The False Claims Act Post-*Escobar*

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The False Claims Act

Civil Liability (31 USC 3729)

- Knowingly Presenting a False Claim
- Knowingly Making a False Statement
- Reverse False Claims
- Conspiracy

Criminal Liability (18 USC 287)

Anti-retaliation provisions (31 USC 3730)

Origins of the False Claims Act

Civil War Era Statute (1863)

- Unscrupulous Contractors
- Faulty Rifles, Rotted Ship Hulls, Rancid Rations
- Decrepit Horses and Bad Mules
- No Redress Under Existing Federal Law
- “Lincoln’s Law”

The False Claims Act's "Qui Tam" Provisions

Qui tam pro domino rege quam pro se ipso in hac parte sequitur

= "who brings this lawsuit for the King as well as for himself"

- Private citizens may file on behalf of the United States
- The government may intervene, decline or dismiss
- The "Relator's Share"
  - 15% to 25% of proceeds if the government intervenes
  - 25% to 30% if the government declines

High Stakes = Big Incentives

- Treble Damages
- Civil Penalties ($10,781 to $21,562 per claim)
- Statutory Attorney's Fees and Costs
- Lengthy Cases, Expensive Discovery

Top 100 Recoveries = $100 million to $2 billion

Median Relator Recovery > $100,000

Expansion in FCA Litigation

- $86 Million (FY1987) to $6.1 Billion (FY2014)
- Most Cases Now Filed by Relators
  - FY1987: 373 new FCA matters (30 by relators)
  - FY2016: 845 new FCA matters (702 by relators)
- Shift from Defense to Healthcare
  - Healthcare: 15 cases in 1987; 570 in 2016
  - Defense: 257 cases in 1987; 39 in 2016
  - Other industries: Financial Services, Education, Telecommunications, Technology

Expansion in FCA Litigation

- Evolving Theories of Liability
  - Express False Statements
  - Reverse False Claims
  - Fraudulent Inducement
  - "Implied False Certification"

The "Implied False Certification" Theory

- "Fraud by Omission"
- Emphasis on Legal Falsity
  - Alleged failures to disclose breaches of statutory, regulatory or contract provisions
- Questions of Materiality and Scope
  - Environmental and OSHA Violations by Munitions providers?
  - Use of Foreign Staplers by Medicare providers?
  - Does a Breach of Contract = Fraud?
- Circuit Split as to Viability and Limits

Universal Health Services, Inc. v. US ex rel. Escobar

- Allegations
  - Counseling services by Massachusetts clinic
  - Unlicensed practitioners
  - Lack of supervision
  - Medicaid claims
  - Implied false certification that clinic was in compliance with Medicaid regulations when it submitted claims

Universal Health Services, Inc. v. US ex rel. Escobar

- District Court: dismissed the complaint
  - The provisions at issue were not material because they were not "express conditions of payment"
- First Circuit: reversed in part
  - Materiality is satisfied so long as the government "would be entitled to refuse payment" if it knew of the alleged violation
- Supreme Court: grants certiorari

Universal Health Services, Inc. v. US ex rel. Escobar

- Issues Presented
  - Is the "implied certification" theory viable?
  - If so, must the statute, regulation, or contractual provision at issue expressly state that it is a condition of payment?

- Oral Argument

Universal Health Services, Inc. v. US ex rel. Escobar

- Unanimous (8-0) Opinion by Justice Thomas
- Implied False Certification: *OK in Some Circumstances*
  - "At least where two conditions are satisfied":
    - *"First, the claim does not merely request payment, but also makes specific representations about the goods or services"*
    - *"Second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."*
  - Key fact: submission of billing codes

Universal Health Services, Inc. v. US ex rel. Escobar

- No "Express Condition of Payment" Requirement
- "Rigorous" and "Demanding" Materiality Standard
  - *The alleged misrepresentation must be "material to the Government's payment decision"*
  - *The FCA is not an "all-purpose antifraud statute" or a vehicle to punish "garden-variety breaches of contract or regulatory violations"*
  - ***"We reject [the] assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment."***

Universal Health Services, Inc. v. US ex rel. Escobar

- Examples of Materiality Evidence
  - *The fact that the provision is labeled as a condition of payment is relevant, but not dispositive*
  - *It is not enough to show that the government would be entitled to refuse payment*
  - *Materiality can be established by knowledge that the government consistently refuses to pay claims in the "mine run of cases" based on noncompliance with the requirement at issue*
  - *Key Question: what did the government do after having actual knowledge of the alleged violations?*

Universal Health Services, Inc. v. US ex rel. Escobar

- Government Knowledge Can Rebut Materiality
  - *"[I]f 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."*
  - *"Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."*

Recent Appellate Cases: Observations

- Since *Escobar*, Several Courts of Appeals Have Affirmed Dismissals at MTD and MSJ Stages
  - **D'Agostino* (1st Cir.): FDA fraud, medical device (MTD)
  - *Whatley* (3d Cir.): Title IV, Higher Education Act (MTD)
  - **Petratos* (3d Cir.): FDA fraud, Medicare claims (MTD)
  - **Abbott* (5th Cir.): offshore mineral rights lease (MSJ)
  - *Harper* (6th Cir.): sublease/reversion clause (MTD)
  - **Sanford-Brown* (7th Cir.): Title IV, Higher Education Act (MSJ)
  - **Kelly* (9th Cir.): FAR cost tracking system (MTD)
  - **McBride* (DC Cir.): DCAA audit, headcount reporting (MSJ)

Recent Appellate Cases: Observations

- Courts have affirmed on multiple grounds
  - Absence of specific representations
  - Failure to satisfy statutory knowledge requirement
  - Failure to plead falsity
  - Lack of particularity; Rule 9(b)
  - Materiality
- A few decisions have affirmed only on materiality
  - *McBride* (DC Cir.)
  - *Petratos* (3d Cir.)
  - *Abbott* (5th Cir.)

Recent Appellate Decisions: Observations

- *Courts are looking to what the government did…*
  - *McBride* (DC Cir.): *"courts need not opine in the abstract when the record offers insight into the government's actual payment decisions"*
  - *D'Agostino* (1st Cir.): *government's failure to take action cast "serious doubt" on materiality*
  - *Sanford-Brown* (7th Cir.): *government agencies "have already examined SBC multiple times over and concluded that neither administrative penalties nor termination was warranted"*
  - *Abbott* (5th Cir.): *decision to allow drilling after "substantial investigation" was "strong evidence" of immateriality*

Recent Appellate Decisions: Observations

- *…but not always finding it to be dispositive.*
  - *Escobar* (1st Cir., on remand): *mere awareness is not actual knowledge*
  - *Campie* (9th Cir.): *"to read too much into the FDA's continued approval—and its effect on the government's payment decision—would be a mistake"*

Questions After *Escobar*

- What does materiality mean after *Escobar*?
- Scope of the "specific representations" requirement?
- When should materiality be measured?
- Knowledge of allegations or actual noncompliance?
- What "government conduct/knowledge" evidence should be considered?
- How receptive will courts be to decide materiality on a dispositive motion?

Practice Thoughts

- Compliance considerations
- Pleading considerations
- Dispositive motions
- Discovery considerations

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