held or implies the existence of facts that do not exist); *United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730, 742-43 (10th Cir. 2018) (holding that a doctor's certification to the government that a procedure is "reasonable and necessary" can be **false** under the FCA if the procedure was not reasonable and necessary under the government's definition of the phrase, which in that case was found in the Medicare Program Integrity Manual)).

What industries should expect to see more FCA litigation, especially in light of the COVID-19 pandemic?

Federal programs introduced in response to the COVID-19 pandemic may be sources of new FCA **litigation** risks. The acting head of the Department of Justice's (DOJ's) civil division recently stated that he expected to see significant FCA cases and recoveries in light of the Coronavirus Aid, Relief, and Economic Security (CARES) **Act** passed by Congress in response to the COVID-19 crisis (DOJ Press Release, Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference (Feb. 17, 2021)). Similarly, the Deputy Assistant Attorney General for the DOJ's civil division previously noted "that going forward the **False Claims Act** will play a central role in the Department's pursuit of COVID-19 related fraud" (DOJ Press Release, Remarks of Deputy Assistant Attorney General Michael D. Granston at the ABA Civil **False Claims Act** and Qui Tam Enforcement Institute (Dec. 2, 2020)).

The CARES **Act**, which introduced stimulus programs and other regulatory actions in a number of areas to provide economic relief to US businesses affected by the pandemic, includes the Paycheck Protection Program (PPP) to provide economic assistance to eligible businesses. Small businesses and certain nonprofit organizations seeking to obtain a PPP loan must submit an application that certifies that the applicant is eligible to receive a loan and that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the [a]pplicant" (SBA Form 2483, PPP Borrower Application Form).

Entities that receive a PPP loan without properly satisfying the certification requirement may risk FCA **litigation**, with the government potentially seeking the return of the full value of the loan as well as significant penalties. Indeed, the DOJ recently announced the first civil settlement to resolve fraud allegations in connection with the PPP, under which the defendants agreed to pay the government a combined $100,000 in damages and penalties (DOJ Press Release, Eastern District of California Obtains Nation's First Civil Settlement Agreement for Fraud on Cares **Act** Paycheck Protection Program (Jan. 12, 2021)).

For more on the CARES **Act** and the PPP, see Practice Note, Road Map to the Coronavirus Aid, Relief, and Economic Security **Act** (CARES **Act**) and CARES **Act**: Stimulus for Small Businesses Under the SBA Checklist.

Additionally, businesses supplying equipment to the government should be aware that cybersecurity compliance is an emerging focus of relators filing FCA complaints against government contractors (see, for example, *United States ex rel. Adams v. Dell Computer Corp.*, 2020 WL 5970677, at *6 (D.D.C. Oct. 8, 2020) (dismissing a complaint alleging cybersecurity vulnerabilities in the defendant's products because it did not allege that the defendant had to comply with government agency technology policies); *United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, 381 F. Supp. 3d 1240, 1246-48 (E.D. Cal. 2019) (denying a motion to dismiss in part because the complaint alleged that all relevant agency contracts incorporated the minimum system requirements for receiving a government contract, and that defendants knew the computer systems supplied to the government did not meet those contractual requirements)).

What are some key takeaways for practitioners given the current trends and developments in FCA litigation?

Given that FCA liability remains a significant risk for companies conducting business with the government, counsel should understand the relevant case law, including *Escobar* and its progeny. In particular:

- Counsel should be aware of the unsettled areas of law in which circuit splits exist in FCA cases and carefully review the case law for the relevant circuit.

- When pleading FCA **claims** based on a reliable indicia approach, relators' counsel should be as comprehensive as possible when preparing the complaint and articulate a clear scheme of misrepresentation. Conversely, defendants should assess complaints to determine if the relators lack personal knowledge regarding any part of the scheme and whether the complaint specifies the reasons why the relators lack personal knowledge.

- When arguing about whether a pleading satisfies the specific representation requirement, counsel should focus on whether forms or requests submitted to the government seeking reimbursement or funding under programs such as Medicare or the PPP explicitly mention compliance with applicable laws and regulations, which would support a finding that the plaintiffs properly pled that the defendant made a specific representation.

- Companies should pay extra attention to potential FCA liability when seeking to obtain relief through federal programs introduced in response to the COVID-19 pandemic or in connection with cybersecurity compliance issues.

- Given the DOJ's announced intention to use the FCA to crack down on COVID-19 related fraud, now would be a good time for companies doing business with the government to review their existing compliance procedures. Whistleblowers often use companies' internal hotlines to raise issues, which, if handled early, can allow companies to avoid FCA **claims**. Moreover, implementing effective compliance procedures can help companies to prevent actions that could lead to FCA **claims** and help provide defenses if **litigation** ensues.

For more on how companies can avoid FCA **litigation** through effective compliance programs and self-disclosure, see Practice Note, Understanding the **False Claims Act**: Minimizing FCA Exposure.

