Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Escobar Provides New Grounds For Seeking Gov't Discovery

By **Ethan Posner and Noam Kutler**

Ethan Posner

Noam Kutler

Law360, New York (August 11, 2017, 5:11 PM EDT) -- The U.S. Supreme Court's 2016 decision in Universal Health Services v. United States ex rel. Escobar,[1] should alter the way the government, defendants and courts approach discovery into the government's knowledge and deliberations in False Claims Act cases.

The Deliberative Process Privilege and Government Efforts to Restrict Discovery

Typically, when litigants seek discovery against the United States in FCA cases in which the government declined to intervene, the government tries to limit, if not avoid its discovery obligations. One way it tries to do this is through the imposition of the agencies' Touhy regulations — rules limiting discovery to situations where the agency head grants permission.[2] However, such regulations only apply when the government or agency is not part of the case.[3] In FCA cases, even those where the government declines to intervene, the government is still the real party in interest and the Touhy regulations should not apply.[4]

In addition to seeking the protection of agency Touhy regulations, the government also seeks to prevent disclosure of materials concerning its prior knowledge of the claims and allegations at issue, as well as its internal deliberations concerning those issues, under the "deliberative process" privilege. In some narrow circumstances, the deliberative process privilege can prevent disclosure of "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[5] As the Supreme Court explained, the privilege supposedly exists because the government needs to keep some deliberations private because otherwise officials will not communicate candidly amongst themselves.[6]

The deliberative process, however, is not an absolute privilege and courts must balance the government's interest in protecting its communications against the needs of the parties in the litigation. Before upholding the assertion of the privilege, courts are supposed to consider whether the production of the document at issue would be "injurious to the consultative functions of government"[7] and whether necessity outweighs the need to protect the document.[8]

Courts have taken different approaches to evaluating the government's qualified deliberative process

privilege. The application of those factors has often been inconsistent and courts give different factors different weight, often deferring to the government's assertion.[9] While the factors vary, once it is established that the deliberative process applies to the information, courts will likely consider such factors as (1) the interest of the litigants and society in accurate fact finding; (2) the relevance of the information sought; (3) availability of comparable information from other sources; (4) the seriousness of the issues involved; and (5) federal interest in the enforcement of federal law.[10]

U.S. ex rel. Williams v. Renal Care Group Inc.[11] underscores the potential harm that the assertion of the deliberative process privilege can cause defendants in FCA cases. In RCG, the relators alleged that Renal Care Group Supply Co., was "not a legitimate and independent durable medical equipment supply company, but a billing conduit used to unlawfully inflate Medicare reimbursements."[12] During discovery, the defendants sought information about whether Medicare knew about the allegedly improper relationship. The government, however, withheld evidence responsive to that issue solely on the grounds of the deliberative process privilege, which the district court and the Sixth Circuit Court of Appeals upheld.[13] Thus, the defendant was unable to obtain information about what the government knew prior to the allegations.

Escobar's Focus on Government Knowledge to Determine Materiality

The Supreme Court's Escobar decision, however, provides defendants with new grounds for overcoming the government's assertion of the deliberative process privilege in a FCA case. In Escobar, the Supreme Court held that "a misrepresentation about compliance with a ... requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act."[14] The court went on to explain that the materiality requirement is "demanding" and "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[15] It is not sufficient for purposes of materiality to say that the government would have had the option to decline to pay if it had known about the noncompliance.[16] Proof of lack of materiality can include evidence that "the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated."[17] Thus, permitting discovery into what the government knew about the alleged misrepresentations and whether it viewed those misrepresentations as material to its decisions is essential to the elements of a FCA case, on which the government bears the burden. If there was any doubt before about the weakness of the government's assertion of deliberative process privilege in FCA cases, the holding in Escobar should settle the question in favor of FCA defendants.

In United States ex rel. Kelly v. Serco Inc.,[18] the Ninth Circuit demonstrated why, under Escobar, discovery into the government's thinking and what factors it considers relevant to decisions to pay a claim is important in FCA cases. The allegations in Serco concerned a navy subcontractor and reporting guidelines that Serco allegedly violated when reporting costs related to its claims for payment.[19] The court affirmed the decision to grant Serco's motion for summary judgment because there was no evidence that the implied certification as to the reporting guidelines was material to the navy's decision to pay the claim.[20] Serco showed that the government accepted its reports despite their noncompliance with the reporting guidelines.[21] Because Serco established in discovery that the navy was aware of the noncompliance and decided to continue paying the claims, Serco was able to establish a lack of materiality and again, underscore the importance of investigating and establishing what the government knew when it made decisions. Serco and other decisions since Escobar demonstrate that discovery into the government's deliberative process is now essential to FCA cases.[22]

Discovery Into the Government's Deliberations and Decision to Continue Paying Claims is Now an Essential Part of a FCA Case

Prior to Escobar, some courts affirmed the government's ability to withhold evidence relevant to the determination of what the government agencies knew of the FCA allegations.[23] The Supreme Court's Escobar decision, however, establishes that evidence of what the government knew about the claims at issue is now essential to determining materiality.[24] Accordingly, discovery requests seeking historic practices of the relevant government agency, the claims at issue, and information about their deliberations and what the government knew when making its decisions are all highly relevant to determining liability.

Escobar also mandates discovery into the government's decision to investigate, intervene, and decline a qui tam complaint. For example, in U.S. ex rel. Nargol v. DePuy Orthopaedics Inc.,[25] the First Circuit affirmed the dismissal of certain U.S. Food and Drug Administration-related claims for lack of materiality because the relator disclosed all of his allegations to the FDA and it is "compelling [evidence] when an agency armed with robust investigatory powers ... sees no reason to change its position."[26]

Escobar and its progeny establish that such information is highly relevant and, in fact, essential to assessing the very viability of the case. Thus, the government should not be permitted to pursue a FCA case, or participate as the real party in interest in a declined qui tam, while at the same time preventing disclosure of information necessary to assess the viability of its allegations. Following Escobar, defendants such as those in the RCG case should be able to overcome the assertion of the deliberative process to determine the government's prior knowledge of the allegations to resolve questions of materiality.[27]

One of the key factors that courts consider when deciding whether to overcome the deliberative process privilege is the relevance of the information sought. Escobar establishes that information about (1) agency considerations when a government declines to intervene; (2) what the government knew when it continued approving claims after the complaint was filed; and (3) how it has considered other party's claims with similar facts now goes squarely to the essential elements of a FCA case. If the information is essential to the evaluation of a required element of the FCA then the government cannot withhold that very information under an assertion of the deliberative process privilege.

Ethan Posner is a partner and Noam Kutler is an associate in the Washington, D.C., office of Covington & Burling LLP.

[1] 136 S. Ct. 1989 (2016).

[2] 5 U.S.C. § 301 (authorizing agencies to adopt regulations regarding "the conduct of [their] employees . . . and the custody, use, and preservation of [agency] records").

[3] E.g., 42 C.F.R. § 2.1(d)(1) (stating that the Department of Health and Human Services' Touhy Regulations do not apply to any proceeding "where the United States, the Department of Health and Human Services, and any agency thereof, or any other Federal agency is a party.").

[4] See Yousuf v. Samantar, 451 F.3d 248, 257 (D.C. Cir. 2006) (holding that the Government is a

"person" under Federal Rule of Civil Procedure 45 and not exempt from complying with subpoenas); John T. Boese, Civil False Claims and Qui Tam Actions § 5.07(F) (4th Ed. 2010) (the use of Touhy regulations in a declined FCA case can "severely limit or deprive a defendant from obtaining timely and complete access to relevant evidence… ."); but see United States ex rel. Pogue v. Diabetes Treatment Ctr. of Amer., Inc., 246 F.R.D. 322, 324 n.1 (D.D.C. 2007) (holding that government Touhy regulations do apply in declined FCA cases).

[5] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

[6] Id. at 151; see also Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001).

[7] Kaiser Aluminum & Chem. Corp. v. United States, 141 Ct. Cl. 38 (Ct. Cl. 1958).

[8] Id., at 50

[9] See, e.g., A. Piacenti, The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice, 12 Rev. Litig. 275, 293 (1992) (surveying cases and noting that "subsequent courts have developed the balancing test, which varies from case to case in the number of factors considered, the relative weight assigned to particular factors, and even in whether the test is applied at all.").

[10] See, e.g., United States v. Irvin, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (internal citations omitted) (generally discussing the types of factors that courts considers when weighing whether the deliberative process privilege should be overcome).

[11] 696 F.3d 518 (6th Cir. 2012).

[12] Id. at 523 (internal quotations omitted).

[13] Id. at 524 and 527.

[14] Escobar, at 14.

[15] Id. (internal citations omitted).

[16] Id. at 15-16.

[17] Id. at 16.

[18] 846 F.3d 325 (9th Cir. Jan. 12, 2017).

[19] Id. at 328.

[20] Id. at 334.

[21] Id.

[22] See, e.g., United States ex rel Petratos v. Genentech, 855 F.3d 481, 489-90 (3d Cir. 2017) (affirming the dismissal because the relator disclosed the allegations to the FDA and DOJ when he submitted the

complaint, the government declined to intervene, and the FDA continued to approve additional indications of the drug even after being informed of the allegations.).

[23] RCG, 696 F.3d at 527; see also United States v. Wells Fargo at 5, No. 12 Civ 7527 (SDNY Oct. 22, 2015) ECF 302 (in another FCA case, denying defendants' motion to compel production of Government "internal documents" relating to the drafting and development of rules at issue in the allegations because they had "little bearing on this case…").

[24] Escobar, *16 (explaining that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, 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, that is strong evidence that the requirements are not material.").

[25] 2017 WL 3167622 (1st Cir. July 26, 2017).

[26] Id. at *3-4 (explaining that "it is not plausible" that the alleged conduct is material if the FDA and DOJ investigated the allegations and yet, never suspended or withdrew the product's approval).

[27] See also In re Pharm. Indus. Avg. Wholesale Price Litig., 254 F.R.D. 35 (D. Mass. 2008) (rejecting the Government's assertion of the deliberative process privilege in a FCA case because, even pre-Escobar, defendants have "the right during discovery to see documents reflecting the government's knowledge about spreads in order to mount the defense.").
