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GOVERNMENT CHALLENGES "MATERIALITY" STANDARD OF ESCOBAR

Ever since the Supreme Court's June 16, 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, a False Claims Act ("FCA") case upholding the theory of implied certification, significant discussion has commenced regarding the Court's "new" FCA materiality standard. How the appellate courts define materiality under the FCA, post-*Escobar*, will have a significant impact on the future of FCA litigation. Recently, the United States government (the "Government") argued for an expansive definition of materiality through the filing of an amicus brief in the Eleventh Circuit.

BACKGROUND: *ESCOBAR*

In *Escobar*, as explained in a previous post, the Court placed the focus of an implied certification analysis on whether compliance with the requirement that was violated was "material to the Government's payment decision....".[1] With regard to the FCA's materiality requirement, the Court stated that "[t]he materiality standard is demanding," that "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation" and that a "misrepresentation is material only if it would likely induce a reasonable person to manifest his assent."[2]

THE GOVERNMENT'S TAKE

In an amicus brief submitted in *U.S. ex. rel. Marsteller v. Tilton*[3], the Government argued that the term "material" is already defined under the FCA as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property" (31 U.S.C. § 3729(b)(4)) and that the *Escobar* decision did nothing to change this definition. The Government stated that:

> Although the Court in *Escobar* described the materiality requirement as "demanding," and clarified that a violation is not material because the government has the legal right to refuse payment because of that violation, no matter how insubstantial, nothing in Escobar actually imposed a heightened test beyond the "natural tendency" test codified in the False Claims Act, entrenched in the common law, and applied in numerous courts of appeals.... [4]

Regarding the "natural tendency" test, the Government argued that a court should take a "holistic" approach, focusing on the "tendency or capacity of the undisclosed violation to affect the government decision maker."[5] The Government stressed that "there is no requirement that the misrepresentation be likely to affect the ultimate decision itself." Id. In fact, in the Government's view, "a FCA plaintiff need not demonstrate that the government would in fact have refused payment, nor need a plaintiff even show that refusal was likely to result."[6] Moreover, under the Government's approach, the factors enunciated in *Escobar* are neither exhaustive nor individually dispositive and should only be evaluated as part of the overall materiality assessment to determine whether the violation had a natural tendency to influence the decision to pay a claim. The Government also stated its belief that under this approach, a determination on materiality will "likely...be a determination for a jury."[7]

DISCUSSION

The Government's amicus brief does not seek clarification of *Escobar*. Rather, it asks the Court of Appeals to reject the clear pronouncement in Escobar and instead adopt its preferred definition. The court already rejected the Government's proposed interpretation, stating:

> We need not decide whether §3729(a)(1)(A)'s materiality requirement is governed by §3729(b)(4) or derived directly from the common law. Under any understanding of the concept, materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[8]

The Government's new amicus brief appears to be a request that the Eleventh Circuit Court of Appeals disregard the clear language of *Escobar* in favor of its preferred interpretation of the statute. At a minimum, it seems, the Government is hoping for a ruling that materiality is always a jury question with full knowledge that most FCA cases end in settlement if they cannot be successfully challenged by a motion to dismiss or a motion for summary judgment.

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PRACTICAL TAKEAWAYS

- The Government is arguing for a materiality requirement that is significantly less demanding than outlined by the Supreme Court, which would significantly increase the scope of potential FCA liability.
- The Government's view of materiality being a determination for a jury would have a large implication for the future progress of FCA litigation as, if adopted, it would be difficult to challenge materiality by a motion to dismiss (although the sufficiency of a pleading under Federal Rule of Civil Procedure 9(b) could still be challenged) or even by a motion for summary judgment.
- As the appellate and district courts interpret *Escobar*, it is even more vital that a provider facing potential FCA liability be represented by experienced counsel who will advocate for a straightforward interpretation of *Escobar* and the FCA's materiality requirement.

If you have any questions, please contact:

- Benjamin A. Waters at bwaters@hallrender.com or (484) 532-5672;
- David B. Honig at dhonig@hallrender.com or (317) 977-1447;
- Amy O. Garrigues at agarrigues@hallrender.com or (919) 447-4962;
- Jon S. Zucker at jzucker@hallrender.com or (919) 447-4964; or
- Your regular Hall Render attorney.

[1] No. 15-7, 2016 WL 3317565 (June 16, 2016)

[2] Id.

[3] 2016 WL 4492976 (11th Cir. August 1, 2016)

4 Id.

5 Id.

6 Id.

7 Id.

8 *Escobar*, p. 14

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