Legal Backgrounder

Vol. 31 No. 23 September 30, 2016

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Implied-Certification FCA Claims Post-*Escobar*: Three Appellate Court Cases May Show the Way

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Since the US Supreme Court issued *Universal Health Services v. United States ex rel. Escobar* on June 16, 2016,[1] commentators have struggled to predict how the lower courts will apply the decision. On June 27, 2016, the Court presented federal appellate courts with immediate opportunities to construe *Escobar*. The Court remanded three cases to the US Courts of Appeals for the Fourth, Seventh, and Eighth Circuits for disposition in accordance with its June 16 ruling.[2] The decisions in these cases will play a significant role in shaping False Claims Act (FCA) litigation going forward. This Legal Backgrounder briefly describes *Escobar* and then analyzes its potential impact on these three cases.

Implied Certification Following *Escobar*

Prior to *Escobar*, the government and relators aggressively used the implied-certification theory to manufacture falsity under the FCA in situations where the contractor or provider made no false statements. Under implied certification, a factually accurate claim for payment could constitute a false claim if the contractor or provider was noncompliant with some underlying statute, regulation, or contractual provision. The Fourth Circuit and District of Columbia Circuit adopted this expansive view of implied certification.[3]

In an attempt to rein in the potentially unlimited reach of implied certification, the majority of circuits, including the Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits, have limited its application to legal requirements that the government expressly identified as a condition of payment.[4] The Fifth and Seventh Circuits went a step further, rejecting implied certification altogether.[5]

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[1] *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

[2] *Triple Canopy, Inc. v. United States ex rel. Badr*, 136 S. Ct. 2504 (2016); *United States ex rel. Nelson v. Sanford-Brown, Ltd.*, 136 S. Ct. 2506 (2016); *Weston Educ., Inc. v. United States ex rel. Miller*, 136 S. Ct. 2505 (2016).

[3] *See United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636-37 (4th Cir. 2015), *cert. granted, judgment vacated and remanded sub nom. Triple Canopy, Inc. v. United States ex rel. Badr*, 136 S. Ct. 2504 (2016); *United States v. Sci. Applications Int'l. Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

[4] *See United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001), *abrogated by Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1219-20 (10th Cir. 2008); *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306-07 (3d Cir. 2011).

[5] *See, e.g., United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711-12 (7th Cir. 2015), *cert. granted, judgment vacated and remanded sub nom. United States ex rel. Nelson v. Sanford-Brown, Ltd.*, 136 S. Ct. 2506 (2016), *abrogated by Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010).

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The Supreme Court granted certiorari in *Escobar* to resolve this split. In *Escobar*, the Supreme Court created a new theory of implied certification that is fundamentally different than any of the versions that existed previously. Specifically, it held that implied certification can create FCA falsity *only* when: (1) "the claim does not merely request payment, but also makes specific representations about the goods or services provided," and (2) the defendant's "failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." The Court explicitly rejected the precondition to payment limitation that the majority of circuits had imposed.

Escobar emphasized that this new theory is meaningfully limited by the FCA's materiality requirement, which the Supreme Court described as "rigorous" and "demanding." The opinion attempted to clarify how FCA materiality should be applied by discussing hypothetical examples of what is, or is not, material. In so doing, the Supreme Court created a highly fact-specific standard that courts will have to apply on a case-by-case basis.

Interestingly, since *Escobar*, both the Department of Justice (DOJ) and relators' counsel have argued that *Escobar* does not preclude implied certification in situations where the contractor makes no "specific representation." This position is based on one sentence in *Escobar* that stated the Court "need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment."

This position ignores the rest of the decision. Specifically, *Escobar*: (1) stated in no uncertain terms that implied certification applies only when "the claim does not merely request payment, but also makes specific representations about the goods or services provided"; (2) adopted common-law concepts of fraud, whereby an omission can support fraud only when the party has a duty to disclose, such as when a failure to disclose would make a "specific representation" misleading; and (3) emphasized that materiality requires a close nexus between this "specific representation" and the statutory, regulatory, or contractual requirement at issue.

As a practical matter, if DOJ and relators' broad interpretation were to prevail, it would render *Escobar* essentially meaningless and would plunge the courts back into the same circuit split that the Supreme Court explicitly set out to resolve.

So far, federal courts applying *Escobar* have correctly rejected this position and interpreted *Escobar* to require a "specific representation" as a predicate to implied certification falsity.[6] Ultimately, the way in which lower courts interpret the Supreme Court's new implied-certification theory will have a significant impact on the scope of the FCA and the corresponding risk of government contracting in the future.

Triple Canopy

The Fourth Circuit will get its first opportunity to interpret *Escobar's* implied-certification theory in *Triple Canopy, Inc. v. United States ex rel. Badr.*[7] Triple Canopy entered into a contract to provide security guards at the Al Asad Airbase in Iraq. The contract required Triple Canopy to ensure that all guards received weapons training and qualified on a US Army marksmanship course. After the guards failed training, Triple Canopy supervisors allegedly falsified marksmanship scorecards for the guards and placed the scorecards in the guards' personnel files. Triple Canopy did not submit these scorecards to the government, and its invoices stated only that they included costs for "Guards," a term that was not defined in the contract.

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[6] *United States ex rel. Creighton v. Beauty Basics Inc.*, No. 2:13-CV-1989-VEH, 2016 WL 3519365, *3 (N.D. Ala. June 28, 2016); *United States ex rel. Dresser v. Qualium Corp.*, No. 5:12-CV-01745-BLF, 2016 WL 3880763, *6 (N.D. Cal. July 18, 2016); *United States ex rel. Handal v. Ctr. for Employment Training*, No. 2:13-CV-01697-KJM-KJN, 2016 WL 4210052, *5 (E.D. Cal. Aug. 9, 2016); *United States ex rel. Southeastern Carpenters Regional Council v. Fulton Cty., Georgia*, No. 1:14-CV-4071-WSD, 2016 WL 4158392, *5 (N.D. Ga. Aug. 5, 2016); *United States ex rel. Voss v. Monaco Enterprises, Inc.*, No. 2:12-CV-0046-LRS, 2016 WL 3647872, *5 (E.D. Wash. July 1, 2016); *United States ex rel. John Doe v. Health First, Inc.*, No. 6:14-CV-501-ORL-37DAB, 2016 WL 3959343, *3 (M.D. Fla. July 22, 2016).

[7] *United States v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015), *cert. granted, judgment vacated and remanded sub nom. Triple Canopy, Inc. v. United States ex rel. Badr*, 136 S. Ct. 2504 (2016).

The district court dismissed the complaint against Triple Canopy, holding that the government failed to plead that Triple Canopy's invoices contained a false statement. The Fourth Circuit reversed, holding that the government adequately pled that Triple Canopy's invoices impliedly certified that the guards met contract marksmanship requirements. Triple Canopy appealed to the Supreme Court, and the Court remanded after *Escobar*.

On remand, the key question before the Fourth Circuit will be whether Triple Canopy's invoices contained a "specific representation" that was "half-true." In particular, the case will likely turn on whether Triple Canopy misled the government when it submitted invoices for "Guards" without telling the government that those guards did not meet contract marksmanship requirements.

Based on *Escobar*, Triple Canopy should win on remand. *Escobar* plainly states that it is not enough for a contractor to merely submit a bill to the government, but that the invoice must contain some specific, misleading representation about the services provided. For this distinction to have any meaning, merely identifying what the costs in the invoice relate to (*e.g.*, "guards") cannot be enough to trigger implied certification—otherwise, every contractor invoice would potentially contain a "specific representation" sufficiently false under the FCA. This outcome would frustrate the Supreme Court's attempt to create a reasonable limitation on implied-certification liability by requiring specific representations.

That said, the Fourth Circuit embraced a broad interpretation of implied certification prior to *Escobar*, which suggests that it may be open to a broad interpretation of the Court's decision. Moreover, the allegations that Triple Canopy falsified marksmanship reports and, according to the Fourth Circuit, provided guards that "could not, for lack of a better term, shoot straight," may tempt the Fourth Circuit to interpret *Escobar* in a manner that would create liability. Thus, the Fourth Circuit may permit the government to proceed on the theory that Triple Canopy made a specific representation that was impliedly false when it invoiced the government for guards that allegedly did not meet contractual requirements.

Sanford-Brown

The Seventh Circuit will have to interpret *Escobar's* new implied-certification theory in *United States v. Sanford-Brown, Ltd.*[8] The relator in the suit alleged that Sanford-Brown College (SBC) impliedly certified to the Department of Education when it executed a Program Participation Agreement (PPA) that it would remain in compliance with all applicable regulations as a prerequisite to receiving federal education funds. The relator asserts that this implied certification was false because SBC subsequently engaged in recruiting and retention practices that did not comply with applicable regulations. According to the relator, this false implied certification rendered all of SBC's subsequent claims false.

The district court granted SBC summary judgment on the basis that SBC's contractual payment right was not conditioned on compliance with the regulations at issue. The Seventh Circuit affirmed, holding the evidence did not establish that SBC intended to violate regulations *when it entered into the PPA*. Moreover, the Seventh Circuit rejected implied certification, finding that it "lacks a discerning limiting principle."

SBC should likely prevail again on remand, albeit on different grounds. Under *Escobar*, the relators must show that SBC submitted invoices that included "specific representations about the goods or services provided." Based on the record on appeal, such evidence is lacking.

Moreover, it is unlikely that the certification that SBC signed in connection with the PPA could serve as the "specific representation" upon which false certification must be based following *Escobar* for two reasons.

[8] *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), *cert. granted, judgment vacated and remanded sub nom. United States ex rel. Nelson v. Sanford-Brown, Ltd.*, 136 S. Ct. 2506 (2016) *abrogated by Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

ISBN 1056 3059

First, the certification was not contained in any SBC invoice. Second, there is no evidence that the certification was half-true or misleading *when made*. Statements about future performance are not rendered false by future noncompliance unless there is evidence that the contractor did not intend to comply *when it made the statement*. Thus, because SBC made no specific representation in its invoices regarding its recruiting and retention practices, and there is no evidence that its PPA certification was false when made, SBC's summary judgment should be upheld on remand.

Weston Educational

In *United States ex rel. Miller v. Weston Educ., Inc.*,[9] the Eighth Circuit will interpret and apply *Escobar*'s FCA materiality holding in another case involving an educational institution that entered into a PPA with the Department of Education. In *Weston Educational*, former employees of Heritage College alleged that Heritage falsified grades and attendance records to avoid repaying federal funds. Notably, on appeal, the relators pursued a fraud-in-the-inducement theory under 31 U.S.C. § 3729(a)(1)(B), and apparently did not pursue implied certification under 31 U.S.C. § 3729(a)(1)(A). Thus, further proceedings at the Eighth Circuit presumably will focus on materiality in the wake of *Escobar,* and not implied certification.

At the district court, Heritage obtained dismissal on the basis that the relators failed to establish a causal link between allegedly false records and receipt or retention of government funds and that Heritage's promise to maintain accurate records was not material to the government's disbursement decisions.[10] The Eighth Circuit overturned the district court, holding with regard to materiality that: (1) Heritage's certification when it executed the PPA was potentially material to the government's decision to enter into the PPA with Heritage; and (2) it is not relevant to materiality whether the false statements caused actual harm.

The Eighth Circuit on remand likely will consider whether relators presented adequate evidence that the government would have denied payment had it known about the alleged regulatory violations. *Escobar* raises the bar in this regard, providing that it is not sufficient to merely argue that the government could have denied payment.

The Eighth Circuit may also revisit whether it correctly focused on the materiality of Heritage's PPA certification. In doing so, the court must consider if *Escobar* requires that the analysis focus on whether Heritage's alleged regulatory violations were material to the government's decision to distribute funds to Heritage pursuant to invoices. Indeed, like in *Sanford-Brown*, there is no evidence that Heritage made any "specific representations about the goods or services provided" in any of its claims for payments. Thus, the plain language of the FCA and the Supreme Court's decision in *Escobar* provide strong arguments that the Eighth Circuit should reverse itself and reinstate the district court's dismissal on the basis that any false certification in the PPA was immaterial to the government's later payment decisions.

Conclusion

The forthcoming resolution of the cases discussed above will tackle an area of FCA law that is unsettled in the wake of *Escobar*. As the courts begin to grapple with the Supreme Court's decision, it remains to be seen whether the decision will benefit contractors in future FCA cases or negatively impact them by providing new and different areas of risk and uncertainty.

[9] *United States ex rel. Miller v. Weston Educ., Inc.*, 784 F.3d 1198 (8th Cir. 2015), *cert. granted, judgment vacated and remanded*, 136 S. Ct. 2505 (2016).
[10] *Id*. at 1209.

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