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Don't Let Implied-Certification False Claims Bring You Down: Just Remember the Golden Rule!

By Brian J. Markovitz and N. Brenda Adimora

Last summer's highly anticipated Supreme Court decision, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 84 U.S.L.W. 4410, 2016 BL 192168 (U.S. 2016), was lined up to be a monumental moment for the False Claims Act (FCA). In the decision, colloquially known as ''*Escobar*,'' the Supreme Court decided that the theory of ''implied false certification'' was a valid basis for liability in a health-care fraud case. Implied false certifications, as opposed to express certifications, occur when a claim submitted to the government by a contractor somehow indicates, although not directly, that certain conditions or laws associated with the claim have been met when in reality they have not.

To be clear, the alleged facts in *Escobar* hardly could have been worse for the defendant, considering that, if true, they may have contributed to the death of a disabled child. Naturally, many in the defense bar and the government contractor world feared that the Supreme Court's decision would cause the sky to come falling down, raining implied certifications everywhere. Nonetheless, the Supreme Court's decision proved to be much less dramatic, and the feared floodgates opening failed to occur. Ultimately, a narrowly construed, unanimous opinion simply solidified what was the stance of the majority of lower courts upholding the implied certification theory under the FCA.

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As Justice Thomas explained:

Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the government's payment decision. *Escobar*, 136 S.Ct. 1989, 1996.

In essence, the Supreme Court focused not on what description was placed on a payment condition but whether the condition at issue affected the government's decision to make a payment on a claim. This is known as ''materiality,'' meaning the condition is pertinent to the government's decision to pay the claim.

Escobar Explained

In this respect, the allegations in *Escobar* provided a fairly straightforward example of implied certification violations of the FCA. The whistleblowers in *Escobar* were the parents of a deceased teenager who had an adverse reaction to medicine prescribed by a purported doctor at a mental health facility owned by the defendant, Universal Health Services. The parents later learned that very few of the personnel at the facility were properly licensed and that the ''doctor'' who handled their daughter's case was actually a nurse who could not legally prescribe medicine. Yet, the defendant allegedly billed Medicaid for their services, which necessarily implied that the bills were being submitted for the services of properly licensed personnel.

The Supreme Court did not delineate all the ways that implied certifications can be found. But it did provide an example of where liability exists consisting of a two-part test: (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided, and (2) a contractor's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths. *Id.* at 2001.

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Importantly, the Supreme Court did not exhaust the bases of implied certification liability and left what appears, at first blush, to be contradictory and confusing language. For example, the Supreme Court explained that ''not every undisclosed violation of an express condition of payment automatically triggers liability,'' while simultaneously explaining that ''a defendant can have 'actual knowledge' that a condition is material without the Government expressly calling it a condition of payment.'' *Id*. This sounds perplexing, and it will be up to the lower courts to add clarification to what materiality means and when violations of the FCA under the implied certification theory have occurred.

Lower Courts Applying *Escobar*

In fact, the lower courts are rapidly filling in those gaps. This year the U.S. Court of Appeals for the District of Columbia Circuit in *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 2017 BL 48645 (D.C. Cir. 2017), added some meat to the definition of materiality by explaining ''that courts should look beyond the express designation of a requirement as a condition of payment to find it material.'' The *McBride* case involved a contractor running recreation centers for troops in Iraq. The whistleblower (McBride) maintained that the contractor was inflating troop usage of the recreation centers by exaggerating its ''headcount'' on the number of troops entering the recreation centers while destroying documents that reflected an accurate headcount. In upholding dismissal of the case, the D.C. Circuit found that ''McBride had presented no evidence that the alleged headcount practices were material to the Government's payment decisions.'' *Id.* at 1030. The problem for McBride was that she never showed that the number of troops using the facilities (*i.e.* the headcount) actually changed the amounts billed by the contractor or paid by the government. To begin with, even the ''staffing [at the centers was] based on camp population, not based on headcounts or actual usage.'' *Id.* at 1033.

To this end, even if true, submitting inaccurate headcounts did not matter for purposes of payment. As the D.C. Circuit succinctly held, ''[a]bsent any connection between headcounts and cost determinations, it is difficult to imagine how the maintenance of false headcounts would be relevant, much less material, to the Government's decision to pay[.]'' *Id.*

District courts are similarly clarifying *Escobar*. For example, in *City of Chicago v. Purdue Pharma L.P.*, No. 14-cv-4361, 2016 BL 322789 (N.D. Ill. 9/29/16), the city alleged that the defendants, pharmaceutical companies, deceptively marketed opioids by overstating benefits and downplaying risks of opioid therapy for long-term chronic pain. The city stated that had it known of the misrepresentations in opioid marketing, it would not have authorized payment for opioid prescriptions to treat chronic pain. However, the city continued to authorize payment after the litigation started. The United States District Court for the Northern District of Illinois mentioned that it ''ha[d] difficulty understanding how the City remained unaware that the claims were false after the lawsuit was filed.'' *Purdue*, slip op. at 31. Thus, the court found that the city did not sufficiently allege a material misrepresentation.

In other words, the court decided that the city must have not believed the misrepresentations were problematic enough because they continued to authorize payment after bringing suit against the pharmaceutical companies. Ultimately, the court allowed the city to amend its complaint based on *Escobar* to see if it could fix this deficiency in its court filings. However, the court already highlighted the hurdle that the city will have to overcome to show materiality due to its actual knowledge of the deception and continued payments made, which *Escobar* mentions as being ''very strong evidence'' that the payment conditions at issue were not material. *Escobar*, 136 S.Ct. at 2003.

Golden Rule Takeaways

Should contractors be concerned that they will never be able to sort through these standards to act appropriately? Should contractors be worried about getting tripped up in what may sound at first blush to be confusing legal language? The short answer to both questions is no.

The opinion focuses on the government's point of view on payment conditions. Contractors, consequently, can find much solace in the fact that the *Escobar* opinion in many ways boils down to one simple and familiar maxim: Do to others as you would have them do to you, also known as the Golden Rule. If a contractor is withholding information from the government under a government contract that it would want to know from one of its own contractors under similar circumstances prior to making a payment, then it likely is committing a fraud against the government, *i.e.* an implied false certification in violation of the FCA. So, in contracting, as it is in life—remember the Golden Rule!

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