

CRITICAL CONSIDERATIONS OF IMPLIED CERTIFICATION UNDER THE FCA

In a recent case out of Kansas, the Tenth Circuit reiterated the importance of the FCA's materiality and scienter requirements that the Supreme Court set forth in *Escobar*:

1. FCA claims must satisfy materiality and knowledge requirements—both of which are rigorous and strictly enforced.
2. A whistleblower must prove knowledge in an implied certification case—it cannot be presumed.

In *U.S. ex rel. Coffman v. The City of Leavenworth, KS*, a whistleblower alleged that Leavenworth fraudulently billed federal agencies for wastewater services by falsely implying compliance with environmental laws. The district court granted the city's summary judgment motion, holding that the whistleblower failed to demonstrate that the allegedly false certifications were material to the government's payment of monthly invoices for wastewater treatment services or that the city knowingly submitted false claims.

The Tenth Circuit affirmed, amplifying the continued trend that courts will hold relators responsible for proving both materiality and knowledge in FCA actions. The Tenth Circuit echoed *Escobar*, holding that the whistleblower needed to prove that the city knowingly presented a false claim to the government for payment or approval. The Tenth Circuit noted that while the whistleblower argued that she showed the city flouted environmental laws, evidence of a violation wasn't enough. Instead, she needed to prove—and could not prove—that the city *knew* it was violating those laws. This was true, at least in part, because the city introduced un rebutted evidence that the Kansas Department of Health and Environment was aware of the whistleblower's allegations but did not consider them material.

Whistleblowers cannot rely on technical violations to skate past the FCA's materiality and knowledge requirements. They must show that a defendant knowingly presented a false claim for payment and that claims were material to the government's decision to pay.

The Tenth Circuit's opinion joins a growing body of caselaw across the country applying *Escobar* to whistleblower allegations that continue to reinforce the demanding knowledge and materiality standards under the FCA.

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