


ESCOBAR
and the New Compliance Cartel

 JEFFREY D. JETER
Special Counsel
Jones Walker, LLP

FALSE CLAIMS ACT

(31 U.S.C. 3729)

Any person who:

**knowingly presents or causes
to be presented a false or
fraudulent claim for payment**

is liable to the United States ...



FALSE CLAIMS ACT

- Historical purpose
- Traditional interpretation
- *Qui tam* enforcement
- Big incentives
- Breadth breeds ambiguity



ESCOBAR & IMPLIED CERTIFICATION

"Implied Certification" means that when one submits a claim to the government, one is certifying compliance with all underlying laws, rules, regulations, and contract terms.



FCA POST-ESCOBAR



- \$3.7 Billion in total False Claims Act recoveries (all sectors) in 2017.
- 65% of all False Claims Act cases have targeted health care fraud.
- 491 *qui tam* actions filed in 2017.
- 53 non-*qui tam* cases filed in 2017.
- *Escobar* has reduced volume of FCA cases in the first year following the decision.
- However, *Escobar* has also introduced conflict among Federal circuits.



The Escobar Firestorm:

What is a
"MATERIAL"
requirement?



ALTITUDE CHANGES

- Per *Escobar*, a provision that is labeled as a "condition of payment" is relevant, but it is **not dispositive**.
- It is **insufficient** to merely show that the government would be entitled to refuse payment.
- Materiality is established by a showing that the **government consistently refuses to pay claims in the "mine run of cases"** based on non-compliance with the particular requirement at issue.
- *What does the government routinely do after having actual knowledge of the alleged violation?*

NOTES

- *Escobar on remand (1st Circuit) - Conditions of payment cannot just be ignored!*

- Escobar on remand (1st Circuit) - Conditions of payment cannot just be ignored!
- U.S. ex rel. McBride v. Halliburton (D.C. Cir.) - One "could not ignore what actually occurred" when the government investigated the allegations yet continued to pay.

termination was warranted, it presented clear evidence that the allegations were not material to the government.

- U.S. ex rel. Abbott v. BP Exploration (5th Cir.) - Investigations by Congress and the DOI concluded that allegations were "unfounded" and "without merit". Such findings "represent 'strong evidence' that the requirements in those regulations are not material" to the government.

'WEAKLY'

KEY PLEADING CONSIDERATIONS:

U.S. ex re. Dresser v. Qualium (California):

Based on Escobar, a False Claims Act complaint must allege not only the **materiality of the false representations**, but then it must also explain **why those misrepresentations are material**.

- Increased opportunity for **Motion to Dismiss** and **Motion for Summary Judgment**.



Escobar should be pushing us to investigate the government's **payment policies** as well as their **actual practices**.



Taking a Deep Dive!

DEPARTMENT OF JUSTICE

ESCOBAR

and the New Compliance Cartel

JEFFREY D. JETER
Special Counsel
Jones Walker, LLP