



Medicare and Medicaid False Claims Investigations Post *Escobar*

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Anatomy of a False Claim

False Claims laws are the Government's primary tool for combating fraud

Liability occurs where a defendant (i) knowingly presents (or causes to be presented) a false or fraudulent claim for payment; (ii) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (iii) conspires with others to commit a violation of the False Claims Act; (iv) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the Federal Government

31 U.S.C. §§3729-3733



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Potential Repercussions of a False Claim

- Civil - damages, penalties per claim, attorneys' fees, exclusion
- Criminal - Prison, fines, forfeiture, exclusion



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Qui Tam

- Relator or whistleblower on behalf of Government
- Only if the Government has yet to file FCA lawsuit
- Bounty and attorneys' fees
- Intervention by the Government
- Possible liability without Government intervention



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Escobar Case

- Relator argued that violation of regulations constitute false and fraudulent claims to Medicaid
- Claims did not *expressly* certify that the services were performed in compliance with state regulations
- The relator argued that the provider *implied* its regulatory compliance when it submitted the claims (i.e., "implied certification")
- Claim is fraudulent not because of an implicit (vs. actual) representation of regulatory compliance
- Government declined to intervene, district court granted the defendants' motion to dismiss because complaint relied on noncompliance with regulations, rather than conditions of *payment*

U.S. ex rel. Escobar v. Universal Health Servs., Inc., No. 11-CV-11170-DPW, 2014 WL 1271757, at *7 (D. Mass. Mar. 26, 2014).



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Escobar Case

- The US Court of Appeals for the First Circuit reversed, held that conditions of payment, need not be expressly designated
- The supervision regulations at issue did impose conditions of payment, and therefore were "dispositive evidence of materiality"
- Circuit Courts were split on the issue of implied certification

U.S. ex rel. Escobar v Universal Health Servs., Inc., 780 F.3d 504, 512 (1st Cir. 2015).



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Escobar Case

- The Supreme Court granted *certiorari* to answer whether the implied certification theory was a viable one, and if so, whether it could only apply where a provider violated a legal requirement that the Government had expressly designated as a condition of payment



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Escobar Case

- Court held that FCA should not be considered a vehicle for "punishing garden-variety breaches of contract or regulatory violations..."
- Court held that a misrepresentation about legal compliance does not become material simply because the Government expressly labeled the legal requirement as a "condition of payment, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision

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Significance of *Escobar*

- Implied certification theory may be a basis for FCA liability if allegations satisfy both FCA's materiality and scienter requirements
- The focus going forward will be whether the Government would have actually refused to pay the allegedly false claim if it had known of the information allegedly omitted or misrepresented



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Escobar Lessons

- False Claims Act is nuanced and complex
- Implied certification is a valid theory
- Materiality will be closely scrutinized and evaluated on fact specific, case-by-case basis
- React appropriately and promptly to FCA complaints or concerns



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Conducting the FCA Investigation

- Getting the investigation started
 - Preserving attorney-client privilege
 - Working with Government attorneys
- Avoiding major pitfalls during an internal investigation

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Starting the FCA Investigation

- Document the false claim allegation
- Communicate the allegation to leadership
- Engage legal counsel
- Notice to carrier
- Assign responsibility for the investigation
- Ensure the sphere of communication is limited
- Ensure accountability and follow-up

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Conducting the FCA Investigation

- Dig deep and uncover every stone
- Don't assume the Government's position is correct
- Advocate your position of facts and law
- Continue to keep the board informed
- Avoid whistleblower retaliation
- Be mindful of collateral effect on employees



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Planning the FCA Investigation

- Develop investigative plan and timeline
- Decide who must be interviewed
- Place certain employees on leave
- Maintain records of the investigation process, interview notes, and witness log
- Schedule and conduct interviews
- Remind those interviewed of confidentiality



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Conducting the FCA Investigation

- Attorney conducts investigation or deputizes staff to assist with investigation
- Litigation hold communicated throughout organization
- Document review begins
- Interviews conducted
- Auditors or experts engaged



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Maintaining the Privilege

- Protecting attorney-client privilege
- Interview witnesses separately
- Document production and create privilege log
- Limit number of individuals in the sphere of knowledge



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Working with the Government

- Be cooperative and responsive
- Production must be timely
- Understand the issue, the facts and the relevant law
- Don't be intimidated-push back
- Understand the settlement if there is one



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Mitigating the Risk of a FCA Qui Tam

- Be responsive to all issues raised
- Follow through on investigation
- Circle back to complainant
- Provide assurance that the matter is being appropriately addressed
- Involve counsel, experts and the Government as needed



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