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Attys Reflect On Escobar's FCA Impact 2 Years Later

Law360 (June 15, 2018, 5:26 PM EDT) -- It's been two years since the U.S. Supreme Court tossed a firecracker into the world of False Claims Act litigation with its decision in *Universal Health Services v. Escobar*, which explained how courts should gauge whether regulatory violations were "material" to government reimbursement.

Here, attorneys tell Law360 how the decision has played out and what lies ahead.



John G. Martin, Garfunkel Wild PC

"I think the biggest impact of Escobar is yet to be felt. Currently, courts and litigants are focused on the materiality standard that Escobar enunciated, but I think the issue of scienter will end up having a more significant impact. Escobar actually created a new scienter defense to an FCA action. Even when there was a materially false aspect to a claim, FCA plaintiffs now have to prove that the defendant knew about the falsity and also knew that the falsity was material to the government's payment decision. Once the FCA defense bar recognizes the significance of this requirement, I expect we will see more cases dismissed on the ground that the defendant had no way of knowing that any defect in the claim was material."



Shayne C. Stevenson, Hagens Berman Sobol Shapiro LLP

"In too many instances, courts have seized upon the 'actual knowledge' discussion in Escobar to ground dismissal of meritorious claims. That has been an undeserved gift to corporations that commit fraud. That the government 'regularly pays a particular type of claim' cannot by itself answer the question of whether the fraudulent activity was 'material' to payment. In that respect in particular, Escobar has caused great mischief. The government realizes the implications of such a sweeping approach to materiality and has, fortunately, begun to push back harder."



Hannah Bornstein, Nixon Peabody LLP

"Escobar has consequentially impacted False Claims Act litigation and, on balance, has helped defendants. We have witnessed a shift, where instead of focusing on abstract, theoretical and technical discussions as to whether a contractual or regulatory provision was a 'precondition of payment,' courts and parties are now focused on practical and realistic discussions as to whether the government continued to pay for claims despite knowing about the alleged misconduct. A key case to watch is Gilead Sciences Inc. v. Campie. Following the Ninth Circuit's rare decision finding that the plaintiff had satisfied Escobar at the motion to dismiss stage, the defendants filed a petition for a writ of certiorari, and the Supreme Court has requested the views of the U.S. solicitor general."

**Asher D. Funk, Polsinelli PC**

"Certain areas of common focus have emerged from courts attempting to apply Escobar, such as the government's continued payment decisions or its actions after becoming aware of alleged fraud. But courts in different circuits have reached disparate rulings even when applying comparable facts. I see similarities between the case law stemming from Escobar and Federal Rule of Civil Procedure 9(b) because of the fact-specific nature of the required analysis. Despite an arguable circuit split on the standard for Rule 9(b), the Supreme Court has repeatedly declined to weigh in and provide clarity. I believe it will exercise similar restraint when dealing with questions arising from Escobar."

**Douglas W. Baruch, Fried Frank Harris Shriver & Jacobson LLP**

"Even two years later, we're still only beginning to witness the evolution of FCA law following Escobar, but the early signs are promising, at least for FCA defendants. By and large, and albeit with a few notable exceptions, courts are agreeing with the defendants' position that Escobar imposes strict pleading requirements in terms of materiality and that the government's conduct is a relevant and fertile ground for discovery. And courts are weighing in on materiality earlier in the litigation, resulting in dismissal of cases that would have — pre-Escobar — been litigated to summary judgment and trial. There's plenty of reason to believe that Escobar is causing both relators and even the U.S. Department of Justice to think twice about bringing FCA cases based on minor noncompliance or without actually verifying how the affected agency views the alleged misconduct."



Matthew Turetzky, Sheppard Mullin Richter & Hampton LLP

"Escobar certainly opened the door to novel theories of FCA liability, but it and the bulk of its progeny have cemented what the defense bar has been saying for years — that alleged violations must matter to the government's decision to pay. Whether a violation is material depends on the knowledge and actions of the government agents responsible for reimbursing and providing funds in connection with federal programs. The trend is clear — under Escobar, racy allegations of fraud catching a relator's attention are of no moment where the facts involved were known and ignored by government agents responsible for paying claims."



Preston Pugh, Miller & Chevalier Chtd.

"Escobar was intended to provide clarity, but as we have learned, clarity is more of an evolving state of improvement than a finite destination. The defense bar hoped Escobar would streamline litigation, yet some courts have found that what the government knew, and when, are often factual questions that cannot be easily resolved on a motion to dismiss. While government knowledge of contractor noncompliance is certainly significant, some courts have found that general knowledge isn't the same as 'concrete awareness' and have thus found the issue inconclusive. For that matter, the dividing line between what courts consider 'harmless omissions of fact' vs. 'misleading half-truths' is not always clear. There is undoubtedly more work to be done."

**Jane Yoon, Paul Hastings LLP**

"While 2017 yielded no FCA decisions from the Supreme Court, the court in 2018 may revisit Escobar to address the circumstances under which the government's inaction or continued payments — despite its knowledge of a defendant's noncompliance — can defeat materiality claims. Multiple circuits have ruled in favor of defendants, pointing to government agency inaction — e.g., declining to impose sanctions for the violations — or the DOJ's nonintervention as evidence of immateriality. With a Ninth Circuit decision favoring relators now pending certiorari — and the Supreme Court having invited the U.S. solicitor general to file a brief — all parties to FCA cases may finally receive guidance on whether and when government inaction or continued payment of claims can demonstrate immateriality."

**William B. Eck, Seyfarth Shaw LLP**

"Escobar characterized the materiality standard as 'demanding' and 'rigorous.' Courts have largely taken this guidance to heart, showing a willingness to dismiss cases before trial when FCA allegations fall short of the standard. This is true even where the regulatory requirement is a condition of payment, as Escobar expressly permits. Relatedly, courts have dismissed cases where the government knew of the noncompliance and paid the claims. Although not without exception, Escobar has been a positive development for FCA defendants."

**Thomas Hill, Pillsbury Winthrop Shaw Pittman LLP**

"Although Escobar has not slowed the proliferation of qui tam suits, we're certainly beginning to see more cases resolved favorably before trial, particularly at summary judgment. Escobar opened the discovery door much further, enabling defendants to seek discovery on the materiality issue, including how government agencies make payment decisions. One area that is yet to be tested is the significance of Escobar in the reverse false claims context, where the same materiality principle should bar frivolous suits based on alleged regulatory violations. We are currently litigating one of these cases where the agency's enforcement practices and policies may well be a dispositive issue with regard to the viability of a reverse false claim, alleging a defendant's failure to pay monies under an agency's regulatory scheme."

**Brian T. McGovern, Cadwalader Wickersham & Taft LLP**

"It is noteworthy that, just days before the second anniversary of Escobar, the Sixth Circuit, in *Prather v. Brookdale Senior Living*, issued a decision that arguably heralds a more relaxed standard for pleading materiality than some of the earlier post-Escobar decisions. The Sixth Circuit held that allegations of materiality were sufficient to let the case go forward. The relator asserted that a home care agency submitted false claims because physicians had not signed the requisite certifications of medical necessity within regulatory time limits. To meet the materiality threshold, the relator simply alleged that the federal government was unaware of the untimely certifications and would not have paid the claims if it were. However, as the dissent pointed out and courts have cited in other contexts, the relator did not allege any particular past instance when Medicare had denied a claim based on an untimely certification. So while Escobar was certainly a watershed ruling in FCA jurisprudence, it is clearly not the final word on what constitutes a 'material' misrepresentation."



Robert Salcido, Akin Gump Strauss Hauer & Feld LLP

"The impact of Escobar is best measured in dollars — billions of dollars. The Supreme Court's rationale in Escobar resulted in decisions in Harman v. Trinity Industries and Ruckh v. Salus Rehabilitation where courts collectively reversed more than \$1 billion in FCA judgments and entered judgments, in full, for defendants. Moreover, the future impact will result in companies saving several billion dollars because, under the court's rationale in Escobar, the FCA will no longer serve as merely an indirect business tax on companies that do business with the government — or, as the Supreme Court put it, serve merely as a 'vehicle for punishing garden variety breaches of contract or regulatory violations' — but will instead only appropriately apply in the narrow circumstance when an alleged misrepresentation actually impacts federal payment."



Anne Robinson, Latham & Watkins LLP

"Courts continue to struggle with the proper scope of implied certification — specifically whether Escobar requires a 'specific representation' about the item provided. The circuit split is virtually even: courts in the Second, Fourth and D.C. circuits have held that specific representations are not necessary to plead a claim; courts in the Third, Seventh, Ninth and Eleventh circuits have held they are. This deep divide means that, just as was true pre-Escobar, the viability of an implied certification FCA suit depends on where it is filed."



Geoffrey R. Kaiser, Rivkin Radler LLP

"While there is general agreement that Escobar intended a holistic approach in deciding materiality, interesting issues have arisen regarding what types of evidence are relevant in making this determination. For instance, is the government's decision to decline an FCA case evidence that an alleged violation is not material to the government's payment decision? Some courts seem to think so (see, e.g., *Petratos v. Genentech Inc.*, Third Circuit). Others hold that the government's intervention decision is not relevant to materiality and that any such consideration undermines the purpose of the FCA (see, e.g., *Prather v. Brookdale Senior Living Communities Inc.*, Sixth Circuit). The Sixth Circuit's position is consistent with pre-Escobar cases holding that declination of an FCA case should not be interpreted as evidence of government disinterest or lack of merit."



David J. Chizewer, Goldberg Kohn

"Several post-Escobar decisions have placed particular emphasis on the Supreme Court's statement 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.' The Supreme Court evaluated Escobar's case at the pleadings stage, before any evidence had been presented. Thus, Escobar's pronouncement of what might, hypothetically, constitute 'strong evidence' is the most dangerous kind of dicta. The Supreme Court has attempted to dictate to all future trial courts the relative weight to assign theoretical evidence in the abstract, devoid of any context. Such is a job flung far from the role of a reviewing court."

**Larry Prosen, Kilpatrick Townsend & Stockton LLP**

"The Escobar decision continues to be interpreted and applied by the lower courts, creating a deeper breadth of case law. That being said, the fact that we now have a delineation of what the courts are to look at, and how they interpret it, is a positive. Most of the courts appear to be holding the government to a high standard and interpretation of Escobar, and it appears that a finding of guilt under the case is the exception rather than the rule. A review of government briefings indicates the frustration that government attorneys are feeling in this application of Escobar."

**Paul Chan, Bird Marella PC**

"In terms of stating an implied certification claim, federal circuits remain split as to whether the Escobar's two-part test — specific factual representations, coupled with noncompliance that makes those representations half-truths — is the exclusive means of stating a claim, or if courts can take a more holistic approach in evaluating these lawsuits. In practice, Escobar's biggest effect has been to raise the bar with respect to proof of materiality. Because the Supreme Court held that continued payment by the government is 'strong evidence' of immateriality, the government's own conduct is now a real focal point of discovery. This has both made it more burdensome for plaintiffs to litigate materiality and given defendants a potential out at the pleading and summary judgment stages. The Ninth Circuit's recent interpretation of the post-Escobar materiality standard in *Campie v. Gilead Sciences Inc.* is currently under consideration for review, so the Supreme Court may be revisiting the issue soon."

**Jesse Witten, Drinker Biddle & Reath LLP**

"Escobar has been a very powerful case for defendants. In two cases decided in the past 10 months — Harman v. Trinity Industries and Ruckh v. Salus Rehabilitation — the courts overturned a total of \$1 billion in jury verdicts as a result of Escobar. Escobar has also been very powerful at the summary judgment stage. Courts now require relators to introduce evidence that the defendant's alleged regulatory violation or false statements actually was material to the government's payment decision. Relators who lack such evidence will lose at summary judgment. An issue that remains to be ironed out is what a complaint must allege to survive a motion to dismiss alleging lack of materiality under Escobar."

**Kenneth Yeadon, Hinshaw & Culbertson LLP**

"One of the benefits of Escobar for defendants is the emphasis, yet again, that the FCA requires a false claim. Plaintiffs will not satisfy the requirement of a 'false claim' by arguing that a claim that is not false on its face is nonetheless still false because the claim misrepresents whether the defendant was legally entitled to a Medicare payment. Escobar stops short, as an Illinois federal judge in Lisitza v. Par Pharmaceutical Cos. found, of permitting plaintiffs to claim that a defendant's legal violation at the time of the submission of the claim is a false claim. Mere compliance problems do not amount to false claims."

**Justin Chiarodo, Blank Rome LLP**

"Escobar's 'rigorous' and 'demanding' materiality standard continues to see an inconsistent application in the lower courts. One issue is the extent to which materiality inquiries are suitable for resolution on the pleadings, which is critical for defendants seeking to avoid the tremendous costs of discovery in FCA cases. So I'm particularly interested in whether the Supreme Court hears the pending petition in Gilead Sciences Inc. v. Campie. Breaking with other circuits, the Ninth Circuit's decision resurrected an FCA case where the government continued to make payments despite knowledge of alleged misrepresentations. The Supreme Court's request for the views of the U.S. solicitor general signals this may be the opportunity for clarification of this crucial gatekeeping standard."

**Michael Koon, Norton Rose Fulbright**

"Two years out, it's interesting to look back at what the FCA bar was talking about when the case was pending and the immediate reaction when it came down. At issue, of course, was the viability of the implied certification theory. The Supreme Court's decision to recognize the theory was a disappointment to many defense lawyers, particularly as it was not clear then how robust the enhanced materiality standard would prove. Almost immediately, however, the bench and bar seized on it and began applying it in a number of pending cases with some pretty remarkable results. Since then, the materiality issue has become a touchstone for defending clients. It turns out the decision was a significant one in FCA jurisprudence — on an unanticipated point."

**Andrew Hoffman, DLA Piper**

"At first blush, Escobar seemed to be a pro-plaintiff development, endorsing the implied certification theory of FCA liability. Two years later, Escobar seems to have been a Trojan horse — now defendants routinely rely on Escobar to argue that qui tam allegations fail to satisfy the FCA's 'rigorous' materiality and scienter requirements. These defense arguments, which often focus on the government's continued payment of claims after learning about an alleged fraud, have gained significant traction in the lower courts. Indeed, most circuits that recently considered the issue have rejected qui tam complaints where the government was aware of the allegations, investigated them, but continued to pay anyway. The Ninth Circuit's Campie decision is an outlier, and it is subject to a pending cert petition."

**Victor Walton, Vorys Sater Seymour and Pease LLP**

"Defendants have long argued that the FCA's draconian remedies should be invoked only where a defendant intends something deceptive in order to get or retain government money. Relators and the government have tried to stretch the statute to cover mistakes and negligence and ordinary breaches of contract. Escobar made it clear that the FCA is a fraud statute. Its materiality standard has given government agency employees enormous power over a relator's case, and has made getting discovery from the government imperative even in nonintervened cases. I expect courts to continue to struggle with the question of whether the government's continued payment of claims after a case is filed conclusively establishes the alleged fraud was immaterial, or is just evidence of immateriality."

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