

**False Claims Act Update: Measuring  
the Aftershocks from the Landmark  
Supreme Court Decision in *United  
Health Services, Inc. v. Escobar***

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# The False Claims Act

- Is a federal statute that covers fraud involving any federally funded contract or program
- Establishes liability for any person who knowingly presents or causes to be presented a false or fraudulent claim to the U.S. government for payment
- Encompasses grants, subsidies, and “reverse false claims”

# The Federal False Claims Act: 31 USC § 3729

(A) knowingly presents, or causes to be presented, *a false or fraudulent claim* for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or *statement material to a false or fraudulent claim*;

# Materiality

- “[T]he term ‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”
  - 31 USC 3729(b)(4)

# Regulatory Non-Compliance

- The allegation: Claim was “legally false” because service provided was not compliant with one or more regulations.
  - Not a worthless service, but one for which the government would have refused payment had it known about the non-compliance.
  - Brought as a “false certification” claim.

## *U.S. ex rel. Escobar*

- Relators were parents of teen who died after experiencing adverse reaction to medication for bipolar disorder.
- Prescriptions provided by an outpatient mental health counseling center.
- Staff who prescribed medications were not supervised in accordance with state regulation.

# *U.S. ex rel. Escobar*

- Relators brought implied certification claims against provider.
- District Court dismissed on ground that FCA liability only attaches when regulation is express condition of payment.
- First Circuit reversed, holding that district court misread regs, and that they were conditions of payment.

# *U.S. ex rel. Escobar*

- Supreme Court granted cert.
  - Some circuits required express condition of payment
  - Some circuits recognized “implied” conditions of payment
  - One circuit refused to recognize implied certification theory at all



# *U.S. ex rel. Escobar*

- Implied certification theory is viable if:
  - the claim makes **specific representations about the goods or services provided**; and
  - the defendant's failure to disclose noncompliance with **material** statutory, regulatory, or contractual requirements makes those representations **misleading half-truths**.
- Did not decide if “all claims for payment implicitly represent that the billing party is legally entitled to payment.”

## *U.S. ex rel. Escobar*

- No express condition of payment necessary.
- And/but – “Whether a provision is labeled a condition of payment is **relevant to but not dispositive** of the materiality inquiry.”

# *U.S. ex rel. Escobar*

- Evidence of materiality can include, but is not necessarily limited to:
  - evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of [similar] cases;
  - if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated;
  - if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position.

# *U.S. ex rel. Escobar*

- “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.”
- “We emphasize, however, that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations.”

# *Escobar* on Remand

- UHS argued that gov't had paid claims despite knowledge of noncompliance.
- Cited reimbursements only dated to filing of complaint- gov't didn't know of extent of violations until later
- "...mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance."
  - did not weigh in on effect of "actual knowledge"

# *United States ex rel. Petratos v. Genentech Inc.* (3d Cir. 2017)

- Relator alleged Genentech suppressed data about side effects of Avastin, which caused doctors to submit claims that were not “reasonable and necessary.”

## *United States ex rel. Petratos v. Genentech Inc.* (3d Cir. 2017)

- Cited “demanding and rigorous” materiality standard from *Escobar*.
- “As the District Court noted: ‘there are no factual allegations showing that CMS would not have reimbursed these claims had these [alleged reporting] deficiencies been cured.’ Petratos does not dispute this finding, which dooms his case.”

# *United States ex rel. Petratos v. Genentech Inc.* (3d Cir. 2017)

- What about fraud via intermediary?
- “...when the Court wrote ‘the recipient of the alleged misrepresentation,’ it was referring to the Government, not the initial recipient.
- In other words, what the intermediary thinks is irrelevant – “it is the Government’s materiality decision that ultimately matters.”
  - Relator confused causation and materiality arguments.



# *United States v. Triple Canopy, Inc. (4th Cir. 2017)*

- Claims implicitly – not specifically – state legal entitlement to payment.
- *Escobar*'s “billing codes” v. *TC*'s “invoices”
- Sufficient to state “falsity” necessary to bring an implied certification claim.

# *United States v. Triple Canopy, Inc., (4th Cir. 2017)*

- “Guns that do not shoot are as material to the Government’s decision to pay as guards that cannot shoot straight.”
- “[E]laborate cover up” was evidence of materiality.
- As were non-renewal of contract and “immediate intervention” in *qui tam* case.

# *United States v. DynCorp Int'l, LLC* (D.D.C. May 19, 2017)

- Gov't can show falsity by demonstrating that (1) a contractor withheld information about its noncompliance; and (2) the contractual or regulatory requirements were material.
- “...a claim for costs that are significantly higher than reasonable satisfies the materiality requirement.”
- That the government frequently pays charges when billed and claws back unreasonable charges later does not show reasonableness is immaterial.

# *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd. (E.D. Pa. 2017)*

- Drug manufacturers did not certify compliance with PPPA, but represented to pharmacies that they had.
- Must plead specific representations to bring implied cert claims.
- Existence of administrative remedy established immateriality:
  - “this Court is unwilling to undermine the well-established regulatory procedures in place for addressing Defendants' exact kind of noncompliance.”

# 8<sup>th</sup> Circuit Cases

- *Olson v. Fairview Health Servs. of Minnesota* (8th Cir. 2016)
  - FCA “is not ‘an all-purpose antifraud statute.’ ”
- *United States ex rel. Miller v. Weston Educational Inc., d/b/a Heritage College* (8th Cir. 2016)
  - Applied *Escobar* materiality test to fraudulent inducement claims

## *U. S. ex rel. Johnson v. Golden Gate National Senior Care* (D. Minn. 2017)

- Relator alleged false certification claims with regard to SNF PT/OT sessions.
- On summary judgment, court determined fact issues remained with regard to materiality.
  - Rejected participation/payment distinction.
  - 42 C.F.R. § 483.75(I) is ambiguous with respect to detail required in medical records and SNF interpretation was reasonable.

# *U.S. ex rel. Worthy v. E. Maine Healthcare Sys. (D. Me. Jan. 18, 2017)*

- Relator alleged:
  - Three-Day and Same-Day rules require that certain services be bundled instead of separately billed.
  - Defendants specifically made changes and created dummy accounts in order to get claims paid in violation of the billing rules and to conceal those payments
- Court also considered:
  - Gov’t has previously taken action to prevent the type of double-billing and unbundling alleged here and has warned that duplicate billing “may generate an investigation for fraud.”
- Relator plead plausible claim of materiality.

# Other Cases

- *United States ex rel. McBride v. Halliburton Co.*, (D.C. Cir. 2017)
  - “DCAA investigated McBride's allegations and did not disallow any charged costs.”
- *Abbott v. BP Expl. & Prod., Inc.*, (5th Cir. 2017)
  - “DOI decided to allow the Atlantis to continue drilling after a substantial investigation into Plaintiffs' allegations...”



# Recent DOJ Position

- *United States ex rel. Kolchinsky v. Moody's Corp.* (S.D.N.Y.)
- Relator moved under Rule 59(e)
- Gov't filed statement of interest:
  - “an agency’s continued payment of claims to a potential FCA defendant who faces public allegations of fraud is insufficient – by itself – to establish that the alleged fraud is immaterial.”

# Questions?

# Presenter



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