AN UPDATE ON FALSE CLAIMS ACT LITIGATION: CIRCUIT SPLITS AND OTHER DEVELOPMENTS IN 2018

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Consistent with recent trends, 2018 saw significant activity in False Claims Act ("FCA") litigation. While the government has made efforts to formalize its approach to FCA dismissals, the lower courts have continued to grapple with key questions under the FCA, including those left unanswered by the Supreme Court's 2016 *Escobar* decision. Circuit splits have deepened or reemerged, and a number of issues are now positioned for imminent Supreme Court review. This alert summarizes key developments over the past year, as well as arguments moving toward the high court with respect to the government's dismissal power, materiality, falsity, and the statute of limitations under the FCA.

BACKGROUND

FCA liability arises when any person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the federal government. [1] The FCA provides a direct cause of action by the government and a *qui tam* cause of action for private parties (known as relators) to bring suit on the government's behalf. When a relator files a *qui tam* action, the government has the option to intervene or to allow the relator to proceed alone. The government can also ask the court to dismiss the suit. In the event a *qui tam* lawsuit is successful, the relator stands to receive a substantial recovery, between 15 to 30% of the triple damages allowed by the FCA.

In 2016, the Supreme Court resolved a heavily litigated question regarding expanded application of the FCA. *Universal Health Services, Inc. v. United States ex rel. Escobar* holds that "implied false certification"—*i.e.*, violation of a statutory, regulatory, or contractual requirement with which the entity impliedly certified compliance by submitting a claim for payment—can support FCA liability, subject to important caveats. [2]

The Supreme Court held that the misrepresentation about compliance "must be *material* to the Government's payment decision," meaning that the government would have refused payment had it known about the misrepresentation. [3] Emphasizing the "demanding" nature of this standard, the Supreme Court identified factors that may be relevant to materiality, such as evidence that "the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated." [4] Further, the Supreme Court

confirmed that an omission about a failure to comply with a requirement can constitute a “false or fraudulent” claim under the implied certification theory where the omission “render[s] the defendant's representations misleading with respect to the goods or services provided.” [5]

2018 FCA DEVELOPMENTS

The qualifications delineated in *Escobar* have spawned a host of conflicting rulings in the circuit courts. At the same time, both the Department of Justice (“DOJ”) and the courts have evaluated the latitude of the government's dismissal power under the FCA, and a three-way split of authority has developed with respect to interpretation of the FCA's statute of limitations. As discussed below, these issues came to a head this past year.

A. Government Dismissal of *Qui Tam* Cases

The Granston Memo. In January 2018, Michael Granston, the Director of the Corporate Litigation Branch within the Civil Fraud Section at the DOJ, memorialized for the first time a framework guiding the government's exercise of its authority under the FCA to seek dismissal of a *qui tam* case. [6] The Granston Memo, which has since been incorporated into the DOJ Justice Manual, [7] advises DOJ litigators to think more actively about resolving *qui tam* cases by not only declining intervention but also, where appropriate, moving to dismiss pursuant to § 3730(c)(2)(A). The Granston Memo articulates seven potential bases for pursuing dismissal, including that the claim is likely to generate government costs exceeding the expected gain. [8] At a minimum, these considerations can help support a defendant's position that the government seek dismissal of a *qui tam* action at its earliest stages. Whether the Granston Memo will in fact lead to a steady uptick in this sparingly used gatekeeping function remains unclear.

Circuit Split Over DOJ Deference. In the handful of DOJ-prompted dismissals following the Granston Memo, the government has had varying success as a result of the longstanding circuit split regarding the deference applied to DOJ dismissal requests under § 3730(c)(2)(A). [9] In some jurisdictions, courts have held that the government has unilateral power to dismiss a relator's complaint. [10] For example, in a recent case filed in the Eastern District of Kentucky, the court found that the “plain language of the statute says nothing about the government being required to make any sort of showing in support of its motion to dismiss,” and, as such, the government has “virtually unfettered discretion to dismiss a False Claims Act case.” [11]

Other courts, however, grant dismissal only if (1) the government demonstrates a valid purpose rationally related to the dismissal and (2) relators are unable to show in response that the dismissal is arbitrary and capricious or illegal. [12] The District Court for the Northern District of California recently denied the government's request for dismissal after finding that it failed the valid purpose test. [13] The court rejected the government's argument that proceeding with the suit would drain its resources, as the government had not conducted a “minimally adequate investigation” of the allegations made by the relator. According to the court, the government's investigation

consisted only of interviewing the relator and examining documents that the relator produced. The government turned down the offer of the relator's counsel to provide additional information and did not “meaningfully assess” evidence relating to the potential proceeds from the suit.

In all, the DOJ's use of its dismissal authority in the wake of the Granston Memo may highlight both policy divisions and interpretive questions with respect to § 3730(c)(2)(A). Among other things, at least some courts can be expected to require a showing of meaningful due diligence by the government before it moves to end a relator's effort to pursue claims under the FCA.

Campie Amicus Brief. Another trace of the Granston Memo arose in the recent *amicus curiae* brief filed by the DOJ upon invitation by the Supreme Court in its *certiorari* review of *United States ex rel. Campie v. Gilead Sciences, Inc*. [14] Although the DOJ agreed with the Ninth Circuit's holding in favor of relators with respect to materiality, the DOJ advised against granting *certiorari* and further asserted that, if the case were to be remanded, the government would move for dismissal pursuant to § 3720(c)(2)(A). In a two-page explanation, the DOJ emphasized its “thorough investigation of respondents' allegations and the merits thereof,” as well as the potential for burdensome discovery requests if the claim were to go forward. [15] On the whole, the DOJ proffered, allowing the suit to proceed would not serve the interests of the United States. Soon after the DOJ's submission, the Supreme Court denied *certiorari*.

The pronouncement by the DOJ in *Campie* cuts both ways for FCA defendants. On the one hand, it appears to give real meaning to the Granston Memo; when appropriate, the government stands ready to forego a purported billion-dollar case, even following a favorable ruling at the circuit court level. On the other hand, the remand of the case (likely based, at least in part, on the government's position in favor of dismissal) leaves in place *Campie's* pro-relator interpretation of *Escobar* materiality—at least for now.

B. *Escobar* Materiality

At base, *Campie* concerned the proper application of *Escobar*'s materiality standard, which has been presented to courts in various contexts (and with varying results) in the years following the Supreme Court ruling. The relators' complaint asserted that the defendant, a drug manufacturer, had received funds from the government based on false claims of compliance with FDA regulations. The manufacturer moved to dismiss, arguing that the relators failed to demonstrate in their pleadings that the alleged non-compliance was material to the payment decision. In fact, the defendant contended, the complaint established that the government kept paying the claims, even after learning of the purported FDA violations. The Ninth Circuit acknowledged *Escobar*'s guidance that this is “strong evidence” against materiality, but it nevertheless rejected the defendant's argument. The court held that, unlike the circumstance described in *Escobar*, “the parties dispute exactly what the government knew and when, calling into question its actual knowledge.” [16]

In its petition for Supreme Court review, the drug manufacturer in *Campie* requested clarification of *Escobar*'s materiality standard and the import of the government's continued payment for claims while aware of the alleged regulatory misconduct. It called upon the holdings of other circuit courts that have dismissed cases with analogous facts. As an example, the defendant raised the First Circuit's dismissal of a *qui tam* complaint based upon a finding that the FDA's decision to provide payments after being informed of the alleged violations was

"fatal on a Rule 12(b)(6) motion." [17]

As noted previously, the DOJ sided with the Ninth Circuit's holding that the continued payments to the manufacturer "did not render the alleged misstatements immaterial as a matter of law." [18] The DOJ likewise agreed with the relators that the Supreme Court should not take up the case, noting that the decision below was consistent with both *Escobar* and other circuit court cases, which "broadly agree that materiality is a holistic inquiry and that continued payment by the government, despite actual knowledge of violations, can constitute important but not necessarily dispositive evidence that the violations were not material." [19] Moreover, the DOJ explained, the parties' pre-*Escobar* briefing at the Ninth Circuit was not informed by the Supreme Court's analysis. Therefore, from the perspective of the DOJ, Campie was not the ideal vehicle for review of the issue.

Although the Supreme Court has since rejected the appeal, it may have another opportunity to resolve the materiality questions left unanswered in *Escobar*. On November 20, 2018, the defendants in *Brookdale Senior Living Communities, Inc. v. United States ex rel. Prather* appealed the Sixth Circuit's reinstatement of a *qui tam* claim based on purported non-compliance with Medicare regulations caused by submitting bills for home health services without obtaining a physician signature in a timely manner. [20] The district court had found that "relator's inability to point to a single instance where Medicare denied payment based on violation of the [timing requirement]. . . weighs strongly in favor of a conclusion that the timing requirement is not material." [21] The Sixth Circuit, however, aligned itself with the broader analysis applied in *Campie*. It explained that, because the relator did not plead any facts one way or the other about how the government responded to such violations in its payment decisions, this factor has no significance to materiality and could not be a basis for dismissal. [22] In their petition for *certiorari*, the defendants argued that this holding deepens the circuit split on application of *Escobar*'s materiality standard. [23]

C. *Escobar* Falsity Factors

Escobar also confirmed that "certain misleading omissions" can form a false claim as defined by the FCA. The Supreme Court explained:

> [T]he implied certification theory can be a basis for liability, 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 provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths. [24]

From this paragraph, a separate circuit split has materialized: whether these two factors are mandatory for establishing falsity in an implied certification case (or merely sufficient).

Adopting a limited reading of *Escobar*, the First and Seventh Circuits have concluded that relators must satisfy both conditions in order to proceed with an implied certification claim, starting with an allegation of "specific representations" by the defendant. [25] In contrast, the Fourth Circuit has held that *Escobar* is not "crabbed" in

this way, and that the government pleads a “half-truth” when it “alleges a 'request for payment under a contract' where the contractor 'withheld information about its noncompliance with material contractual requirements.'" [26] Two post-*Escobar* cases out of the D.C. district court similarly reaffirmed the “D.C. Circuit's broader statement of the implied certification theory.” [27] The DOJ has also argued in favor of a more expansive view. [28]

With its recent decision in *United States ex rel. Rose v. Stephens Institute*, the Ninth Circuit joins the former camp by defining the two-part test as mandatory, thereby exacerbating the circuit split on this issue. [29] The defendant, a private for-profit art school, receives federal funding under the Higher Education Act, provided that it complies with various legal requirements, including the Department of Education's ban on incentive compensation. The relators alleged that the defendant violated this ban by paying bonuses and awarding gifts to recruiters who successfully met enrollment targets, and, as a result, the defendant's requests for funding were false and are actionable under the implied certification theory.

Bound by its own post-*Escobar* decisions, the Ninth Circuit reluctantly concluded that relators must satisfy the two-part test in order for implied false certification liability to attach. Under previous Ninth Circuit precedent, a relator was not required to show that a claim for payment contained a “specific representation” that was misleading due to a failure to disclose a violation. Instead, the relator could establish falsity by merely “pointing to noncompliance with a law, rule, or regulation that is necessarily implicated in a defendant's claim for payment.” [30] The *Rose* court conceded that, while *Escobar* itself did not explicitly overrule this precedent, decisions by two other panels interpreting *Escobar* fatally undermined it, thus instituting the two-part test as Ninth Circuit law. [31] The court found that the relators had pled sufficient evidence under this stricter test to survive summary judgment. [32]

On December 6, 2018, the *Rose* court granted the defendant's motion for a stay pending disposition of its anticipated petition for *certiorari*. [33] Therefore, while there appears to be a growing consensus that the two conditions outlined in *Escobar* are required to find liability under an implied false certification theory, FCA litigants can expect likely Supreme Court involvement.

D. FCA Statute of Limitations

Case law continues to evolve relative to the FCA's statute of limitations. In particular, the Supreme Court recently agreed to hear a case involving the three-way circuit split regarding the application of the two distinct case filing deadlines. Pursuant to § 3731(b), an FCA suit may not be brought:

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last. [34]

In *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, the relator filed his *qui tam* action on November 27, 2013. He alleged that the defendant submitted false claims to the government “some time prior to January 2006 until early 2007”—i.e., more than 6 years before he filed his action—but that he told FBI agents about it on November 30, 2010—i.e., less than 3 years before he filed his action. [35] The district court dismissed the case,

finding that, because the government chose not to intervene in his action, Hunt could rely only on the 6-year deadline, which had expired. [36] The Eleventh Circuit reversed and held that the 3-year statute of limitations was available to relators, even where the government had not intervened. [37] The court further ruled that, in such cases, the 3-year limitations period is triggered not by the knowledge of the relator but by the knowledge of the United States. Therefore, counting from Hunt's 2010 disclosure of the alleged fraud to the FBI, Hunt filed suit within the FCA's statute of limitations.

In its petition to the Supreme Court, the defendant emphasized that this decision creates a third interpretation of § 3731(b) amongst the circuit courts. The Fourth, Fifth, and Tenth Circuits, like the district court in *Hunt*, have held that a relator cannot invoke the 3-year deadline unless the government has intervened in the case. According to Third and Ninth Circuit precedent, a relator may utilize the 3-year provision but, for the purpose of that section, the relator is considered to be the "official of the United States" such that *his* knowledge triggers the 3-year period. The defendant told the Supreme Court that, in any of these circuits, Hunt's claim would have been time-barred.

The relator agreed that the Supreme Court should resolve this issue, but argued that the Supreme Court should adopt the Eleventh Circuit's analysis. [38] The Supreme Court granted *certiorari* and, if it affirms, the ruling from the high court could drastically expand the duration of access to an FCA claim by a *qui tam* plaintiff.

CONCLUSION

The FCA continues to be a critical tool in the government's arsenal. As reported in statistics recently released by the DOJ, the government recovered $2.8 billion in FCA settlements and judgments over the past fiscal year, $2.1 billion of which is attributable to whistleblower suits. [39] Nevertheless, the theories on which these cases are brought continue to be tested, and there have been significant, oftentimes conflicting rulings at the appellate level regarding liability under the FCA. As a result, the court in which a case is brought may dictate whether that case moves on to expensive and burdensome discovery. With the growing divergence below, the Supreme Court is likely to have a number of FCA cases on its docket in the near future, and resolution of these issues may be determinative for entities facing FCA lawsuits.

NOTES

[1] 31 U.S.C. § 3729 *et seq*.

[2] *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1995–96 (2016).

[3] *Id*. at 1996 (emphasis added).

[4] *Id*. at 2004.

[5] *Id*. at 1999.

[6] Michael D. Granston, Director, DOJ Commercial Litig. Branch, Fraud Section, "Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)" (Jan. 10, 2018), https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

[7] DOJ, Justice Manual § 4-4.111, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111.

[8] This firm addressed the Granston Memo in detail in a prior alert following its publication, Granston Guidance: Leaked Memorandum Encourages DOJ Attorneys to Seek Dismissal of Meritless FCA Qui Tam Suits.

[9] *See, e.g., United States ex rel. Health Choice Grp., LLC v. Bayer Corp*., No. 5:17-cv-126 (E.D. Tex. Dec. 17, 2018) (pending); *United States ex rel. Manchester v. Purdue Pharma, L.P*., No. 1:16-cv-10947 (D. Mass. Aug. 24, 2018) (pending); *United States v. Academy Mortg. Corp*., No. 16-cv-2120, 2018 WL 3208157, at *3 (N.D. Cal. June 29, 2018) (denied on the ground that the government failed to show a valid purpose for the dismissal), *appeal docketed*, No. 18-16408 (9th Cir.); *United States ex rel. Maldonado v. Ball Homes, LLC*, No. 5:17-cv-379, 2018 WL 3213614, at *4 (E.D. Ky. June 29, 2018) (granted based on government's "unfettered discretion" to dismiss an FCA case); *United States ex rel. Stovall v. Webster Univ*., No. 3:15-cv-03530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018) (granted as satisfying both standards).

[10] *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003); *Riley v. St. Luke's Episcopal Hosp*., 252 F.3d 749, 753 (5th Cir. 2001).

[11] *Maldonado*, 2018 WL 3213614, at *3–4.

[12] *See, e.g., United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998); *Ridenour v. Kaiser-Hill Co*., 397 F.3d 925, 935 (10th Cir. 2005); *United States ex rel. Stevens v. State of Vt. Agency of Natural Res*., 162 F.3d 195, 201 (2d Cir. 1998) (citing *Sequoia Orange* with approval), *rev'd on other grounds*, 529 U.S. 752 (2000).

[13] *Academy Mortg. Corp*., 2018 WL 3208157, at *3.

[14] Brief for the U.S. as Amicus Curiae at 8, *22–23, Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (Nov. 30, 2018) ("Campie DOJ Amicus Br.").

[15] *Id*. at 15–16.

[16] *United States ex rel. Campie v. Gilead Scis., Inc*., 862 F.3d 890, 906–07 (9th Cir. 2017).

[17] Petition for a Writ of Certiorari, *Gilead Scis., Inc. v. United States ex rel. Campie* at 15, No. 17-936 (Dec. 26, 2017) (quoting *U.S. ex rel. Nargol v. DePuy Orthopaedics, Inc*., 865 F.3d 29 (1st Cir. 2017)).

[18] Campie DOJ Amicus Br. at 8.

[19] *Id*. at 17.

[20] Petition for Writ of Certiorari, *Brookdale Senior Living Cmtys., Inc. v. United States ex rel. Prather*, No. 18-699 (Nov. 20, 2018) ("Prather Pet.").

[21] *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc*., 265 F. Supp. 3d 782, 797 (M.D. Tenn. 2017).

[22] *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc*., 892 F.3d 822, 834 (6th Cir. 2018).

[23] Prather Pet. at 16. The defendants separately criticized the Sixth Circuit's assessment of scienter required for FCA liability, asserting the court erroneously conflated alleged knowledge of noncompliance with knowledge that the noncompliance was material to the government's decision to pay. *Id*. at 26.

[24] *Escobar*, 136 S. Ct. at 2001.

[25] *U.S. v. Sanford-Brown Ltd*., 840 F.3d 445, 447 (7th Cir. 2016); *Nargol*, 865 F.3d at 37.

[26] *United States ex rel. Badr v. Triple Canopy Inc*., 857 F.3d 174, 178 (4th Cir. 2017) (internal citation omitted).

[27] *United States v. DynCorp Int'l LLC*, No. 16-1473, 2017 WL 2222911, at *100 (D.D.C. May 19, 2017); *United States ex rel. Landis v. Tailwind Sports Corp*., No. 10-cv-00976, 2017 WL 573470, at *11 (D.D.C. Feb. 13, 2017).

[28] *See* Brief for the U.S. as Amicus Curiae Supporting Appellees at 15, *United States ex rel. Rose v. Stephens Inst*., No. 17-15111 (9th Cir. Aug. 7, 2017) ("[C]laims that merely demand payment, without making any other representations, may be 'misleading half-truths' actionable under the implied certification theory.").

[29] *United States ex rel. Rose v. Stephens Inst*., 909 F.3d 1012 (9th Cir. Aug. 24, 2018), *as amended* (Nov. 26, 2018).

[30] *Id*. at 1017–18 (citing *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010)).

[31] *See id*. at 1018 (citing *United States ex rel. Kelly v. Serco*, Inc., 846 F.3d 325, 332 (9th Cir. 2017), which applied the two-part test from *Escobar* and not the more relaxed *Ebeid* standard, and *Campie*, 862 F.3d at 901–03, which states that *Escobar*'s two conditions *must* be satisfied).

[32] *Id*. The court also concluded that a reasonable trier of fact could find materiality because payment was conditioned on compliance with the incentive compensation ban and because of past government enforcement activities. *Id*. at 1020.

[33] Order, *United States ex rel. Rose v. Stephens Inst*., No. 17-15111 (Dec. 6, 2018).

[34] § 3731(b).

[35] Petition for a Writ of Certiorari at 6, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315 (Sept. 7, 2018).

[36] *United States ex rel. Hunt v. Cochise Consultancy, Inc*., 2016 WL 1698248, at *3 (N.D. Ala. Apr. 28, 2016).

[37] *United States ex rel. Hunt v. Cochise Consultancy, Inc*., 887 F.3d 1081, 1083 (11th Cir. 2018).

[38] Response to Petition for Writ of Certiorari at 13, *Hunt*, No. 18-315 (Oct. 11, 2018).

[39] DOJ, Office of Public Affairs, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018),https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

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