Appreciating the Impact of *Universal Health Servs. Inc. v. United States ex rel. Escobar* in False Claims Act Actions

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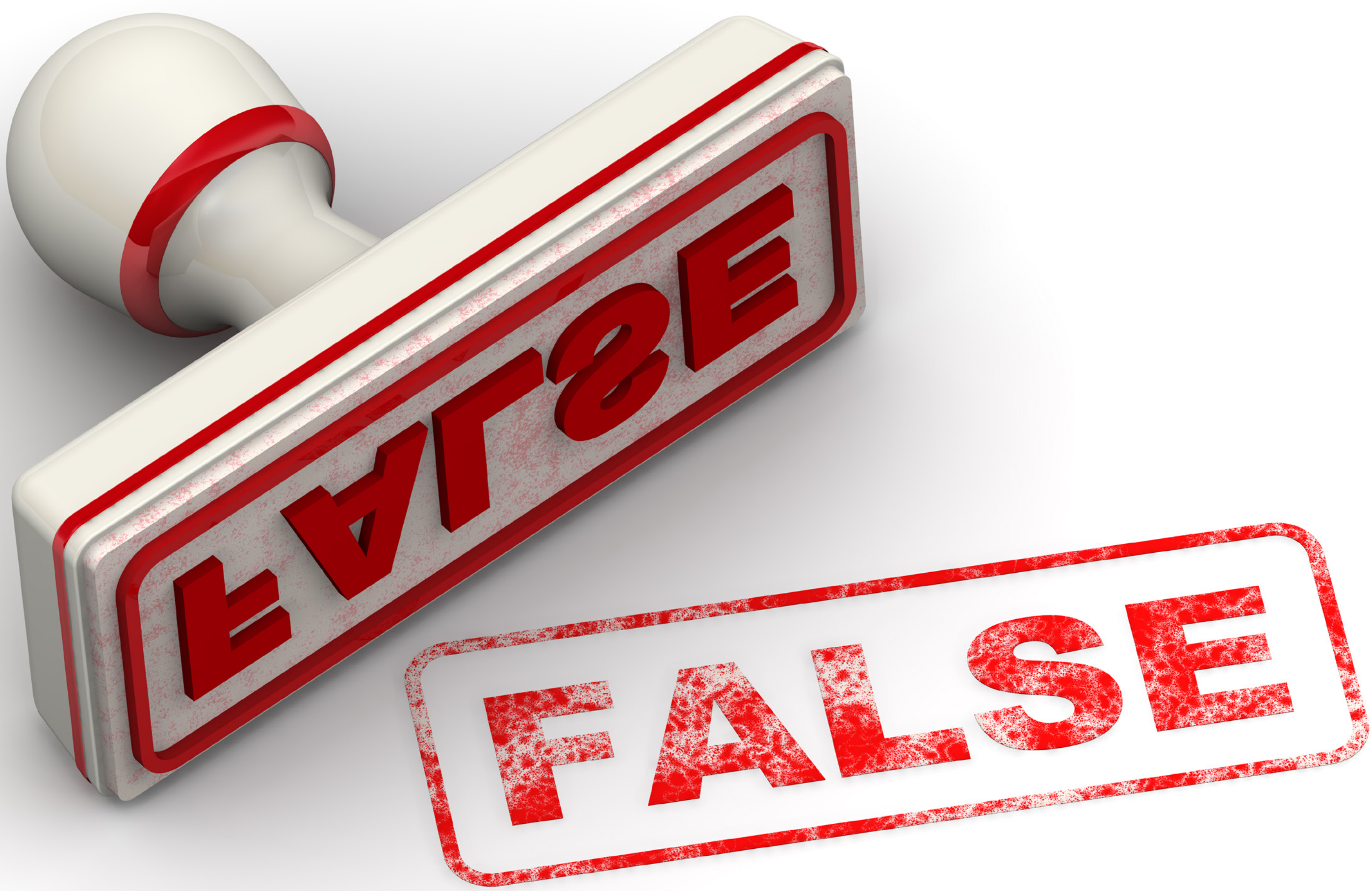


Also known as the "Lincoln Law" or the *qui tam*[1] statute, the False Claims Act (FCA)[2] stems back to 1863.[3] Enacted by Congress as a way to uncover corrupt suppliers of goods to the Union Army, the FCA initially "provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty of $2,000 for each false claim."[4] Since its inception, the FCA has undergone only two major amendments—in 1943 and 1986. The 1943 amendments served to refine the FCA by providing an initial 60-day period for the government to intervene, precluding *qui tam* suits based on information already in the government's possession and reducing the relator's share from 50 percent to between 10 percent to 25 percent.[5] By way of contrast, the 1986 amendments[6] revitalized *qui tam* causes of action by providing, among other items, a cause of action for retaliation against whistleblowers, expressing a cause of action for reverse false claims, an increase from 25 percent to 30 percent as the maximum award, and increasing the penalties from "$2,000 and double damages to a penalty of not less than $5,000 nor more than $10,000 and treble damages."[7]

Other laws, such as the Fraud Enforcement and Recovery Act of 2009 expanded the FCA by proscribing: (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the United States and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the United States; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation to pay or transmit money or property to the United States, or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the United States; or (7) conspiring to commit any such offense. The penalties have increased since 1863 and currently have two possible ranges: $5,500 to $11,000 per violation, plus treble damages for violations prior to Nov. 2, 2015[8]; and a new range of $10,781 to $21,563, which the Department of Justice announced in its interim final rule on June 30 and applies to violations after Nov. 2, 2015.[9] Hence, the financial and reputational ramifications for the offenders are potentially significant.

As illustrated in the FCA's legislative history, "[c]laims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program."[10] In general, there are three categories of claims that are brought under the FCA: (1) factually false, (2) legally false, and (3) reverse false claim.[11] Factually false claims are straightforward. Specifically, a claim for reimbursement included "incorrect description of goods or services provided or a request for reimbursement for goods or services never provided."[12] By way of contrast, legally false claims are "predicated on an express or implied false certification of compliance with a regulation, statute, or contract term—is more complicated, and has resulted in one of the most controversial debates on the proper scope of FCA liability."[13] Express false claim cases have been accepted by district courts without controversy. And, until *Universal Health Services Inc. v. United States ex rel. Escobar*,[14] there was a split in the circuit courts as to whether an implied false certification claim was permissible. Writing for a unanimous Supreme Court, Justice Clarence Thomas resolved this dispute and held that the "implied" certification theory is a viable basis for a cause of action under the False Claims Act.[15]

A recent U.S. District Court ruling provided guidance in relation to a reverse false claim—a claim where a person receives an overpayment from the government but does not return the portion that is in excess of what is owed. In *Kane v. Healthfirst Inc.*, the U.S. District Court for the Southern District of New York interpreted the health care providers' obligations under the 60-day rule to require "a person who has received an 'overpayment' must: (A) report and return the overpayment to the secretary, the state, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and (B) notify the secretary, state, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment."

The purpose of this article is to provide an overview of the *Escobar* case and highlight some of the key aspects of the case. From my perspective, despite the Court's attempt to narrow recovery, *Escobar* is a welcome decision that provides clarity and enables the government and whistleblowers to reclaim tax payers' money based on omissions, as well as "co-missions."

Analysis

Escobar was one of the most anticipated cases of 2016 term for the Supreme Court because it resolved a split in the circuit courts. Specifically, the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. circuits found that implied certification is a valid FCA theory,[16] while the Fifth and Seventh circuits held that the implied certification theory was invalid.[17] In light of the holding in *Escobar*, the dispute was resolved and the implied certification theory has been deemed valid.

In *Escobar*, Universal Health Services (e.g., the contractor) provided mental health services and submitted claims for payment by Medicare and Medicaid. Yarushka Rivera was a teenage Massachusetts' Medicaid beneficiary who received mental health counseling services from one of Universal Health Services' facilities. Ultimately, she died after receiving medication that a "doctor" prescribed after diagnosing her with bipolar disorder. Afterward, her parents discovered that very few of the employees were actually licensed to provided mental health counseling or legally authorized to prescribe medication without supervision.

The premise of this case centers around the allegations that Universal Health Services violated the False Claims Act under the implied certification theory for "knowingly present[ing] … a false or fraudulent claim for payment or approval" to the federal government, despite having the knowledge that the employees were violating basic licensing requirements and, therefore, misrepresenting that the claims were "clean" and that material laws were being complied with in relation to licensing and prescribing requirements.[18] In fact, the Court boldly states, "[n]othing in the text of the False Claims Act supports Universal Health's proposed restriction…. A statement that misleadingly omits critical facts is a misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information."[19] In sum, a reasonable person would discern the importance of the information in making an informed decision.

Despite holding that the implied certification theory is a valid basis for a False Claims Act cause of action, the Court narrowed the government and the First Circuit's perception of materiality—"that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the government would be entitled to refuse payment were it aware of the violation."[20] The Court went on to say that requiring contractors to comply with every aspect of the U.S. Code and Code of Federal Regulations was too broad, and the intent of the FCA was not to make liability as broad as "requir[ing] contractors to buy American-made staplers" even if it is in the U.S. Code.[21] By way of contrast, knowingly being out of compliance with state regulatory requirements governing licensure and prescribing is material and a basis for liability under the FCA. Hence, there are a lot of areas of law that are deemed material under the FCA.

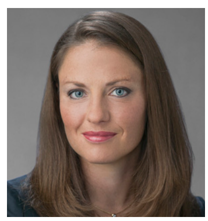
Conclusion

In sum, the FCA enlists the assistance of the public in combating fraud against the government and recovering civil penalties. *Escobar* alleviated the divergent interpretations of "implied" certification theory, which should make it easier for counsel and the government in bringing these types of causes of action. Counsel should pay particular attention to the Court's focus for limiting exposure under the FCA to effect the true spirit of the law's "strict enforcement of the act's materiality and scienter requirements." Hence, counsel need to be prudent in choosing a case, as the lower courts have been provided guidance to avoid "punishing garden variety breaches." As this article was heading to print, the U.S. Court of Appeals, First Circuit, issued an opinion based upon the U.S. Supreme Court's Opinion, which required the Court of Appeals to evaluate some issues on remand. *Universal Health Servs., Inc. v. United States and Commonwealth of Mass. ex rel. Escobar,* 136 S. Ct. 1989, 2004 (2016) ("Escobar II"). The First Circuit "[a]ppli[ed] the Supreme Court's guidance on the question of whether UHS's misrepresentations were material, we again find that Relators' complaint sufficiently states a claim under the FCA. We therefore REVERSE the district court's grant of UHS' Motion to Dismiss and REMAND for further proceedings consistent with this opinion." *United States and Commonwealth of Mass. ex rel. Escobar v. Universal Health Servs., Inc.,* 780 F.3d 504, 514 (1st Cir. 2015) ("Escobar I"), on remand, No. 14-1423 (Nov. 22, 2016).[22] In sum, the First Circuit's discussion on materiality relies upon the notion that materiality is a holistic approach.

The main take-aways for counsel include:

- Appreciating that the fundamental inquiry is "whether a piece of information is sufficiently important to influence the behavior of the recipient." *United States ex rel. Winkelman et al. v. CVS Caremark Corp.,* 827 F.3d 201, 211 (1st Cir. 2016).
- "regulatory compliance is not merely a condition of payment."
- Actual knowledge of the government about the violations, as well as other circumstances should be considered in ascertaining whether or not the government continued to pay the claims despite knowing the claims were false.

Overall, *Escobar* changed the landscape of False Claims Act cases under the implied certification theory. Attorneys and whistleblowers alike should be sure to address all of the elements, with particular emphasis on materiality and the government's actions. ⊙



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Endnotes

[1] *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1152 (3d Cir. 1991); illustrating that, "*qui tam*" is shorthand for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" meaning "who brings the action for the king as well as himself."

[2] 31 U.S.C. 3729-3733.

[3] The False Claims Act, 12 Stat. 696 (Mar. 2, 1863).

[4] U.S. Department of Justice, *The False Claims Act: A Primer*, *available at* https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

[5] *See* S. Rept. No. 78-291 (1943), citing Pub. L. 78-213, 57 Stat. 608 (1943).

[6] S. Rept. No. 99-345, at 2-3 (1986).

[7] Compare 31 U.S.C. 3729, 3730(c)(2) (1982 ed.), with 31 U.S.C. 3729(a)-(d)(1988 ed.).

[8] 28 C.F.R. § 85.3(a)(9) (2008).

[9] 81 Fed. Reg. 42491 (Jun. 30, 2016).

[10] S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986), *reprinted in* 1986, U.S.C.A.A.N. 5266, 5274.

[11] The most illustrative example of a reverse false claim is the Affordable Car Act's 60-day rule provision (Pub. L. 111-148, § 6402(a), 124 Stat. at 755 (Mar. 23, 2010)). *See also Kane v. Healthfirst Inc.*, 2015 WL 4619698 (S.D.N.Y. Aug. 3, 2015).

[12] *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *see, e.g.*, *United States v. Aerodex*,
[469] F.2d 1003, 1008 (5th Cir. 1972) (ruling that "the deliberate mislabeling in the case at bar, coupled with the fact that the parts

delivered did not actually meet the specifications of the contract, compels a finding of liability under the act").

[13]John T. Boese, *Use of the False Claims Act to Enforce Federal Regulations: Necessary Limits on False Certification Cases Brought Under the civil False Claims Act*, American Bar Association Section of Litigation Conference (Jan. 29-31, 2016), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-joint-cle/written_materials/02_what_you_don't_know_could_hurt_you_an_examination.authcheckdam.pdf.

[14]*Universal Health Servs. Inc. v. United States ex rel. Escobar*, 579 U.S. ___ (2016).

[15]Ronald Mann, *Opinion analysis: Justices chart their own path in narrowing recovery for implied fraud under the False Claims Act,* SCOTUS BLOG (June 16, 2016), *available at* http://www.scotusblog.com/2016/06/opinion-analysis-opinion-analysis-justices-chart-their-own-path-in-narrowing-recovery-for-implied-fraud-under-the-false-claims-act.

[16]*See, e.g., United States ex rel. Hutcheson v. Blackstone Med. Inc.*, 647 F.3d 377, 387 (1st Cir. 2011); *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp. Inc.*, 659 F.3d 295, 306 (3d Cir. 2011); *United States v. Triple Canopy Inc.*, 775 F.3d 628, 636 (4th Cir. 2015); *United States ex rel. Augustine v. Century Health Servs. Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 996 (9th Cir. 2010); *United States ex rel. Conner v. Salina Reg'l Health Ctr. Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *United States v. Sci. Apps. Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

[17]*United States v. Sanford-Brown Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015) ("[W]e decline to join them and instead join the Fifth Circuit.") (citing *United States ex rel. Steury v. Cardinal Health Inc.*, 625 F.3d 262, 270 (5th Cir. 2010)); *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 389 (5th Cir. 2008).

[18]31 U.S.C. § 3729(a)(1)(A).

[19]*Escobar*, 579 U.S. ____ (2016); referring to page 12 of the Slip Opinion.

[20]*Id.*; referring to page 17 of the Slip Opinion.

[21]*Id.*

[22]scholar.google.com/scholar_case?case=5849770691471226369&hl=en&lr=lang_en&as_sdt=6,44&as_vis=1&oi=scholaralrt (last accessed, Dec. 1, 2016).