

# Indiana Health Law Review

Volume XVI

2018

Number 1

## ARTICLES

### THE FALSE CLAIMS ACT AND THE *ESCOBAR* DECISION: WHAT IS ON THE HORIZON FOR THE HEALTHCARE INDUSTRY

NATASHA BOYADZIEVA\*

#### I. INTRODUCTION

The federally funded Medicare and Medicaid health care programs are subject to fraud and abuse by various health care entities due to the opportunity for the entities to receive a great payout. The payout has been expanding over the years and is projected to grow, making the health care system an attractive target for fraud and abuse.<sup>1</sup> The False Claims Act (“FCA”) is the primary tool for combating such fraud and abuse.<sup>2</sup> In effect, FCA provides remedies to the Government and individuals, including consumers and taxpayers.<sup>3</sup> The FCA statute enables the Federal Government to recover billions of dollars that are lost due to fraudulent activities. In the Fiscal Year 2017, the Government recovered

---

\* Natasha Boyadzieva is an attorney practicing in California. Ms. Boyadzieva graduated in 2017 with her J.D. with honors degree from The George Washington University Law School. She would like to thank her family, friends, and the editors of the Indiana Health Law Review for their support and guidance.

1. *National Health Expenditure Data Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> [<http://perma.cc/76JQ-YFHV>] (last modified Apr. 17, 2018); see also *Health Care, Projections for Major Health Care Programs for FY 2018*, CONG. BUDGET OFF., <https://www.cbo.gov/topics/health-care> [<http://perma.cc/373P-7BWA>]; Juliette Cubanski & Tricia Neuman, *The Facts on Medicare Spending and Financing*, KAISER FAM. FOUND. (June 22, 2018), <http://kff.org/medicare/fact-sheet/medicare-spending-and-financing-fact-sheet/> [<http://perma.cc/T59P-MQLC>].

2. False Claims Act (FCA), 31 U.S.C. §§ 3729–33 (2012). Besides civil FCA provisions, there are also criminal ones (18 U.S.C. §287 (2012)) that are not the focus of this Article. Additionally, twenty-nine States and D.C. have enacted their own civil FCA provisions similar to the federal FCA. See, e.g., LA. STAT. ANN. §438.3 (2018).

3. See generally TAXPAYERS AGAINST FRAUD, [www.taf.org](http://www.taf.org) [<https://perma.cc/7SEH-M8QL>]; *The Health Care Fraud and Abuse Control Program Protects Consumers and Taxpayers by Combating Health Care Fraud*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 18, 2017), <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-01-18-2.html> [<https://perma.cc/QXP3-4WZZ>].

\$2.4 billion as a result of health care fraud judgments, settlements and additional administrative impositions in health care fraud cases and proceedings.<sup>4</sup> In 2016, over \$3.3 billion was returned to the Federal Government or paid to private persons.<sup>5</sup> The recovered amount represents only a fraction of the actual fraud.<sup>6</sup>

For many years the lower courts did not demonstrate consistency when deciding under which legal theory FCA claims could be brought. Some lower courts recognized only the express theory of certification. In 2016, the Supreme Court's *Escobar* decision emerged with recognizing the implied certification theory. This Article addresses the FCA in wake of the *Escobar* decision as well as the implications the decision has on future cases. Section II provides an overview of FCA, distinguishes it from medical malpractice, and points to the variations that existed in the lower courts. Section III states the relevant facts and legal issues in *Escobar*. Further, Section IV discusses the decision, addresses the way *Escobar* redefined the existing judicial tests for assessing materiality, and discusses ways in which *Escobar* opened the door for future prosecution and defense. Section V contains additional pleading issues that must be considered. Finally, Section VI concludes by offering some guidance on what *Escobar* changed as well as what it left unaffected in relation to the FCA enforcement. Potential effects that could be observed in the lower courts, as a result of *Escobar*, are also stated.

## II. FCA OVERVIEW

The FCA prohibits any person from knowingly submitting a false or fraudulent claim to the United States for payment or approval or knowingly making any false statement material to such a false or fraudulent claim.<sup>7</sup> The Attorney General may bring actions directly in the name of the United States.<sup>8</sup> Alternatively, a relator—private person also known as whistleblower—may bring a qui tam action for the person and for the U.S. Government.<sup>9</sup> If the action brought prevails, the relator would share a portion of the damages received with

---

4. U.S. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2017, at 1 (2018), <https://oig.hhs.gov/publications/docs/hcfac/FY2017-hcfac.pdf> [<http://perma.cc/5XE7-UCH3>].

5. U.S. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2016, at 1 (2017), <https://oig.hhs.gov/publications/docs/hcfac/FY2016-hcfac.pdf> [<http://perma.cc/5NL9-SNGD>].

6. See, e.g., *Financial Crimes Report to the Public: Fiscal Year 2010-2011*, FBI, <https://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011> [<http://perma.cc/XG26-D78K>] (Reports by the Federal Bureau of Investigation estimate that “fraudulent billings to health care programs, both public and private, [represent] between 3 and 10 percent of total health care expenditures.”).

7. 31 U.S.C. § 3729(a) (2009).

8. 31 U.S.C. § 3730(a) (2012).

9. 31 U.S.C. § 3730 (2012).

the Government.<sup>10</sup>

However, FCA is not designed to reach every kind of fraud practiced on the Government.<sup>11</sup> It does not encompass regulatory noncompliance that is irrelevant to the Government's disbursement decision.<sup>12</sup> A plaintiff, in violation under section 3729(a)(1) must prove that "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent."<sup>13</sup> Pointing to a specific claim deemed to be *false* is significant because the theory of the FCA violation is grounded primarily in identifying the false claim submission(s). Further, the requisite intent is the knowing presentation, thus the violation would not be actionable under the FCA unless it is knowingly committed. As defined by Congress, the terms "knowing" and "knowingly" besides actual knowledge also include deliberate ignorance or reckless disregard of the truth or falsity of the information.<sup>14</sup> Innocent mistakes or negligent conduct are not equivalent to reckless disregard.<sup>15</sup> Further, if the defendant's interpretation of the applicable regulations is reasonable, although incorrect, the element of *knowingly* is not satisfied.<sup>16</sup>

Moreover, the false claim must be material, highlighting that it must have a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."<sup>17</sup> For example, a violation of certification of compliance with regulations could not be material if the Government is aware of the violation but continues to pay anyways.<sup>18</sup> Even if unknown to the Government, not all noncompliance and violations are material because "to

10. 31 U.S.C. § 3730(d)(1)-(2) (2012).

11. *United States v. McNinch*, 356 U.S. 595 (1958).

12. *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001).

13. *Hutchins v. Wilentz*, 253 F.3d 176, 182 (3d Cir. 2001) (paraphrasing 31 U.S.C. § 3729(a)(1)).

14. 31 U.S.C. § 3729(b)(1)(A) (2012).

15. Congress added "reckless disregard" or "deliberate ignorance" to FCA in 1986. *See False Claims Amendments Act of 1986*, Pub. L. No. 99-562, 100 Stat. 3153 (1986). The Senate Report that accompanied the change evinced an intent to hold liable "only those who act in gross negligence," who failed "to make such inquiry as would be reasonable and prudent to conduct under the circumstances." S. REP. NO. 99-345, at 20 (1986). *See also Hindo v. Univ. of Health Scis.*, 65 F.3d 608, 613 (7th Cir.1995) (stating that negligence is not actionable).

16. *United States ex rel. Kersulis v. RehabCare Grp., Inc.*, 2007 WL 294122 (E.D. Ark. Jan. 29, 2007) (holding that summary judgment was appropriate for the defendants because CMS did not provide any formal guidance regarding the interpretation of the relevant but unclear FCA regulations, and there was no evidence to show that the hospital knowingly provided false information or caused false claims to be submitted to the federal government).

17. 31 U.S.C. § 3729(b)(4) (2012) (emphasis added).

18. *United States ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138 (5th Cir. 2013) (defendant provided emails that the government knew the trucks were overweight. The court wondered "[h]ow could such 'fraud' be material to payment if the defrauded party knows about it and remains satisfied with the work?").

construe the implied false certification theory in an expansive fashion would improperly broaden the Act's reach."<sup>19</sup> In 2009, the FCA amendments stipulated that materiality should be judged objectively focusing on what the impact would be on a "reasonable" agency rather than judging subjectively, and requiring the plaintiff to show an actual effect on the Government's decision to pay.<sup>20</sup> The 2009 amendments are seen as expanding the original FCA provisions since liability may attach to claims that are submitted to a "contractor, grantee, or other recipient" of federal funds, regardless of whether a false claim was submitted directly to the Government.<sup>21</sup> In addition to overturning judicial precedents,<sup>22</sup> the amendments provided explicit materiality requirement—"knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim."<sup>23</sup>

Generally, the primary purpose of the FCA "is to indemnify the Government-through its restitutionary penalty provisions-against losses caused by a defendant's fraud."<sup>24</sup> Notably, the civil FCA provisions include heavy penalties and treble damages.<sup>25</sup> The incentive for a relator to bring an FCA claim can also be viewed as huge. For instance, if the Government declines to intervene in an action, the relator may proceed independently and be awarded a "reasonable amount"—between 25 and 30 percent—of any proceeds or settlement, along with reasonable costs and attorney's fees.<sup>26</sup> Moreover, FCA is significant as many FCA violations implicate prohibited activity and penalties under other laws, such as the Anti-Kickback Statute or Stark Law.<sup>27</sup> The legal consequences that might

---

19. *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). *See also United States ex rel. Milam v. Regents of the Univ. of Cal.*, 912 F. Supp. 868 (D. Md. 1995) (granting summary judgment for defendants when the plaintiff argued that the defendants' research was false because it was not conducted in accordance with the scientific method).

20. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1617, 1621 (2009). *See also* S. REP. NO. 111-10, at 4 (2009) ("The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds.")

21. §4(a), 123 Stat. at 1623. Congress also removed the requirement that a subcontractor act with the specific intent "to get" a false claim paid "by the government." S. REP. NO. 111-10, at 12. As a consequence, it is no longer necessary that an individual or entity act with the specific intent to defraud the government.

22. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

23. 31 U.S.C. § 3729(a)(1)(B) (2012) (emphasis added).

24. *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 331 (S.D.N.Y. 2004).

25. 31 U.S.C. § 3729(a)(1)(G) (providing that the penalties range from \$5,000 to \$10,000, "plus 3 times the amount of damages which the Government sustains").

26. § 3730(d)(2).

27. *See* Anti-Kickback Statute, 42 U.S.C. § 1320a-7b; Stark Law, 42 U.S.C. § 1395nn (promulgating regulations at C.F.R. §§ 411.350-411.389); *see also Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (stating that Stark Law and the Medicare regulations

follow if FCA liability attaches are some of the reasons that Congress' language and intent need to be enforced with great precision. If allowed to proceed forward, baseless suits targeting conduct outside of the FCA's purpose and scope, would also exhaust judicial resources.

#### *A. FCA Framework: Falsity*

Initially, FCA raises several complex issues regarding the meaning and the scope of a false claim since Congress did not define the terms *false* or *fraudulent*. While lower courts have attempted to clarify the meaning on numerous occasions, the Supreme Court has stated that absent other indication, common law terms of fraud should be incorporated.<sup>28</sup> The aspect that must be underlined is the required objective falsehood. Recently, *United States v. AseraCare*,<sup>29</sup> the Government argued that medical records of 123 patients did “not contain ‘clinical information and other documentation that support[ed AseraCare’s] medical prognosis,’ and thus, AseraCare’s claims for those patients were ‘false.’”<sup>30</sup> The court granted summary judgment for AseraCare holding that an opinion of one medical expert alone is insufficient to support an FCA claim alleging false certification of patient eligibility for Medicare hospice benefits.<sup>31</sup> The court emphasized that “[w]hen hospice certifying physicians and medical experts look at the very *same* medical records and disagree about whether the medical records support hospice eligibility, the opinion of one medical expert *alone* cannot prove falsity without further evidence of an objective falsehood.”<sup>32</sup> The court was “concerned that allowing a mere difference of opinion among physicians alone to prove falsity would totally eradicate the clinical judgment required of the certifying physicians.”<sup>33</sup> Consistent with *AseraCare*, recently in *United States ex rel. Polukoff v. St. Mark’s Hospital*,<sup>34</sup> a district court dismissed the relator’s complaint and denied a leave to amend after determining that the relator could not “identify an objectively false representation made by any of the defendants.”<sup>35</sup> The relator’s “allegations [were] based on subjective medical opinions that cannot be proven

---

could form the basis for an FCA suit if pled properly).

28. *Sekhar v. United States*, 570 U. S. 729 (2013); *see also Neder v. United States*, 527 U.S. 1, 22 (1999) (explaining that the term “actionable ‘fraud’” is one with “a well-settled meaning at common law”).

29. *United States v. AseraCare, Inc.*, 176 F. Supp. 3d 1282 (N.D. Ala. 2016) (granting summary judgment for the defendant).

30. *Id.* at 1283.

31. *Id.* at 1286.

32. *Id.* at 1283.

33. *Id.* at 1285. *See also United States ex rel. Phalp v. Lincare Holdings, Inc.*, 116 F. Supp. 3d 1326, 1360 (S.D. Fla. 2015) (“Expressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false.”).

34. *United States ex rel. Polukoff v. St. Mark’s Hosp.*, 2017 WL 237615 (D. Utah, Jan. 17, 2017).

35. *Id.* at \*11.

to be objectively false.”<sup>36</sup> Overall, the case law is clear and consistent: “the submission of a false claim is the *sine qua non* of [an FCA] violation.”<sup>37</sup>

### *B. Distinguishing FCA from Medical Malpractice*

FCA must first be distinguished from medical malpractice. “Medical malpractice is defined as any act or omission [done] by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes an injury to the patient.”<sup>38</sup> FCA can be used against providers who provide substandard health care that harms patients when systemic, egregious violations are implicated.<sup>39</sup> Sanctions under the FCA are appropriate only if dereliction has “occurred in a substantial number of cases or the violation [is] especially gross and fragrant...rather than an individual incident of noncompliance.”<sup>40</sup> For example, in some cases the health care entity exists for no other purpose than to financially defraud the Government. Unlike medical malpractice, FCA has the scienter requirement of intentional misrepresentation that extends to encompass gross negligence or reckless disregard but not negligence alone.<sup>41</sup> Furthermore, many health and safety matters are of local concern and are left in the purview of the individual state legislation; they are not appropriate for imposing the federal FCA liability.<sup>42</sup>

### *C. False Certification Theory: Express and Implied Certification*

There are two categories of false claims under the FCA: a factually false claim and a legally false claim.<sup>43</sup> A claim is factually false when the claimant misrepresents what goods or services it provided to the Government while a claim is legally false when the claimant knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for

---

36. *Id.* at \*9.

37. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1052 (11th Cir. 2015) (citation omitted).

38. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 339, 340 (2009), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/pdf/11999\\_2008\\_Article\\_636.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/pdf/11999_2008_Article_636.pdf) [<https://perma.cc/AWA4-PAZR>].

39. *See United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001).

40. *Id.* at 702.

41. 31 U.S.C. § 3729(b)(1)(A) (2018). *See also* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

42. Michael M. Mustokoff et al., *The Government's Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Ingenuity or the Heavy Hand of the 800-pound Gorilla*, 6 ANNALS HEALTH L. 137, 137 (1997), <https://pdfs.semanticscholar.org/7d6c/30c7a350c08710668eb789a2fac20ad62400.pdf> [<https://perma.cc/4UGD-H4MG>] (stating that allowing FCA to be used in that way was not “an ingenious exercise of federal power,” but was like “the heavy hand of the 800-pound gorilla”).

43. *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008) (citing *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 695-96 (2d Cir. 2001)).

Government payment.<sup>44</sup> A legally false FCA claim is based on the “false certification” theory of liability<sup>45</sup> and it is the main focus of this paper.

Prior to 2016, some courts recognized two types of false certifications: 1) express and 2) implied.<sup>46</sup> Under the “express false certification” theory, an entity is liable under FCA for falsely certifying that it complies with regulations that are prerequisites to Government payment in connection with the claim for payment of federal funds.<sup>47</sup> There is also an expansive version of the false certification theory called “implied false certification” where liability attaches when a claimant seeks and makes a claim for “payment from the Government without disclosing that it violated regulations that affected its eligibility for payment.”<sup>48</sup> Thus, an implied false certification theory of liability is premised “on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are precondition to payment.”<sup>49</sup> “[S]upport for the implied theory [is] found in the Congress’ expressly stated purpose that the Act include at least some kinds of legally false claims...and in the Supreme Court’s admonition that the Act intends to reach all forms of fraud that might cause financial loss to the Government.”<sup>50</sup> However, the implied theory did not gain nationwide recognition; the theory was raised repeatedly as basis for liability and defendants in some jurisdictions were successful in challenging it.

#### *D. Decisions from Lower Courts Prior to Escobar*

Until 2016, whether a complaint could survive a motion to dismiss challenge<sup>51</sup> depended on whether a specific jurisdiction recognized the two theories of liability or only the express one. Many circuits permitted FCA claims to proceed under an implied certification theory. *United States ex rel. Mikes v. Straus*,<sup>52</sup> is a leading case recognizing implied certification as a basis for liability under the FCA. However, the Second Circuit stated that the implied theory should have limited application only in cases where compliance with specific regulations

---

44. *Id.*

45. See *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 303 (3d Cir. 2008) (overruled in part on other grounds by *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009)).

46. See, e.g., *Conner*, 543 F.3d at 1217; Mustokoff et al., *supra* note 42.

47. *Rodriguez*, 552 F.3d at 303.

48. *Id.*

49. *Mikes*, 274 F.3d at 699; see also *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (“Courts infer implied certifications from silence where certification was a prerequisite to the government action sought.”).

50. *Mikes*, 274 F.3d at 699; see also *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

51. FED. R. CIV. P. 12(b)(6). A party may assert the following defense by motion: failure to state a claim upon which relief can be granted.

52. *Mikes*, 274 F.3d at 687.

or laws was condition to payment.<sup>53</sup> In *United States ex rel. Wilkins v. United Health Group, Inc.*,<sup>54</sup> the Third Circuit stated that to plead a claim for relief under an implied certification theory, it is required to allege that the “defendants submitted claims for payment to the Government at a time that they knowingly violated a law, rule, or regulation which was a condition for receiving payment from the Government.”<sup>55</sup>

Additionally, the Tenth Circuit explained the difference between conditions of participation and conditions of payment: “Conditions of participation...are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the Government program,” while conditions of payment are those which, “if the Government knew they were not being followed, might cause it to actually refuse payment.”<sup>56</sup> Many courts followed this distinction.<sup>57</sup>

However, some conditions of eligibility could be viewed as preconditions to payment, thus it is hard to completely separate the conditions of eligibility from conditions of payment.<sup>58</sup> Therefore, some courts did not draw lines because those categories “do more to obscure than clarify.”<sup>59</sup> While many courts recognized the implied false certification liability,<sup>60</sup> other courts rejected it. For example, the

---

53. *United States ex rel. Qazi v. Bushwick United Hous. Dev. Fund Corp.*, 977 F. Supp. 2d 235, 240 (2d Cir. 2013) (holding that the FCA action is dismissed since the alleged was a condition of participation violation and not conditions of payment, therefore the claim was not actionable); *see also United States ex rel. Blundell v. Dialysis Clinic, Inc.*, 2011 U.S. Dist. LEXIS 4862, at \*56 (N.D.N.Y. Jan. 19, 2011).

54. *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 306 (3d Cir. 2011).

55. *Id.* at 313; *see also Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

56. *United States ex rel. Conner v. Salena Reg'l Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008).

57. *See, e.g., United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295 (3d Cir. 2011); *United States ex rel. Parikh v. Citizens Med. Ctr.*, 977 F. Supp. 2d 654, 677 (S.D. Tex. 2013) (holding that failure to comply with a mere condition of participation, rather than a condition of payment is inadequate for FCA liability to attach. The court reasoned if contractual language could convert a condition of participation into a condition of payment, it would “drastically expand the role of the courts in policing regulations in an area traditionally governed by administrative agencies.”); *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707 (6th Cir. 2013).

58. *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1176 (9th Cir. 2006) (holding that a regulation may in some cases be both, a condition of payment *and* a condition of participation).

59. *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377 (1st Cir. 2011) (refusing to apply distinctions between factually false and legally false, as well as between express certification and implicit certification).

60. *See United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699-700 (2d Cir. 2001); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Ebeid*, 616 F.3d at 996-98; *Conner*, 543 F.3d at 1217-18; *but see Hutcheson*, 647 F.3d at



Seventh Circuit stated that only express (or affirmative) falsehoods could render a claim “false or fraudulent.”<sup>61</sup> In 2016, the Supreme Court was presented with a unique opportunity<sup>62</sup> to decide whether the implied theory could be a viable cause of action. The court aimed to achieve uniformity on a matter that was dividing the lower courts. Consistency across the country was required particularly because an enforcement of a federal law with potentially significant penalties was at issue. The Supreme Court provided guidance on some of the most critical FCA aspects.<sup>63</sup>

### III. *UNIVERSAL HEALTH SERVICES INC. V. UNITED STATES EX REL. ESCOBAR*

The case came to the Supreme Court to resolve a circuit split regarding the use of *implied* certification theory as a basis for asserting that certain claims are false.<sup>64</sup> The Court focused on whether the theory would be recognized or not as a cause of action, without addressing the merits of the case. Therefore, the decision was whether access to the courts would be granted or precluded. Yet, it impacted the applicable substantive law since whether the merits were reachable or not depended on the court’s recognition of the implied certification theory.

In *Escobar*, it was alleged that Arbour, a mental health treatment facility and subsidiary of Universal, “knowingly misrepresented its compliance with requirements central to the mental health counseling, [which Medicaid] would have refused to pay...had it known of these violations.”<sup>65</sup> Both sides disagreed if “submitting a claim without disclosing violations of statutory, regulatory, or contractual requirements constitutes...an actionable misrepresentation.”<sup>66</sup> The relators and the Government argued that submitting a claim for payment means “implicitly represent[ing] that the claimant is legally entitled to payment, and that failing to disclose violations of material legal requirements [makes] the claim misleading.”<sup>67</sup> On contrary, Universal, as defendant, argued “that submitting a claim involves no [representation]...nondisclosure of legal violations is not actionable absent a special duty...to exercise reasonable care to disclose the matter in question...”<sup>68</sup>

The district court granted a motion to dismiss, thus initially the 12(b)(6)

---

380 (declining to employ judicially created categories of express and implied false certification); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 n.8 (4th Cir. 1999) (without addressing validity of implied false certification theory, stating that its precedent makes the theory “questionable”).

61. *United States v. Sanford-Brown, Ltd.*, 788 F. 3d 696, 711-12 (7th Cir. 2015).

62. *Universal Health Servs. Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

63. *See id.*

64. *Id.* at 1998.

65. *Id.* at 1993.

66. *Id.* at 1999.

67. *Id.* at 2000.

68. *Id.*

challenge of failure to state a claim based on the implied theory was successful.<sup>69</sup> There was a precedent recognizing implied false certification theory of liability but, “none of the regulations Arbour violated was a condition of payment.”<sup>70</sup> On appeal, the First Circuit reversed in relevant part and remanded.<sup>71</sup> The court emphasized that “a statutory, regulatory, or contractual requirement can be a condition of payment either by expressly identifying itself as such or by implication.”<sup>72</sup>

Finally, the Supreme Court addressed the case and held:

that the implied certification theory can be a basis for liability where at least two conditions are satisfied: first, the claim for payment must make specific representations about the goods or services provided, and second, the party’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.<sup>73</sup>

#### IV. *ESCOBAR* ANALYSIS

##### *A. Escobar Decision Clarifies Certain FCA Aspects*

*Escobar* is a suitable FCA case because systemic and egregious violations committed by the medical center were pervasive: unlicensed and licensed professionals acted outside of their scope of practice, inadequate counseling and supervision was provided, crucial credentials such as Ph.D. title were misrepresented, nurses were held out as psychiatrists and prescribed medications, basic licensure and other qualifications when obtaining National Provider Identification numbers were misrepresented.<sup>74</sup> Medical malpractice or criminal charges could have been brought and the Massachusetts agencies already found violations of multiple state Medicaid regulations.<sup>75</sup> Nonetheless, the conduct went beyond those legal frameworks and created the perfect opportunity for the Supreme Court to address the express-implied distinction that implicated both FCA’s materiality and intent requirement:

A defendant can have “actual knowledge” that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has “actual knowledge.” Likewise, because a reasonable person would realize the imperative of

---

69. *Id.* at 1998.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2001.

74. *Id.* at 1997.

75. *Id.*

a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.<sup>76</sup>

Further, even if there is an express designation as condition of payment, not every violation of such a requirement gives rise to liability.<sup>77</sup> What matters is "whether the defendant knowingly violated a requirement that the defendant [knew was] material to the Government's payment decision."<sup>78</sup> The Court gives significance to the "must be material" determination with the term material according to the Act leading to examining whether the false claim *influenced or was capable of influencing* the Government's decision.<sup>79</sup> Materiality is a demanding standard since the complaint must now clearly state how a certain violation is material to the Government's decision to pay. After all, FCA is not only about noncompliance, but if and how would that noncompliance influence the Government's reimbursement decision. The parameters provided by the Court show that the requirements under the implied theory are not rigid.

FCA imposes liability on those who present "false or fraudulent claims"<sup>80</sup> and after the ruling in *Escobar*, also to certain claims of misrepresentations about express conditions of payment. The ruling may be interpreted as if the Court expanded the FCA language. Courts must interpret legislative intent from the statute as written, not what the legislature might have said or add words that the legislature did not include.<sup>81</sup> However, the Court in *Escobar* explained that they have not expanded the language because the Court saw no restrictions made by Congress in the text. The Court states that the interpretation it gives exists, implicitly, in the statute.<sup>82</sup>

At the end the Court did not side completely with either party. The case was

76. *Id.* at 2001-02.

77. *Id.* at 2001.

78. *Id.* at 1996 ("must be material").

79. *See* 31 U.S.C. § 3729(b)(4) (2012).

80. 31 U.S.C. § 3729(a)(1)(A).

81. *See* *Estate of Cowart v. Nicklos Drilling Co.*, 505 U. S. 469, 476 (1992) (stating that the basic and unexceptional rule is that the "courts must give effect to the clear meaning of statutes as written."). *See also* LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (Dec. 2011), <https://fas.org/sgp/crs/misc/97-589.pdf>, [<https://perma.cc/X2US-XV67>] ("[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.").

82. If Congress does not agree with the Supreme Court, it can effectively overrule the decision. When FCA is at issue, it would not be the first time. *See* *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), (superseded by statute, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in sections 18 and 31 of U.S.C.)).

vacated and remanded for reconsideration of whether there was sufficient pleading of FCA.<sup>83</sup> It is up to the lower courts to resolve cases in accordance with this ruling and guidance provided by the Supreme Court. Accordingly, tailoring would be necessary since the circumstances of each case might differ drastically and case-by-case analysis is necessary. The Court was careful not to make a broad ruling by stating “we need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment.”<sup>84</sup>

Universal unsuccessfully attempted to make a policy argument stating that “liability should be limited to...expressly designated conditions of payment” so that the defendant has fair notice and would not be exposed to open ended liability.<sup>85</sup> Nevertheless, the Court stated that “policy arguments could not supersede the clear statutory text.”<sup>86</sup> As for fair notice and open ended liability concern, the Court stated that they can be “effectively addressed through strict enforcement of the Act’s materiality and scienter requirements.”<sup>87</sup> For example, if noncompliance is minor or insubstantial, materiality cannot be found.

Ultimately, even if Universal’s position was accepted, the Government might have designated an almost endless list of conditions of payment and accordingly, subject Universal and other healthcare entities *expressly* to even more regulations. Such holding would not have helped the defendants and the healthcare industry in the long run because the impact would have been temporary in nature—lasting only until the Government adds more to the already existing express conditions of payment.

#### *B. Escobar Clarifies Other Prior Decisions*

*Escobar* is consistent with *McNinch*<sup>88</sup> in reiterating that FCA has an outer boundary—it is not designed to punish every type of fraud committed upon the Government. “It was not intended to operate as a stalking horse for enforcement of every statute, rule, or regulation.”<sup>89</sup> Further, *Escobar* is consistent with *Mikes* in that “a claim cannot be determined to be true or false without consideration of whether the decision maker should pay the claim...a claim is ‘false’ only if the...facts about the misconduct alleged to have occurred were known.”<sup>90</sup> The

---

83. *Escobar*, 136 S. Ct. at 2004.

84. *Id.* at 2000.

85. *Id.* at 2002.

86. *Id.* (citing *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012)).

87. *Id.*

88. *United States v. McNinch*, 356 U.S. 595 (1958).

89. *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996). *Escobar* and all the lower courts have highlighted that when a provider fails to comply with a regulation, the claim is not automatically “false” within the meaning of the FCA. *Escobar*, 136 S. Ct. at 2003.

90. *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) (quoting Clarence T. Kipps, Jr. et al., *Materiality as an Element of Liability Under the False Claims Act*, A.B.A. CENTER FOR CONTINUING LEGAL EDUC. NAT’L INST. (1998)).

Supreme Court just like the Second Circuit saw the statutory language as simply requiring linkage of the wrongful activity to the Government's decision to pay. It should be emphasized that what is relevant is the influence on the Government's disbursement decisions.<sup>91</sup>

What the Second Circuit got wrong is "[s]pecifically, implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid."<sup>92</sup> *Escobar* effectively overturns the *express* requirement. Under *Escobar*, there is no need for the payment to be expressly precluded because of some noncompliance by the defendant. Additionally, court decisions dismissing claims because relators have not cited to statute or regulations that conditions payment of a claim, are also overturned.<sup>93</sup> What matters is what is at the core of the provider's agreement with the Government, the label of express or implied is relevant but not dispositive.<sup>94</sup>

### C. *Escobar Leaves Some FCA Aspects for the Lower Courts to Evaluate*

The Supreme Court's reasoning and analysis in *Escobar* do not simplify nor stabilize the materiality area by providing criteria or firm guidance as there is no clear-cut test on what is material and what is not. Additionally, how lower courts interpret *Escobar* over time will point out if the scope established by the Supreme Court is wide or narrow. How would implied certifications that render a claim "false" be distinguished from those that do not? There is no simple answer, but there is heavy reliance on what the defendant knew about the Government's payment practices and, moreover, what could be shown to *influence* or is *capable of influencing* the Government's payment decision.<sup>95</sup>

Further, when stating, "at least in certain circumstances, the implied false certification theory can be a basis for liability," the court did not attempt to expressly enumerate those "certain circumstances."<sup>96</sup> Undoubtedly, it may not be possible for a law aimed at various type of conduct (predominantly in the healthcare and Government contracting industry) to be any more specific. There is confidence that the lower courts will know how to adequately assess.

---

91. See *Mikes*, 274 F.3d at 687; *Escobar*, 136 S. Ct. at 1989.

92. *Mikes*, 274 F.3d at 700.

93. *United States ex rel. Chesbrough v. VPA, P.C.*, 655 F.3d 461, 469 (6th Cir. 2011).

94. *Escobar*, 136 S. Ct. at 2001.

95. See *Escobar*, 136 S. Ct. at 1989; see also *supra* notes 17-19.

96. *Escobar*, 136 S. Ct. at 1995. The Court provided a general guidance regarding those certain circumstances: "[s]pecifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading."

*D. Implications from Escobar Favorable to the Relators and the Government*

The *Escobar* ruling enables the Government and the relators to bring an FCA cause of action utilizing the implied certification theory.<sup>97</sup> With the recognition of the theory by the Supreme Court, the FCA's reach is expanded and access to the federal courts is granted anywhere in the United States. Prior to *Escobar*, support for the implied theory existed in many, but not all, circuits. The decision was a victory for the Government since it is a powerful tool for enforcing variety of FCA violations.<sup>98</sup> The healthcare entities would not be able to escape liability if there is no express certification, thus there is no longer a clear loophole that was created by the heavy reliance on conditions of payment in some jurisdictions.

*Escobar* enables the Government to pursue wider range of violations. Numerous amicus briefs were filed from various healthcare entities supporting Universal as their exposure to liability was also at stake;<sup>99</sup> and once the ruling came, the potential liability for all of them significantly increased. A violation could be deemed material even if it is not condition of payment, making FCA charge possible. Since labels are not dispositive, what is relevant is whether the defendant knowingly violated a requirement that the defendant knew was material to the Government's payment decision.<sup>100</sup> However, these aspects may not be necessarily favorable for relators or the Government, because it depends on how well intent and materiality can be pleaded and proved. Finally, even before *Escobar*, bringing civil FCA was advantageous, in comparison to the criminal one for example, as protections afforded under criminal procedure and the constitution, would not be available to the defense.<sup>101</sup>

*E. Implications from Escobar Favorable for the Defense*

As standards, materiality and scienter significantly limit the imposition of FCA liability. The Government and the relator have the burden to prove that the defendant knowingly violated the requirement that the defendant knew was material to the Government's payment decision. This leaves room for the defense to contend what the defendant knew and did not know. Additionally, the complaint must state how the misrepresentation is material to the Government's

---

97. *Id.* at 1989.

98. *Id.* Liability is not limited to the express false certification theory. ("Contrary to Universal Health's contentions, FCA liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment.")

99. A complete list of brief amici curiae is available. *Universal Health Services v. United States ex rel. Escobar*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/universal-health-services-v-united-states-ex-rel-escobar/> [<https://perma.cc/HJC3-8KCB>].

100. *Escobar*, 136 S. Ct. at 2001-02.

101. See *Criminal Cases*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> [<https://perma.cc/ZS5N-MU7U>]; see also *Your Basic Constitutional Rights in the Criminal Justice System*, GEORGIALEGALAID.ORG, <https://www.georgialegalaid.org/resource/your-basic-constitutional-rights-in-the-crimi> [<https://perma.cc/Z5U3-D3K5>] (brief overview of the basic Constitutional rights in a criminal case).

payment decision. Moreover, not every contractual term violation (express or implied) gives rise to a cause of action since violations are not automatically material. *Escobar*, just like *Mikes* and all other circuits that recognized the implied theory prior, emphasizes a crucial aspect for the defense—not every regulation is part of the bargain that leads to payment. Simple demand for payment without arguing misrepresentation is not actionable. As one author has stated, “[t]he fact that a hospital fails, for example, to have the exact number of florescent lights, as stipulated somewhere in the regulatory regime under which it functions, does not render all its submitted claims ‘false,’ but a claim submitted for an operation performed in the dark might render a bill for that surgery ‘false.’”<sup>102</sup> Also, after *Escobar*, FCA remains unproblematic for the defense if there are no gross deficiencies or systematic practices that lead to improper billing. It is also still an option for the defense to argue that if the Government pays a particular claim in full, despite its actual knowledge that certain requirements were violated, that would be a strong evidence that those requirements are not material since the Government knew.

In the post-*Escobar* decision world, the initial burden is on the Government and relators to state how the decision to pay was material. Due to this higher bar set for the Government, 12(b)(6) motions claiming deficiencies in pleadings or summary judgment motions might increase. Further, it can be expected that many defendants in the future will attempt to distinguish their case from *Escobar* claiming that their case is not one of those “certain circumstances” that the Supreme Court was referring to in *Escobar*. Extreme violations were present in *Escobar*: death of a teenager followed from a treatment in a setting where only few employees were licensed to provide mental health counseling or authorized to prescribe medications, and counseling services were provided without adequate supervision.<sup>103</sup> A nurse held out as psychiatrist without authority to prescribe medications and twenty-three employees in total lacked licenses to provide services.<sup>104</sup> Many severe violations occurred: use of payment codes that did not correspond to the actual services provided, the staff members misrepresented their qualifications and licensing status to obtain National Provider Identification numbers, and used the National Provider Identification numbers according to specific job titles.<sup>105</sup> Therefore, the defendants after *Escobar* could state that their violations including the misrepresentations are not as severe and consequently, not analogous so as to make the standards of materiality and scienter clearly met.

#### V. ADEQUACY OF THE PLEADINGS

Besides the ruling in *Escobar*, there are other issues that counsel should be aware of when faced with an FCA suit. There are frequently observed

---

102. SARA ROSENBAUM ET AL., LAW AND THE AMERICAN HEALTH CARE SYSTEM 1144 (2nd ed. 2016).

103. *Escobar* 136 S. Ct. at 1993, 1997.

104. *Id.* at 1997.

105. *Id.*

deficiencies in the pleadings that could greatly impact the FCA case. For example, once a suit is filed, the defendants could immediately make a motion under Rule 12 or Rule 56.<sup>106</sup> The complaint would be dismissed pursuant to Rule 12(b)(6) if the relator and the Government, who have the initial burden, are unable to establish the required elements as a matter of law.<sup>107</sup> The motion to dismiss tests the legal sufficiency of the FCA asserted claim. The defendants would argue that there is insufficiency of the complaint as required by Rules 8 and/or 9(b) of Civil Procedure.<sup>108</sup>

For Rule 8 to be satisfied, the “[f]actual allegations must be enough to raise [the] right to relief above the speculative level [regarding] the assumption that all of the complaint’s allegations are true.”<sup>109</sup> The defendant would win the motion to dismiss if the complaint does not contain sufficient facts for a court to draw an inference that the defendant is liable for the alleged conduct.<sup>110</sup> Vague allegations are insufficient.<sup>111</sup> However, the initial challenge in the FCA suit is to make sure that there is sufficiency under both, Rule 8 and 9(b). Deciding the sufficiency of these two requirements is not done in the abstract, it depends on the facts of each case.<sup>112</sup> Besides motion to dismiss, the defendants might easily move for summary judgment under Rule 56 if the record is silent on any important element. For example, the plaintiff must come forward with at least a “single false [or fraudulent] claim” that the defendants submitted to the Government for payment.<sup>113</sup> Many of the FCA complaints are very long but the courts closely inspect the stated factual and legal aspects in them. The Seventh Circuit dismissed a complaint for failure to state a claim that in total had 155 double-spaced pages,

---

106. See FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

107. See *United States ex rel. Mobin v. Desert Construction*, 87 F.3d 1325 (9th Cir. 1996) (the district court may dismiss an action for failure to comply with any order of the court).

108. *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 301 (3rd Cir. 2011) (the defendant argued that motion to dismiss 12(b)(6) should be granted based on failure to satisfy Rule 8, then alternatively argued that it should be granted based on a failure to plead with particularity Rule 9(b)).

109. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 677-81 (2009).

110. *Twombly*, 550 U.S. at 555.

111. Compare *United States ex rel. Blundell v. Dialysis Clinic* 2011 WL 167246, 10-12 (N.D.N.Y. 2011) (dismissal due to vague allegations of improper documentation, billing, and staffing; no adequate allegation that dialysis provided was worthless), with *United States ex rel. Landers v. Baptist Mem’l. Health Care Corp.*, 525 F. Supp. 2d 972, 979-80 (W.D. Tenn. 2007) (allegations of improper staffing and sterilization of equipment did not allege that the care rendered was worthless).

112. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011); *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 178-179 (5th Cir. 1997).

113. *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 440 (3rd Cir. 2004) (holding that the district court correctly granted the defendant’s Federal Rule of Civil Procedure 56(f) motion for summary judgment based on the plaintiff’s failure to identify a single claim for payment to the Government arising from defendant’s alleged Medicare fraud).



more than 400 numbered paragraphs and 99 attachments.<sup>114</sup> “You’d think that all this paper and ink would be enough to narrate at least one false claim.”<sup>115</sup> Precision in drafting remains imperative.

#### *A. Pleading Fraud with Particularity—9(b) Heightened Pleading Requirement*

The FCA is anti-fraud statute and claims under it are subject to the heightened pleading requirement under Rule 9(b).<sup>116</sup> Satisfying Rule 9(b) could be burdensome. The pleading requirements enumerated in Rule 9(b) state that “in alleging fraud or mistake, a party must state with particularity the circumstances constituting the fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”<sup>117</sup> In order to satisfy the particularity requirement for pleading a fraud claim, a complaint must specify “the who, what, when, where, and how” of the conduct charged.<sup>118</sup> “A pleading is sufficient under 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.”<sup>119</sup> The heightened pleading standard is also designed to prevent “fishing expeditions,” to protect defendants’ reputations from allegations of fraud, and to narrow potentially wide-ranging discovery to relevant matters.<sup>120</sup>

It should be anticipated that many defendants would make a 9(b) motion and argue that the Complaint fails to plead fraud with particularity, drawing attention to what is stated and missing in the FCA Complaint. While *Escobar* did not change this procedural framework, even more specificity in pleading would be needed after the decision because how the Government’s decision to pay was influenced or was capable of being influenced has to be clearly stated. Additionally, the specific allegations of the defendant’s knowledge are crucial.

#### *B. Pleading Fraud in FCA Context*

Courts have provided direction as to how the 9(b) standard should be applied

---

114. *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003).

115. *Id.* at 376-77 (length and complexity may doom a complaint by obfuscating the claim’s essence).

116. *Id.* at 376. (Rule 9(b) is applicable “because the False Claims Act condemns fraud but not negligent errors or omissions.”).

117. FED. R. CIV. P. 9(b).

118. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)).

119. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). *See also Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (stating that a claim for fraud must be “specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.”); *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir. 2003) (“[D]efendants accused of defrauding the federal government have the same protections as defendants sued for fraud in other contexts.”).

120. *United States ex rel. Snapp, Inc. v. Ford Motor Co.*, 532 F.3d 496, 504 (6th Cir. 2008).

in the FCA context.<sup>121</sup> Since FCA concerns conduct that occurred on systemic or large scale level, it is highly impractical to require the plaintiff to allege each individualized act (time, place and manner) of the fraud. Requiring specific citation to each instance of fraudulent conduct is impractical where the violative conduct is repeated frequently over a lengthy period of time.<sup>122</sup> The Ninth Circuit joined the Fifth Circuit in holding that “it is sufficient to allege ‘particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.’”<sup>123</sup> Prior to *Escobar*, inferences were permitted. After *Escobar*, there is not much space left for inferences, various connections between the submitted claims and the Government’s decision to pay must be directly asserted.

One court left open the possibility that a court may apply the requirements of Rule 9(b) differently “in circumstances where a relator demonstrates that he cannot allege the specifics of actual false claims that in all likelihood exist, and the reason that the relator cannot produce such allegations is not attributable to the conduct of the relator.”<sup>124</sup> *Hill v. Morehouse Medical Associates, Inc.* was cited as an example of when this relaxed standard might be appropriate.<sup>125</sup> In *Hill*, the relator was a former billing department employee who alleged that she had seen claims with fraudulently altered billing codes submitted to Medicare.<sup>126</sup> Although she could not identify the specific names and dates of the claims, she had personal knowledge that billings were submitted because she had worked in the billing department.<sup>127</sup> The Eleventh Circuit held that her allegation sufficed to “[alert the] defendants to the precise misconduct with which they are charged.”<sup>128</sup> The heightened pleading standard for fraud claims is also different

---

121. See, e.g., *United States ex rel. Tamanaha v. Furukawa America, Inc.*, 445 F. App’x 992, 994 (9th Cir. 2011); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

122. See *United States ex rel. Franklin v. Parke-Davis, Warner-Lambert Co.*, 147 F. Supp. 2d 39, 49 (D. Mass. 2001) (Where allegations are “complex and far-reaching, pleading every instance of fraud would be extremely ungainly, if not impossible.”); see also *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318, 333 (D. Conn. 2004) (“[W]here the alleged fraudulent scheme involved numerous transactions that occurred over a long period of time, courts have found it impractical to require the plaintiff to plead the specifics with respect to each and every instance of fraudulent conduct.”); cf. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1298 (3d ed. 2004) (sufficiency of a fraud pleading varies with the complexity and duration of the scheme).

123. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010) (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

124. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 n.12 (6th Cir. 2007) (“[W]e express no opinion as to the contours or existence of any such exception to the general rule that an allegation of an actual false claim is a necessary element of a FCA violation.”).

125. *Id.*; accord *Hill v. Morehouse Med. Assocs., Inc.*, No. 02-14429, 2003 WL 22019936, at \*4 (11th Cir. 2003).

126. *Hill*, 2003 WL 22019936, at \*1.

127. *Id.* at \*4.

128. *Id.* at \*5 (quoting *Ziemba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)).

where factual information is peculiarly within defendant's knowledge or control.<sup>129</sup> When some of the evidence lies in the defendant's exclusive possession, it may be difficult for the plaintiff to identify each specific action that was taken in causing the harm but can identify an overwhelming number of them.

Overall, the *Escobar* ruling did not impact any of the foregoing pleading requirements. Nonetheless, the decision states that further specificity in the pleadings is required to demonstrate the materiality and scienter requirements. The Supreme Court opinion itself reiterated that those FCA requirements are demanding and rigorous, making frequent dismissals in the lower courts through either Rule 12 or Rule 56 motions not surprising.

## VI. CONCLUSION

*Escobar* tested the theories for imposing FCA liability and came out with recognizing the implied certification theory. With the enacted FCA and the *Escobar* decision, the Government is given the opportunity to attach liability to a wider range of violations when various health care systemic abuses are at issue since specified conditions of payment are not determinative. However, it also places a burden on the Government and relators to plead the complaint with particularity and to state sufficient facts in order to meet the materiality and scienter requirements. In the Court's view, the implied false certification theory gives effect to Congress' expressly stated purpose that the FCA should reach many fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.<sup>130</sup> While this approach suggests possible openings for the relators and the Government to bring suits, since they are no longer tied to the conditions of payment framework, the *Escobar* decision also raises a number of favorable aspects for the defense. With its elements, the FCA has built in mechanisms assuring proper safeguards for the defense. In the interests of consistency and predictability in the current post-*Escobar* period, where the implied theory is no longer automatically rejected by any court,<sup>131</sup> the FCA materiality and scienter requisites as interpreted by the Supreme Court allow fairness for both sides. The courts in the future will apply the principles of

---

129. *E & E Co., Ltd. v. Kam Hing Enters., Inc.*, 429 F. App'x 632, 633 (9th Cir. 2011). *But see* *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050-51 (6th Cir. 2011) ("The plaintiff may not use the discovery process to obtain these facts after filing suit." (stating that plaintiff must allege specific facts even if those facts are only within the head or hands of the defendants.))

130. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016).

131. *But see* Bruce Frederick et al., *Post- Escobar Circuit Challenges*, A.B.A. (Sept. 27, 2018), [https://www.americanbar.org/groups/health\\_law/publications/aba\\_health\\_resource/2016-2017/november2017/postescobar/](https://www.americanbar.org/groups/health_law/publications/aba_health_resource/2016-2017/november2017/postescobar/) [<https://perma.cc/PCY7-ERFB>] (addressing courts' inconsistency in the treatment of the two part falsity test) ("Courts across the country are inconsistent: a June 2017 Law360 review of the 22 cases addressing the issue post-*Escobar* found seven courts holding the test as mandatory, six finding it optional, and nine having ambiguous rulings.")

*Escobar* to those requirements. In the end, however, some of the fatal defects for any FCA case remain the same, including many of the above-mentioned issues such as: the lack of identifying objectively false claim, failure to meet the Rule 8 and Rule 9(b) requirements, the cause of action focuses on insignificant violations or violations more adequate for medical malpractice charges, etc.