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Attys Dish On Escobar's FCA Impact One Year Later

Law360, New York (June 16, 2017, 2:02 PM EDT) -- The U.S. Supreme Court's decision one year ago in Universal Health Services v. Escobar has jolted False Claims Act litigation by creating a new approach to "implied certification" cases involving undisclosed noncompliance. Here, attorneys tell Law360 about key ways in which the decision has been applied.

Brian Tully McLaughlin, Crowell & Moring LLP

"Two circuit courts — the Third Circuit in Petratos v. Genentech Inc. and the Fourth Circuit in Badr v. Triple Canopy — have recently relied on the government's intervention decision in determining the materiality of an alleged false claim. This raises a question as to whether the largely accepted notion that the government's intervention decision is not evidence of its view on the merits is now on the table. Other important questions, with seemingly conflicting answers so far, are whether materiality is measured based only on what the government knew at the time it paid the claims or what it may learn after the fact, and relatedly, whether government knowledge of allegations of wrongdoing, as opposed to actual noncompliance, is a sufficient basis to find the requirement at issue was not material."

Palmina Fava, Paul Hastings LLP

"In the wake of Escobar, parties that submit claims to the government should re-examine their internal controls, assess compliance risks based on their organizations and adjust their controls as necessary to prevent and detect instances of material noncompliance with statutory, regulatory or contractual requirements. Government contractors would be well served in implementing regular compliance reviews to ensure compliance with such requirements. While the Federal Acquisition Regulation and most government contracts require disclosure of noncompliance and impose penalties for nondisclosure, timely disclosures may be useful in demonstrating favorable government courses of conduct in continuing to pay claims — an element relevant to the 'materiality' analysis enunciated in Escobar."

Robert Rhoad, Sheppard Mullin Richter & Hampton LLP

"One of the best defenses to materiality — and a factor specifically identified by the court in Escobar — is government knowledge. Nevertheless, there is still so much more courts need to do to clarify what constitutes sufficient government knowledge. Who in the government needs to know? Does the government actually need to know of a violation, or is knowledge of an allegation sufficient? When does the government need to know in order for the defense to apply? Although courts are still working through these questions, government knowledge remains one of the best facts a defendant can present to negate materiality."

Brian T. McGovern, Cadwalader Wickersham & Taft LLP

"While a number of courts post-Escobar have already dismissed FCA cases that relied on an implied certification theory, the pendulum over time may start to swing back in favor of the government and relators. The materiality standard announced in Escobar is from the government's perspective, so the government might respond going forward by making more explicit, in its claims forms and contracts, that compliance with all regulations and contract terms is a condition of payment, and that a provider or contractor is expressly certifying full compliance each and every time it submits a claim. In this way, the government can try to foreclose any issue being raised under the 'implied certification' doctrine about whether regulatory or contractual compliance with one term or another was material to its decision to pay."

John Horan, Dentons

"Government contractors had hoped that the Escobar decision would eliminate fraud liability for 'implied certifications,' or at least provide a test that would allow contractors to predict which of the myriad of statutes, regulations and contract terms could subject them to the FCA. The decision has disappointed. It left open liability based on an implied certification when a contractor fails to detect and disclose a violation that, if known by the government, would have been material to its decision to pay. It also stated that no single consideration will always be determinative of materiality — leaving the test open to interpretation by the courts — while providing the largely unhelpful and obvious example that whether the government typically pays while knowing about the violation is an important consideration. Not surprisingly, courts have applied the Escobar test inconsistently, and contractors face nearly as much uncertainty after Escobar as before."

Peter Hutt, Covington & Burling LLP

"Escobar is such a powerful case because it establishes rules that align with common sense. As to 'implied certification,' courts are instructed to determine if defendants were lying to the government by telling half-truths. As to 'materiality,' courts are told to look to what happens in the real world and determine what obligations the government has actually treated as material to payment — not what it may have artificially labeled as material. Seizing these common-sense rules, numerous courts have dismissed FCA claims for lack of materiality based on evidence that the government knew of the alleged violations and nevertheless continued to make payments. Perhaps most importantly, many courts have dismissed cases on materiality grounds at the pleading stage, obviating the need for protracted discovery."

Victor Walton, Vorys Sater Seymour and Pease LLP

"The U.S. Supreme Court prefers unanimity to clarity in its FCA decisions, and Escobar has raised as many questions as it answered. In general, the decision has been very good for defendants, allowing them to rebut the government's bald affirmations of materiality and permitting the introduction of evidence concerning the government's continued payment of claims. Indeed, the government's handling of similar situations should now be fair game in discovery, as defendants are entitled to know whether other contractors or health care providers were treated differently for comparable conduct. The big fight continues to be whether Escobar's two-part test is mandatory. Lower courts have been divided on the issue. If a consensus emerges that it is mandatory, expect relators' counsel to seek relief from Congress."

Mark Colley, Arnold & Porter Kaye Scholer LLP

"Several courts have explored how to follow the direction in Escobar that noncompliance with a contract or regulation is not material to the claim payment decision, and thus not a FCA violation, where the government continued paying claims even after knowing about the problem. Courts are dividing, however, on the significance of various details — who in the government had the knowledge, who makes the payment decision, whether knowledge of suspected or alleged misconduct is sufficient. Firms performing contracts under more traditional government procurements may benefit from keeping contracting officers fully apprised of even seemingly inconsequential contract deviations so that they do not later become the basis for a whistleblower's claim."

Aron Beezley, Bradley Arant Boult Cummings LLP

"As a result of the now-famous footnote 6 in the Escobar decision — in which the Supreme Court rejected the argument that questions of 'materiality' are not properly resolved via a dispositive motion — FCA defendants are increasingly seeking to resolve suits at the dispositive motions stage. Notably, the Ninth Circuit, in Kelly v. Serco, recently cited footnote 6 of the Escobar decision in support of the proposition that 'courts can properly dismiss an FCA claim on summary judgment based on a claimant's failure to meet the rigorous standard for materiality under the FCA.'"

Delphine O'Rourke, Hall Render Killian Heath & Lyman PC

"The jury is still out on whether Escobar is the game changer that FCA attorneys thought it would be a year ago. The federal circuits that have interpreted Escobar have focused their materiality analysis on whether the government has paid for services or goods despite actual knowledge of alleged fraud or if the government would pay for goods or services if the government knew of the alleged fraud. The government continues to argue, however, that the FCA's statutory language is clear, that Escobar did not change the statute and that the proper analysis under the statute's natural tendency test is whether the government could have withheld payment had the government known about the alleged fraud."

Maura Kathleen Monaghan, Debevoise & Plimpton LLP

"Escobar represented a compromise: It permitted at least some types of 'implied certification' claims under the FCA but also stressed that plaintiffs must meet a 'rigorous' standard in showing misrepresentations would have been material to the government's decision to provide reimbursement. Courts interpreting Escobar over the past year have shown that the materiality standard has teeth. They have carefully scrutinized whether plaintiffs met the materiality standard and have dismissed multiple cases where plaintiffs failed to establish materiality — particularly where the government continued providing reimbursements notwithstanding knowledge of the alleged violations. Nevertheless, because it is impossible to predict ex ante which regulatory or contractual obligations are likely to be immaterial, any entity reimbursed by the federal government should maintain a strong compliance program that carefully monitors compliance with all applicable government regulations."

Kathryn E. Hickner, Ulmer & Berne LLP

"The court in Escobar essentially held that a party may be liable under the FCA when its failure to disclose noncompliance with material statutory, regulatory or contractual requirements makes its specific representations — included in a reimbursement claim about the goods or services provided — misleading half-truths. This is a relatively ambiguous standard that can create a degree of

unpredictability in FCA cases. Although the rule can be used as the basis for arguments both for and against FCA defendants, the Escobar materiality standard is often viewed as an arrow within an FCA defendant's quiver.

Blanca Fromm Young, Munger Tolles & Olson LLP

"Perhaps the most important issue arising from the Escobar decision is the standard for materiality. Escobar emphasized the need for 'strict enforcement' of the FCA's 'rigorous' materiality requirement to prevent the implied false certification theory from improperly converting minor regulatory infractions into massive fraud liabilities subject to treble damages and civil penalties. Courts have taken this directive to heart: Since Escobar was decided, the Third, Fifth, Ninth and D.C. Circuits have all affirmed dismissals of FCA claims for failure to establish materiality. Of course, the materiality inquiry is highly fact-specific, and the law in this area is still evolving. But all indications so far are that, in the post-Escobar world, the materiality standard has teeth."

Adam Feinberg, Miller & Chevalier Chtd.

"Since Escobar, numerous decisions have stated that FCA defendants are entitled to discover the government's views of the statutory, regulatory or contractual requirement at issue. Courts have allowed discovery about whether the government, despite knowing the requirement was unmet, nonetheless paid claims either to the defendant or to similarly situated parties. Whether and why the government continued to make payments after learning of the allegations in the case also might be relevant to materiality and thus be the proper subject of discovery."

Lorinda Holloway, Husch Blackwell LLP

"Escobar triggered a flurry of early predictions by commentators, but the prediction that has come true is that defendants have a sharper arrow in their quiver with the heightened materiality standard. Escobar intensified the materiality requirement, and courts are strictly enforcing it. Citing Escobar, district courts are consistently dismissing implied certification cases where the government knew of the alleged fraud but paid the claims anyhow. To date, the First, Second, Third, Ninth and D.C. Circuits have upheld such dismissals, and no circuit court has taken an opposite view. As clearly intended by the court, the materiality requirement has become a meaningful way to significantly limit abuse of the FCA as an all-purpose anti-fraud statute or a regulatory compliance tool."

Rebecca Worthington, Squire Patton Boggs LLP

"An unsettled issue is whether it is mandatory to satisfy Escobar's two-part test for falsity, i.e., that the claim does not merely request payment but also makes specific representations, and the failure to disclose noncompliance makes the representations misleading. One district court has certified the question to the Ninth Circuit, noting the uncertainty among district courts on this issue. A district court for the District of Columbia, however, views the issue as resolved, noting that the D.C. Circuit held in a pre-Escobar decision that all the government must show is that a defendant withheld information about its noncompliance, and that a specific representation is not required."

Jesse A. Witten, Drinker Biddle & Reath LLP

"Escobar has proven to be a welcome injection of common sense. Lower courts have understood, and acted upon, the Escobar ruling that a defendant can be liable under the FCA for certifying regulatory compliance only if the violation, had it been known, would actually have resulted in the government not

paying claims. This ruling has also meant that discovery of the government has taken on far more significance than in the past, since how the government has responded to similar regulatory violations is highly relevant to whether a given regulatory violation is material. I anticipate that Escobar will also have the increasing effect of deterring relators from filing dubious qui tam actions based on immaterial regulatory infractions."

Courtney Gilligan Saleski, DLA Piper

"The Escobar decision has had a silver lining: Courts are taking seriously the Supreme Court's admonition that the materiality element has teeth and is not 'too fact intensive' to be decided on a motion to dismiss or a motion for summary judgment. Every federal circuit court that has considered the scenario of the government continuing to pay claims despite knowledge of an alleged fraud has held that the relator's allegations cannot satisfy the FCA's demanding materiality requirement and affirmed the district court's dismissal or grant of summary judgment. Defendants are and should be looking to make these arguments early in motions practice to avoid the cost of discovery."

Anne Robinson, Latham & Watkins LLP

"Although the Supreme Court held that a government agency's continued payment of claims with knowledge of noncompliance with a given requirement is 'very strong evidence' that the requirement is not material, agencies are largely continuing to pay contractors named as FCA defendants. The U.S. Department of Justice has argued that agencies are issuing payment for sound policy reasons, and doing so has no bearing on the materiality inquiry. Lower courts have accorded different weight to agencies' continued payment. In McBride v. Halliburton Co., for example, the D.C. Circuit affirmed the summary judgment dismissal of FCA claims, in part, because the government investigated the allegations against the defendant and continued to pay claims."

Lawrence Prosen, Kilpatrick Townsend & Stockton LLP

"Escobar is just the start of the voyage. While explicitly recognizing that implied certification FCA liability exists, the burden to prove liability is high. Since its issuance, many federal district and circuit courts have applied Escobar's materiality standard, limiting liability and developing precedent that generally follows the Supreme Court's admonition that such an analysis is 'rigorous' and 'demanding' but not overly 'fact intensive.' That the contractor, or government funds recipient, acted intentionally and with an understanding that the violation and resulting payment is made by the government in reliance upon the implied representations/certifications of the recipient, most courts have concluded that this is not an easy burden to meet for the government or any qui tam relator, ruling in favor of the contractor."

Judith Sherwin, Lewis Brisbois Bisgaard & Smith LLP

"I believe the Supreme Court decision is correct in that it advances the purpose of the FCA, and I hope settles the argument about scienter and the need for the intention to make a false claim, as opposed to some accidental violation that it was never the intention of the FCA to reach. It certainly will be helpful for those of us defending these claims."

Christopher R. Hall, Saul Ewing LLP

"Escobar set a demanding materiality standard in FCA cases that shifted the focus to whether noncompliance with a statute, regulation or contract influenced the government's payment decision.

The Escobar standard requires a fact-intensive analysis that has caused lower courts to arrive at differing conclusions based on individual circumstances. For instance, despite Escobar's holding that express conditions of payment are not dispositive, courts have allowed FCA claims to proceed over unreasonable contract costs and over promotion of off-label prescriptions. And Escobar left unanswered whether merely seeking payment without making specific representations about the provided goods and services violates the FCA."

Mazin A. Sbaiti, Sbaiti & Co. PLLC

"When Escobar was released, the headline was that implied certification was a viable theory of liability under the FCA. But the more significant impact has stemmed from the court's statements on materiality. The court described the materiality standard as 'demanding' and set a high bar for relators to overcome. Now, even where statutes and regulations require compliance as condition of payment, misstatements regarding compliance are not automatically material. Further, the fact that the government has the option to decline payment based on noncompliance does not render such misstatements material. Instead, relators must demonstrate that the misrepresentations likely would have or actually did impact the government's payment decision. Since Escobar, courts around the country have struggled with how to apply the materiality standard, especially in declined cases. Now, an agency's response — or nonresponse — to a relator's allegations will become much more pertinent to the outcome of declined FCA matters."

George Breen, Epstein Becker Green

"What has become clear is that materiality matters. Defendants have successfully focused courts on the need to meticulously scrutinize complaints for compliance with the FCA's 'demanding' materiality and scienter requirements. Last month, in affirming the dismissal of a relator's complaint, the Third Circuit, in Petratos v. Genentech, noted, 'We now join the many other federal courts that have recognized the heightened materiality standard. In short, Escobar's focus on the FCA's strict materiality standard has had a positive impact on health care entities, which should continue to vigorously resist efforts to use the FCA as a weapon against what are nothing more than regulatory missteps.'"

David Nadler, Blank Rome LLP

"Escobar is perhaps the most significant FCA case in a generation. With its practical focus on the FCA's 'rigorous' and 'demanding' materiality standard, the Supreme Court put reasonable constraints on the implied certification theory, which can have almost boundless implications and exposes contractors to almost unlimited FCA liability. The Supreme Court rightly instructed courts to weed out cases that do not meet this rigorous standard, which is an important step toward ensuring that ordinary breach of contract issues are not the basis of FCA liability. Though the lower courts are still working through how to properly apply Escobar, the Supreme Court has signaled that the implied certification theory has limits and that those limits must be recognized and enforced."

Robert Salcido, Akin Gump Strauss Hauer & Feld LLP

"The Escobar decision will have a transformative effect on FCA law in defining its appropriate scope and application. As to scope, the Supreme Court reaffirmed that the FCA is not an 'all-purpose anti-fraud statute' meant to punish 'garden-variety breaches of contract or regulatory violations.' As to application, the Supreme Court narrowed the FCA's materiality standard some courts applied by finding that courts should not simply look at what the relevant government decision-makers would decide at the time in which the claim is submitted, but also at how the government reacted after the claim was submitted,

such as, whether the government, after review, continued to pay claims or renewed a contract, which is very strong evidence that the claim is not material."

Amelia Rudolph, Eversheds Sutherland

"One question left open by Escobar, on which lower courts seem to be in some disagreement, is on whether a bare demand for payment to the government, without more, is an implicit representation for FCA purposes that the billing party is in compliance with all legal requirements for payment. Some lower courts, seeing that the court expressly left that question open, have opted to follow their existing precedent on the issue. Other courts, the Third Circuit among them, appear to have viewed Escobar as changing the law on this question and have held that under Escobar, specific representations about the goods and services provided are required to establish falsity under the implied false certification theory. We can expect this debate to continue."

Danielle Corcione, Day Pitney LLP

"The Supreme Court's directive to lower courts to scrutinize the materiality of the false statements to the government's decision to pay a claim has raised the bar for successful prosecution of qui tam claims. It is not enough for a prosecutor to simply assert that if the government knew of the noncompliance it would not have paid the claim. This is arguably a more stringent standard than federal criminal health care fraud liability in the excluded provider context. Consider U.S. v. Imadeldin Awad Khair in the District of New Jersey. Khair was previously convicted of health care fraud and excluded from participation in federal health care programs years ago. Despite his exclusion, he continued in the health care industry, and the company he worked for submitted claims for reimbursement from Medicare and Medicaid in the millions of dollars. Khair was convicted anew of health care fraud and other federal offenses after trial for submitting claims to Medicare and Medicaid that they would not have paid if they knew an excluded provider worked at the company. He was sentenced to 18 years' incarceration by the Honorable Susan D. Wigenton in the District of New Jersey."

James Melendres, Snell & Wilmer LLP

"In Escobar, the Supreme Court recognized the validity of the implied-certification theory under the FCA. Nonetheless, the majority also made crystal clear that lower courts must limit the range of implied certification 'through strict enforcement of the act's materiality and scienter requirements.' As we approach the one-year anniversary of the Escobar decision, we can see that circuit courts, including the D.C. Circuit in the Halliburton case, the Seventh Circuit in the Sanford-Brown case and the Fifth Circuit in the BP Exploration case — all of which affirmed district courts' grants of summary judgment — have appropriately applied the Supreme Court's guidance to ensure that only material noncompliance with underlying statutes or regulations results in liability."

Enu Mainigi, Williams & Connolly LLP

"The Escobar case has clarified the contours of 'implied certification,' previously one of the most controversial and least understood areas of FCA jurisprudence. When Escobar was first decided, some viewed it as inconclusive or ambiguous. Courts since Escobar generally have drawn two key limiting principles from the Supreme Court's decision on the doctrine of implied certification: First, courts require a plaintiff to show an actual false statement or misleading 'half-truth' in connection with the claim, not merely a violation of law that relates in some way to the claim. Second, materiality is a 'demanding' standard that looks to whether the misstated information would have a tendency to affect the government's payment decision. Escobar also makes clear that courts can and should police the

limitations on implied certification claims at the pleading stage, which can have an enormous impact on the prospects for early resolution of complex litigation."

Ryan Spiegel, Paley Rothman

"Notwithstanding concern over heightened exposure for implied certifications, one key issue is how courts address the materiality element. In Escobar, the court noted that an omission must still be material in order to establish an FCA violation, even under the implied certification theory. So defendants can argue that even if they impliedly certified compliance with certain regulations when they did not in fact comply, an FCA claim nevertheless fails when the false certification or omission was not 'material.' The court rejected the 'extraordinarily expansive view' that the materiality element would be satisfied whenever the government could withhold payment due to some minor regulatory infraction, asking instead whether the government would withhold payment despite knowing of the noncompliance. Just recently, the Third Circuit in Petratos relied heavily on this 'heightened materiality standard,' dismissing a claim for lack of evidence that the government consistently refuses to pay in similar cases of noncompliance."

Brian J. Markovitz, Joseph Greenwald & Laake PA

"The narrowly construed, unanimous Escobar opinion of the Supreme Court upheld the implied certification theory under the FCA, but the opinion left a few unanswered questions in its path. By not exhausting the bases of implied certification liability, the language used by the court opened the door for interpretation by the lower courts. The year since its issuance has been full of lower court interpretation and clarification on what is meant by materiality to determine whether a violation of the FCA has occurred. The year ahead will likely include more gap fillers by the lower courts, which does not necessarily spell doomsday for either whistleblowers or contractors."

Laura McLane, McDermott Will & Emery LLP

"Despite the landmark decision in Escobar, battles over the scope of implied certification liability continue. For example, courts have diametrically opposing views on whether the first prong of the two-part test enunciated by the Supreme Court — that a plaintiff must allege that a contractor made specific representations about the goods or services provided and knowingly failed to disclose its noncompliance with a requirement that is material to payment — is mandatory. Some courts have held that the first prong is required, while others have held it is not. We can expect disputes like this to continue. As defense counsel in Escobar, I will add that defendants expect to prevail on remand on multiple grounds, including the materiality standard announced by the Supreme Court."

Jacqueline C. Wolff, Manatt Phelps & Phillips LLP

"The decision is important in that it may provide defendants in FCA cases brought by relators alleging a theory of implied certification another route to get the complaint dismissed at the motion to dismiss level. Post-Escobar, a defendant may be able to prevail in a motion to dismiss and avoid costly discovery where the relator is unable to allege that the violation of the regulation was material to the government agency paying the claim, i.e., that the government would not have paid for the claim had it known of the violation and that the defendant knew the government would not pay. Time will tell how this will play out practically, but various courts across circuits are beginning to dismiss FCA complaints on materiality grounds."

Michael E. Clark, Duane Morris LLP

"While the government has had several victories since the Escobar ruling, some courts have rejected its interpretation of materiality in favor of Escobar's stringent materiality test. A few circuit courts now have held against the plaintiffs post-Escobar on materiality. In U.S. ex rel. Hagerty v. Cyberonics, the First Circuit affirmed the dismissal of an FCA complaint since the plaintiff didn't sufficiently link alleged facts to false claims submitted to the government. The Fifth Circuit in Abbott v. BP Exploration & Production likewise affirmed the summary judgment dismissal of a FCA complaint after holding that plaintiffs didn't create a genuine dispute of material fact on materiality. The Seventh Circuit, on a post-Escobar remand, likewise affirmed the dismissal of a qui tam case in U.S. v. Sanford-Brown Ltd."

Richard L. Scheff, Montgomery McCracken Walker & Rhoads LLP

"In Escobar, the Supreme Court recognized the implied false certification theory of FCA liability but imposed a demanding materiality requirement. The Escobar materiality test focuses on the effect of the implied misrepresentation on the government's payment decision. Under this standard, materiality depends on whether the government would actually decline payment on the challenged claims had it known of the defendant's implied false certification of compliance with the requirement at issue. Federal courts are still defining the evidentiary standards for this determination, and there has been increased analysis of the government's response to the alleged fraud. We will likely see additional development in this area, given the continuing rise in FCA litigation and the post-Escobar focus on the government's payment decisions."

--Editing by Alyssa Miller.

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