

## Escobar Proves Potent as Tool for Defendants

In taking stock a year-and-a-half after the U.S. Supreme Court's most recent seminal False Claims Act decision, *Universal Health Services v. United States ex rel. Escobar*, it is clear that *Escobar* didn't just reaffirm the FCA's materiality standard as "demanding" and "rigorous"—it has reinvigorated materiality as a potent defense tool that can defeat FCA suits before they get to trial.

In *Escobar*, the Supreme Court expressly rejected the idea that the government could make all statutory, regulatory and contractual requirements material simply by labeling them "conditions of payment" or by requiring contractors to "aver their compliance" with all relevant laws.

The court also held it was insufficient to find terms "material" if the government "knew of the defendant's noncompliance" and merely had the option to decline payment. What matters is what the government actually did or would have done. If the government pays a particular claim despite knowing certain requirements were violated, the court ruled, "that is very strong evidence that those requirements are not material." *Escobar* opened the door for defendants to obtain broad discovery not only of the government's payment practices with respect to the defendant, but also other similarly situated entities. FCA defendants should take full advantage of this opportunity.

### LOWER COURTS ALREADY APPLYING LESSONS LEARNED

Lower courts are already acting on *Escobar's* lessons. In 2017 alone, at least four appellate courts have ruled in a defendant's favor on the basis of materiality. In *United States ex rel. McBride v. Halliburton*, the U.S. Court of Appeals for the D.C. Circuit held that claims of inflated "head counts" were immaterial based in part on deposition testimony from U.S. Army witnesses that the inflated data had no bearing on costs billed to the government or fees paid.

In *United States ex rel. Petratos v. Genentech*, the Third Circuit found withheld pharmaceutical data to be immaterial because the U.S. Food and Drug Administration knew of the plaintiff's allegations but continued to approve the drug and added three more indications for it.

The Ninth Circuit in *United States ex rel. Kelly v. Serco* ruled that the defendant's allegedly improper cost reporting format was immaterial because the government had agreed to the format, accepted reports, and knowingly paid for the work.

The Fifth Circuit also issued a pair of materiality decisions last year. In *Abbott v. BP Exploration & Production*, the court held a false certification of compliance with regulations was immaterial because the government allowed the defendant's conduct to continue despite a "substantial investigation" into the plaintiff's allegations. And in *United States ex rel. Harman v. Trinity Industries*, the court reversed a \$663 million verdict against a highway guardrail maker in part because the relevant government agency looked into the allegations of fraud, issued an official memorandum rejecting the allegations, and continued to pay for the product.



**Adam P. Feinberg**

Member

[afeinberg@milchev.com](mailto:afeinberg@milchev.com)

202.626.6087



**Jonathan D. Kossak**

Counsel

[jkossak@milchev.com](mailto:jkossak@milchev.com)

202.626.6056

## WORKING ESCOBAR TO THE DEFENDANT'S ADVANTAGE

Importantly, *Escobar* does not limit the determination of materiality to the specific contract or contractor at issue. If the government "regularly pays a particular type of claim in full" despite knowing certain requirements were violated and it signals no change in its position, "that is strong evidence the requirements are not material."

*Escobar* also notes proof of materiality can include evidence the defendant knows the government consistently refuses to pay claims based on particular statutory, regulatory or contractual requirements.

Taken together, these statements show the government's treatment of other contractors in similar situations is relevant to materiality.

To be sure, this does not always help the defendant: In *Rose v. Stephens Institute*, a district court held last year that while the government's enforcement of a regulatory requirement was "uneven," its handling of 54 similar cases over 11 years weighed against the defendant.

In many cases, however, the government's behavior can work to the defendant's advantage. Suppose the U.S. Army contracted with multiple private firms to provide services in a military zone and one allegedly maintained inadequate records in violation of the Federal Acquisition Regulation, which governs federal purchases of goods and services.

Under *Escobar*, any materiality analysis should turn, at least in part, on whether other contractors kept similarly inadequate records—and whether they were paid despite the government's knowledge of those inadequate records. An FCA defendant should be able to discover that information even if it requires substantial effort from the government.

Disputes regarding the limits of relevancy under the materiality analysis are likely to be litigated heavily in the years to come. But one thing is clear so far: Discovery in FCA cases in *Escobar*'s aftermath is no longer a predominantly one-way street. The government's treatment of not only the defendant but other similarly situated entities is fair game.

---

*Adam P. Feinberg is a member and Jonathan D. Kossak is counsel at Miller & Chevalier in Washington, DC. Both are experienced False Claims Act litigators.*

*Reprinted with permission from the "February 1, 2018" edition of the "THE NATIONAL LAW JOURNAL" © 2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. ALMReprints.com – 877-257-3382 - reprints@alm.com*