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Medicare and Medicaid False Claims Investigations Post *Escobar*

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Anatomy of a False Claim

False Claims laws are the Government's primary tool for combating fraud

Liability occurs where a defendant (i) knowingly presents (or causes to be presented) a false or fraudulent claim for payment; (ii) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (iii) conspires with others to commit a violation of the False Claims Act; (iv) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the Federal Government

31 U.S.C. §§3729-3733

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Potential Repercussions of a False Claim

- Civil - damages, penalties per claim, attorneys' fees, exclusion
- Criminal - Prison, fines, forfeiture, exclusion




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Qui Tam

- Relator or whistleblower on behalf of Government
- Only if the Government has yet to file FCA lawsuit
- Bounty and attorneys' fees
- Intervention by the Government
- Possible liability without Government intervention



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Escobar Case

- Relator argued that violation of regulations constitute false and fraudulent claims to Medicaid
- Claims did not *expressly* certify that the services were performed in compliance with state regulations
- The relator argued that the provider *implied* its regulatory compliance when it submitted the claims (i.e., "implied certification")
- Claim is fraudulent not because of an implicit (vs. actual) representation of regulatory compliance
- Government declined to intervene, district court granted the defendants' motion to dismiss because complaint relied on noncompliance with regulations, rather than conditions of *payment*

U.S. ex rel. Escobar v. Universal Health Servs., Inc., No. 11-CV-1170-DPW, 2014 WL 1271757, at *7 (D. Mass. Mar. 26, 2014).

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Escobar Case


- The US Court of Appeals for the First Circuit reversed, held that conditions of payment, need not be expressly designated
- The supervision regulations at issue did impose conditions of payment, and therefore were "dispositive evidence of materiality"
- Circuit Courts were split on the issue of implied certification

U.S. ex rel. Escobar v Universal Health Servs., Inc., 780 F.3d 504, 512 (1st Cir. 2015).

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Escobar Case

- The Supreme Court granted *certiorari* to answer whether the implied certification theory was a viable one, and if so, whether it could only apply where a provider violated a legal requirement that the Government had expressly designated as a condition of payment



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Escobar Case

- Court held that FCA should not be considered a vehicle for "punishing garden-variety breaches of contract or regulatory violations..."
- Court held that a misrepresentation about legal compliance does not become material simply because the Government expressly labeled the legal requirement as a "condition of payment, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision

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Significance of Escobar

- Implied certification theory may be a basis for FCA liability if allegations satisfy both FCA's materiality and scienter requirements
- The focus going forward will be whether the Government would have actually refused to pay the allegedly false claim if it had known of the information allegedly omitted or misrepresented

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Escobar Lessons

- False Claims Act is nuanced and complex
- Implied certification is a valid theory
- Materiality will be closely scrutinized and evaluated on fact specific, case-by-case basis
- React appropriately and promptly to FCA complaints or concerns

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Conducting the FCA Investigation

- Getting the investigation started
 - Preserving attorney-client privilege
 - Working with Government attorneys
- Avoiding major pitfalls during an internal investigation

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Starting the FCA Investigation

- Document the false claim allegation
- Communicate the allegation to leadership
- Engage legal counsel
- Notice to carrier
- Assign responsibility for the investigation
- Ensure the sphere of communication is limited
- Ensure accountability and follow-up

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Conducting the FCA Investigation

- Dig deep and uncover every stone
- Don't assume the Government's position is correct
- Advocate your position of facts and law
- Continue to keep the board informed
- Avoid whistleblower retaliation
- Be mindful of collateral effect on employees

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Planning the FCA Investigation

- Develop investigative plan and timeline
- Decide who must be interviewed
- Place certain employees on leave
- Maintain records of the investigation process, interview notes, and witness log
- Schedule and conduct interviews
- Remind those interviewed of confidentiality

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Conducting the FCA Investigation

- Attorney conducts investigation or deputizes staff to assist with investigation
- Litigation hold communicated throughout organization
- Document review begins
- Interviews conducted
- Auditors or experts engaged

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Maintaining the Privilege

- Protecting attorney-client privilege
- Interview witnesses separately
- Document production and create privilege log
- Limit number of individuals in the sphere of knowledge

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Working with the Government


- Be cooperative and responsive
- Production must be timely
- Understand the issue, the facts and the relevant law
- Don't be intimidated-push back
- Understand the settlement if there is one

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Mitigating the Risk of a FCA Qui Tam

- Be responsive to all issues raised
- Follow through on investigation
- Circle back to complainant
- Provide assurance that the matter is being appropriately addressed
- Involve counsel, experts and the Government as needed



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Joan W. Feldman is Chair of the Health Law Practice Group. She has devoted her legal career to representing health care providers in connection with health care, business, regulatory and administrative law matters. Joan is a frequent speaker, educator and prolific writer on a variety of subjects of interest to health care providers, including compliance, medical ethics, regulatory and reimbursement matters and health care reform, including accountable care organizations, medical homes and other innovative strategies focused on cost containment and quality improvement.

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