Implied False Certification Liability Under the False Claims Act: How the Materiality Standard Offers Protection after *Escobar*

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The False Claims Act (FCA)[1], initially enacted in 1863 during the Civil War, was sponsored by the Lincoln administration to curtail the rampant fraud and excessive profiteering being perpetuated by government contractors, who, among other things, were selling sawdust-tainted gunpowder to the U.S. government.[2] The FCA was used infrequently to combat such actions until 1982, when Congress passed the current version of the law, now codified as 31 U.S.C. §§ 3729–3732. Perceived abuses by defense contractors—such as the $640 toilet seat—were the impetus for the passing of the modern version of the FCA. Congress further amended the FCA in 1986 and it has been widely used by a number of federal agencies to deter overcharges and false claims, particularly most recently in the health care industry. Congress has amended the FCA twice since 1986 to further sharpen the tool.

The FCA prohibits seven types of misconduct, including (1) submitting false or fraudulent payment claims; (2) creating false records or statements in support of fraudulent claims; (3) conspiring to violate the FCA; (4) delivering less property than is owed to the government; (5) creating and submitting a false receipt; (6) knowingly receiving property from an official not authorized to pledge such property; and (7) falsifying records to avoid or decrease an obligation to pay the government.[3] For a violation of the FCA, a contractor could be liable to the government for a civil penalty of not less than $5,000 and not more than $10,000 for each violation, plus three times the amount of damages that the government sustains as a result of the violation.[4]

A "claim" is defined in the FCA as "any request or demand for payment of money or property" that is presented to "an officer, employee or agent of the United States" or is made to a "contractor, grantee or other recipient if the money or property is to be spent on the government's behalf or to advance a government program or interest."[5] The scienter requirement of the FCA means that the violator must make the claim "knowingly," which requires that party to either (a) have actual knowledge of the false information or (b) act in deliberate ignorance of the truth or falsity of the information or (c) act in reckless disregard of the truth or falsity of the information.[6]

The courts have found liability for a "claim" arising from the prohibited misconduct both for making, with scienter, an affirmative false claim to the U.S. government as well as for concealing or avoiding an obligation to pay. In addition to imposing liability for making a misrepresentation to the government in connection with a claim for payment of money or property ("direct false claim"), liability also attaches when a party expressly certifies compliance with a required contract provision, statute, regulation, or governmental program in connection with a claim ("express false certification"). In certain instances, those to be examined in more detail here, a party also can be liable for an implied false certification made without expressly certifying compliance with a specific contract provision, statute, regulation, or governmental program ("implied false certification").[7]

An implied false certification claim may arise even though the invoices themselves submitted by a contractor do not contain any factual misrepresentations. Some examples are instructive here. For instance, if the contract requires that the defendant dispose of wastewater from its operations in accordance with various environmental laws, which the contractor knowingly does not, and then fails to disclose those violations at the time of submitting a claim, the government may assert FCA liability on an implied false certification theory. Or an implied false certification claim may arise when a contractor submits a claim but fails to disclose misrepresentations relating to its small business or disadvantaged status, its failure to pay Davis-Bacon prevailing wages, its noncompliance

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with contractual apprenticeship requirements, or its violation of domestic source restrictions. Theoretically, FCA implied false certification liability even could arise if a contract contains an express obligation that the contractor perform in accordance with all project specifications, that it timely pay its subcontractors, or that it submit accurate monthly project schedule updates.

An implied false certification claim can be directly asserted either by the United States or by a *qui tam* plaintiff. A suit filed by an individual on behalf of the government is known as a *qui tam* action and the person bringing the action is referred to as a "relator."[8] Section 3730(b)(2) provides that a *qui tam* complaint must be filed with the court under seal. The complaint and a written disclosure of all relevant information known to the relator must be served on the government, and the government then either joins with the relator to pursue the claim or declines to join (whereupon the relator proceeds alone in the prosecution of the FCA claim). *Qui tam* plaintiffs typically are disgruntled former employees of a government contractor and the most likely plaintiffs to assert an implied false certification claim. Over the last ten years, the majority of implied false certification claims have been asserted in the health care industry in the context of Medicare reimbursement, for instance, but implied false certification claims also are frequently asserted against government contractors.

In this article, we focus on the viability of implied false certification claims in general under the FCA, the key elements of the Supreme Court's decision in *Escobar*, and how the varying interpretations of *Escobar* apply to the construction industry.

Implied False Certification Claims Prior to *Escobar*

Before the Court's decision in *Escobar*, the courts of appeals were divided on the issue of whether the submission of a claim without disclosure of a violation of a rule or regulation could potentially trigger an FCA violation. The First and Second Circuits took an expansive view of the FCA and focused on whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material condition of payment.[9] The courts held that conditions of payment, found in sources such as statutes, regulations, and contracts, need not be "expressly designated."[10] In determining materiality, those courts considered whether the violation was "relevant to the government's disbursement decisions."[11] The Tenth Circuit went even further, stating that "materiality does not require a plaintiff to show conclusively that, were it aware of the falsity, the government would not have paid. Rather it requires only a showing that the government *may* not have paid."[12] Under these decisions, the violation of a regulatory, statutory, or contractual requirement could be sufficient to state an implied false certification claim.

Alternatively, other circuits held that to establish an implied false certification claim, compliance with a regulation, statute, or contract term was required to be an "express condition of payment."[13] These courts distinguished between whether the violation constituted a "condition of payment" (which triggered potential FCA liability) and violations that are "conditions of participation" (which did not create FCA liability).[14] Ultimately, the Court accepted *certiorari* of *Escobar* to resolve the split of authorities.

The U.S. Supreme Court's Decision in *Escobar*

With its 2016 *Escobar* decision, the Court resolved many of the issues being debated in the circuit courts about implied false certification liability under the FCA. Because *Escobar* is now the starting point for any analysis of implied false certification liability, we closely examine that opinion here.

In *Escobar*, Yarushka Rivera was a teenage mental health patient who received care at Arbour Counseling Services (Arbour), a facility owned and operated by a subsidiary of Universal Health Services, Inc. (Universal Health), as a beneficiary of the Massachusetts' Medicaid program. She received counseling services for approximately five years and, after being diagnosed with a bipolar disorder, a purported doctor at the facility prescribed medication to treat her illness. Ms. Rivera's condition worsened until she finally died of a seizure caused by an adverse reaction to the medication prescribed.[15]

Her mother and stepfather, Carmen Correa and Julio Escobar, later learned that there were few Arbour employees who were licensed to provide mental health counseling or prescribe medication without supervision.[16] In fact, the practitioner who diagnosed Yarushka as bipolar identified herself as a psychologist with a Ph.D. but failed to mention that her degree came from an unaccredited Internet college and that Massachusetts had rejected her application to be licensed as a psychologist. Likewise, the practitioner who prescribed medicine to Yarushka, and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision.[17] In essence, Universal Health allegedly ignored many of the regulations promulgated by the Massachusetts' Medicaid program when it hired unlicensed, unqualified, and unsupervised staff.[18]

Ms. Rivera's parents, as relators, filed a *qui tam* action seeking to hold Universal Health liable under the implied false certification theory. They alleged that Universal Health defrauded the Medicaid program by seeking reimbursement for claims for services rendered by professionals without disclosure that these professionals were unlicensed to provide those services. By knowingly misrepresenting that it had complied with the requirements of the mental health facility, defendant Universal Health had allegedly defrauded the Medicaid program.

The district court granted defendant's motion to dismiss on the basis that there could be no liability when the licensing requirements were not a "condition of payment."[19] The First Circuit reversed in relevant part and

remanded,[20] holding that every claim impliedly represents that the facility had complied with the required regulations, so an undisclosed violation makes the claim false. The First Circuit also held that those regulations were a material condition of payment.

The Supreme Court held that (1) "at least in certain circumstances, implied false certification theory can be a basis for liability" under the FCA[21] and, most importantly, (2) "False Claims Act liability for failing to disclose violations of legal requirements does not turn on whether those requirements were expressly designated as conditions of payment. . . . What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."[22] To reign in potential liability, the Court made clear that the FCA does not support the expansive view "that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation."[23]

The Court established that liability under the implied false certification theory exists when "first, the claim does not merely request payment, but also makes specific representation about the good or services provided[24]; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[25]

By describing both what is and what is not material, the Court provides some guidance as to how to apply the "rigorous" measure of materiality under the FCA to the specific facts of any given case. On that analysis, the Court noted:

- "[M]ateriality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'"[26]
- "The materiality standard is demanding. The False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations."[27]
- "Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry."[28]
- ". . . [P]roof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirements."[29]
- ". . . [I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material."[30]
- ". . . [I]f the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."[31]

In *Escobar*, the Court vacated the First Circuit's judgment and remanded the case for further consideration, with the guidance provided in the Court's decision, of whether respondents (Ms. Rivera's parents) had pleaded a False Claims Act violation.[32]

What Does Materiality Really Mean?

While the *Escobar* opinion resolved many open issues, it also raised new questions and left the answers to other questions sufficiently ambiguous such that the district courts and courts of appeal have continued to flesh out the law of implied false certification liability.

One key takeaway from these cases is that, in determining whether an implied certification is "material," many courts now will give significant weight to evidence regarding how the government acted in response to the disclosure of the defendant's alleged noncompliance. Specifically, courts will look to whether the government refused to make further payments to a defendant after learning of the alleged fraud or took some other action that evidenced the government's determination that it had been harmed. In the absence of such evidence, a plaintiff will have great difficulty establishing that a nondisclosure was material. A number of courts, relying on the government's continued payment of claims following notice of a defendant's alleged false certifications, have found that the alleged failure to disclose was not material to the payment decision.

With regard to regulatory requirements, the Fifth Circuit's decision in *Abbott v. BP Exploration & Production, Inc.*,[33] is instructive for contractors facing fraudulent implied false certification claims. In *Abbott*, the relator filed an FCA claim against BP, alleging that BP falsely certified compliance with various regulatory requirements in connection with the construction of an offshore oil rig, Atlantis, in the Gulf of Mexico.[34] Specifically, the relator alleged that construction drawings were missing, the required professional "stamps" were not affixed, and the engineers had not approved various stages of the construction of the platform.[35] Following the filing of the lawsuit, due to scrutiny resulting from the Deep Water Horizon explosion, there was a congressional investigation of the allegations. In addition, the U.S. Department of the Interior investigated the relator's allegations and issued a report that concluded that the allegations were "unfounded" and "without merit."[36] BP filed a motion for summary judgment arguing that the alleged false certifications were not material. That motion was granted and the relator appealed.

The *Abbott* court affirmed the district court's ruling. It confirmed that the FCA's materiality standard is "demanding" and noted that *Escobar* "debunked the notion that a Governmental designation of compliance as a condition of payment by itself is sufficient to prove materiality."[37] On the materiality question, the court

focused on the government's actions following notice of the alleged false certifications:

> As recognized in *Escobar*, when the DOI decided to allow the Atlantis to continue drilling after a substantial investigation into Plaintiffs' allegations, that decision represents "strong evidence" that the requirements in those regulations are not material. These "strong facts" have not been rebutted by Plaintiffs' evidence such that Plaintiffs have failed to create a genuine dispute of material fact as to materiality. The district court therefore correctly granted summary judgment on the FCA claims in favor of BP.[38]

In *United States ex rel. Kelly v. Serco, Inc.*,[39] the plaintiff alleged that his former employer, Serco, Inc. (Serco), a technology and project management services provider, submitted fraudulent claims for payment to the United States for work done under a contract to upgrade the wireless communications systems situated along the United States–Mexico border for the Department of Homeland Security. Specifically, plaintiff alleged that the defendant submitted unreliable billings that failed to conform to applicable Federal Acquisition Regulation (FAR) billing guidelines. Defendants brought a motion for summary judgment, which was granted. On appeal, plaintiff's principal contention was that the district court erroneously granted summary judgment alleging that Serco submitted false or fraudulent claims for payment under an implied false certification theory of liability.[40]

The *Kelly* court identified the two-part test announced in *Escobar* as being applicable to implied false certification claims and held that plaintiff failed to meet the first part of the *Escobar* test—that the claim does not merely request payment, but also makes specific false representations about the goods or services provided. In *Kelly*, the court noted that, while the format of the invoice submissions may not have complied with the FAR guidelines, plaintiff failed to establish that defendant made any false statements regarding its performance.

In addition, the court held that the relator failed to meet the materiality requirement, stating:

> Kelly has failed to establish a genuine issue of material fact regarding the materiality of Serco's obligations to comply with [the guidelines]. Given the demanding standard required for materiality under the FCA, the government's acceptance of Serco's reports despite their non-compliance with [the guidelines], and the government's payment of Serco's public vouchers for its work under Delivery Orders 49 and 54, we conclude that no reasonable jury could return a verdict for Kelly on his implied false certification claim.[41]

More recently, in *United States ex rel. Harman v. Trinity Industries, Inc.*,[42] a *qui tam* plaintiff brought an action against a rival manufacturer of highway guardrails claiming that the defendant failed to disclose that its product did not meet federal regulations. The district court denied defendant's motion for summary adjudication, which argued that the alleged lack of disclosure of the claimed defect was not material to the government's payment decision. The case was ultimately tried by a jury, which found for plaintiff and awarded damages in excess of $663,000,000.[43]

The *Kelly* court identified the two-part test announced in *Escobar* as being applicable to implied false certification claims and held that plaintiff failed to meet the first part of the *Escobar* test.

As the *Harman* court explained, the federal government subsidizes the cost of highway construction and improvements through grants that are given to the states. During the time periods relevant to the facts of the *Harman* case, acceptance by the Federal Highway Administration (FHWA) of the products used in the state highway improvements was a prerequisite to eligibility for federal reimbursement.[44] The plaintiff claimed that the defendant failed to disclose revisions in the guardrail product's design in a report submitted to the FHWA. Plaintiff alleged that this design revision was a "defect" that led to several highway deaths.

Prior to filing his lawsuit, the plaintiff/relator reported the alleged defect in the guardrail product, which the FHWA investigated.[45] After completing its investigation, the FHWA found that notwithstanding the failure to disclose the design change, the guardrail complied with applicable regulations and thereafter the government continued making guardrail cost reimbursements to states.[46]

In reviewing the materiality standard established in *Escobar*, the *Harman* court noted,

> "the FCA requires proof only that the defendant's false statements 'could have' influenced the government's pay decision or had the 'potential' to influence the government's decision, not that the false statements actually did so . . . ." The Supreme Court approved this standard in *Escobar*, writing that "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property," and "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[47]

The *Harman* court reviewed cases decided by the First, Seventh, Ninth, and D.C. Circuits after *Escobar* that involved implied false certification claims and consideration of the government's actions after being advised of the alleged false claims. It concluded that "[t]he lesson we draw from these well-considered opinions is that, though not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality."[48] It further found that the failure to disclose could not have been material because the violations complained of involved the "potential for horrific loss of life and limb" and the government would have had "strong incentives to reject nonconforming products"[49] stating: "[t]he judgment before us falls far short of the FCA's true setting and fails to account for its congressional purpose in drawing upon private litigation to protect public coffers. The government has never been persuaded that it has been defrauded."[50]

However, the *Harman* court noted that "there are and must be boundaries to government tolerance of a supplier's failure to abide by its rules" and cited a Ninth Circuit decision in which that court rejected a similar materiality argument where there was a question whether the government approval was obtained by fraud, there were other reasons why the government would continue to approve payments, and the payments came after noncompliance was terminated.[51]

These cases follow *Escobar*'s directive that courts should give substantial weight to the government's continued payment or approval of the use of a product in finding that the failure to disclose a noncompliance was not material. However, the cases also make clear that a factually intensive inquiry of the government's post-disclosure conduct is required to make a determination as to whether a given violation is material and no one single factor will determine the outcome.

Substantial Breaches vs. Insubstantial Breaches

The analysis is much more difficult when there is no governmental conduct that will provide guidance on whether a particular nondisclosure is material to the government's payment decision.

For instance, in *United States ex rel. Dana Curtin v. Barton Malow Co*.,[52] there were no facts presented to evidence the government's payment decision. In this case, a former quality control manager on an Air Force construction project filed a *qui tam* lawsuit against the project contractor for utilizing a roofing product in the construction despite the fact that the warranty on the product had been voided prior to installation of the product. The plaintiff claimed that he had notified the contractor of the voided warranty prior to installation and, despite that notice, the contractor nevertheless went ahead and installed the defective product. Plaintiff's complaint included a claim for implied false certification under the FCA based on the defendant's billing for its nonconforming work. Defendant filed a motion to dismiss, which the district court granted.[53]

In its review of the nondisclosure of the voided warranty, the court characterized the nondisclosure as a "garden variety" or insubstantial breach of contract.[54] It noted that the product was only one component in the construction of a roof, not the entire building, and that there was no allegation that the product was not installed or was installed improperly.[55] It ruled that these allegations did not support an implied false certification claim:

> The Court finds that the use of one type of material with an expired warranty in the construction of a building, at least under the facts of the instant action as alleged by Curtin, is not the type of breach that would render BMC's representations in its request to the federal government for payment on the contract 'misleading half-truths.' If there were factual allegations in the Amended Complaint that these roofing substrata panels were of particular importance to the building being constructed, for example, Curtin may have had a stronger argument that BMC's failure to disclose this alleged contractual breach in its claim for payment was material. Under these facts, however, this type of breach might have given the government "the option to decline to pay if it knew of the defendant's noncompliance," but this is not enough to establish materiality under *Universal Health Services*.[56]

In contrast to the *Dana Curtin* decision, the Fourth Circuit held that a defendant's failure to disclose a breach of contractual requirement was sufficient to establish materiality under *Escobar.* In *United States ex rel. Badar v. Triple Canopy Inc.*,[57] the case was remanded by the Supreme Court to the Fourth Circuit following its decision in *Escobar*. The defendant had been awarded a contract to provide security at a U.S. Air Force base in Iraq. One of the requirements of the contract was that its employees be U.S. Army–qualified marksmen. The *qui tam* plaintiff alleged that security personnel used on the project did not hold the required weapons qualification and, despite knowing of this noncompliance, defendant billed full price for those employees.[58] While the contract did not make certification of weapons qualification a condition of payment,[59] the plaintiff claimed defendant's nondisclosure was material.

The court found defendant's omissions material for two reasons: "common sense and Triple Canopy's own actions in covering up the noncompliance."[60] It noted that a defendant can have actual knowledge of the materiality of a nondisclosure even if compliance is not a condition of payment. It analogized the facts in this case to a situation where the government buys guns that cannot shoot and that a reasonable person would know that in such a circumstance the government would likely rescind the contract, and even failing to establish such knowledge, "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."[61] Additionally, the court pointed to the fact that after learning of the nondisclosure, the government canceled the contract and intervened in the relator's lawsuit as further evidence that the nondisclosure was material.[62]

The Eastern District of Virginia reached a similar result in the analogous case of *United States ex rel. Beauchamp v. Academi Training Center, Inc*.[63] Therein, the defendant contracted to provide security services for the U.S. Embassy in Afghanistan. The security contract required the defendant's employees to meet certain weapons-proficiency requirements. A *qui tam* plaintiff brought an FCA claim alleging that the defendant failed to disclose to the government that its employees were not properly trained. The defendant brought a motion for judgment on the pleadings on the implied false certification claim, arguing that there was a contractual certification requirement in the contract and therefore the nondisclosure was not material.

The court denied the motion, stating that the defendant's argument "left common sense at the door" because the government's payment decision surely would be affected by knowledge that the personnel who were intended to provide security to the U.S. Embassy did not have the proper weapons qualification.[64] In finding the nondisclosure "material," the court also pointed to provisions in the contract providing that the security personnel must comply with the training program and "a failure to do so would require them to be shipped back home, indicating that the weapons qualifications requirement is central to the contract."[65] On that basis, the court concluded, "[a]s a result, relators have alleged sufficient facts to support the common-sense proposition that PRSs' inability to shoot straight with firearms in a high-risk warzone in the course of protecting U.S. officials likely would have influenced the government's decision to pay or not to pay defendant under the WPPS contract."[66]

In *United States ex rel. Southeastern Carpenters Regional Council v. Fulton County*,[67] the court also considered whether materiality is tied to a determination that a relevant requirement is "central" to the contract. In this case, which involved the construction of an airport project that received federal funding, a carpenters' union and one of its members who worked on the project (Mr. Borja) filed a *qui tam* complaint against the project owner, the general contractor, and the drywall subcontractor for failing to ensure that Mr. Borja was paid "prevailing wages." Plaintiffs/relators alleged express false certification and implied false certification claims under the FCA. The court addressed a number of issues including whether the plaintiffs had sufficiently pled their claim and whether the failure to disclose that laborers were not paid at prevailing wages was material to the government's payment decision.

On the question of materiality, plaintiffs/relators argued in their complaint that defendants "were required to comply with all provisions of the [Davis-Bacon and Related Acts] as a term of [the Contract]" and because of that, payment at prevailing wages was "included as a condition of the contract."[68] Rejecting this argument, the court held that the "relators' allegations failed the *Escobar* materiality requirement because relators did not show that defendants misrepresented matters 'so central' to the [c]ontract that the government 'would not have paid [the] claims had it known of [the] violations'").[69]

Marshalling the Evidence of Materiality

Escobar and its progeny mean that a defendant sued on an implied false certification claim under the FCA must focus its efforts on the discovery and presentation of evidence of materiality. Of course, although not always possible, a defendant may attempt to offer evidence, as follows:

1. That the government was first aware of the alleged violations prior to the submission of the claim;
2. That the government approved, explicitly or implicitly, the modification to the contractor's obligation;
3. That the government took no actions in response to the allegations of fraud or misrepresentation;
4. That the government imposed no administrative or payment sanction;
5. That the government continued to pay claims that relate to the subject matter of the relator's complaint;
6. That the government renewed any existing contract;
7. That the government entered into new contracts that omit the provisions that give rise to potential liability;
8. That the agency head published favorable statements about the materiality of any similar cases;
9. That the legislative history shows little significance placed on the requirements in the statute or regulation at issue; or
10. That the government or *qui tam* plaintiff has other motives to pursue the action besides the materiality of the requirements.

Conclusion

In *Escobar*, the U.S. Supreme Court set out the two-part test to be applied to determine whether a claim for liability based on the implied false certification theory lies. The Court demands that reviewing courts apply those standards "rigorously," so as to avoid the application of the FCA to what otherwise would be simple breach of contract cases. Simply put, an effective defense must be supported by evidence that shows that the alleged violation was immaterial to the claimed services.

Endnotes

1. 31 U.S.C. § 3729 *et seq*.
2. *See United States v. Bornstein*, 433 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976), for a more expansive discussion of the history of the FCA.
3. 31 U.S.C. § 3729(a)–(f).
4. *Id*. § 3729(g).
5. *Id*. § 3729(b)(2)(A).

6. *Id*.
7. *See* Universal Health Serv., Inc. v. United States *ex rel*. Escobar, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016).
8. 31 U.S.C. § 3730(b).
9. *See, e.g*., New York v. Amgen Inc., 652 F.3d 103, 110 (1st Cir. 2011).
10. United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385 (1st Cir. 2011).
11. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).
12. United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1169 (10th Cir. 2010).
13. United States *ex rel.* Hobbs v. Medquest Assocs., 711 F.3d 707 (6th Cir. 2013); *Mikes*, 274 F.3d 687.
14. *See* United States *ex rel.* Vigil v. Nelnet, Inc., 639 F.3d 791, 799 (8th Cir. 2011).
15. Universal Health Serv., Inc. v. United States *ex rel*. Escobar, 136 S. Ct. 1989, 1997 (2016).
16. *Id.*
17. *Id.*
18. *Id.* at 1998.
19. United States *ex rel.* Escobar v. Universal Health Serv., 2014 WL 1271757 (D. Mass. Mar. 26, 2014), *dismissed*.
20. United States *ex rel.* Escobar v. Universal Health Serv., 780 F.3d 504, 517 (1st Cir. 2015).
21. *Escobar*, 136 S. Ct. at 1995. The Court stated, "Specifically, 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." *Id*.
22. *Id*. at 1996.
23. *Id*. at 2004.
24. The Court avoided the more thorny question of whether "all claims for payment implicitly represent that the billing party is legally entitled to payment" by limiting its ruling to the claim presented here, which did, according to the Court, "do more than merely demand payment." *Id*. at 1997.
25. *Id*. at 2001.
26. *Id*. at 2002 (citing 26 R. Lord, Williston on Contracts § 69:12, at 549 (4th ed. 2003)).
27. *Id*. at 2003 (citing Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 678, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008)).
28. *Id*. at 2001.
29. *Id*. at 2003.
30. *Id*. at 2003–04.
31. *Id*. at 2004.
32. *Id*.
33. 851 F.3d 384 (5th Cir. 2017).
34. *Id.* at 386.
35. *Id*. at 388.
36. *Id*.
37. *Id*. at 387.
38. *Id*. at 388 (citations omitted).
39. 846 F.3d 325 (9th Cir. 2017).
40. *Id*.
41. *Id*. at 334.
42. 872 F.3d 645 (5th Cir. 2017).
43. *Id*. at 651.
44. *Id*. at 648.
45. *Id*. at 649.
46. *Id*. at 650–51.
47. *Id*. at 661 (internal citations omitted).
48. *Id.* at 663.
49. *Id.*
50. *Id*. at 669.
51. *Id*. at 664 (citing United States *ex rel.* Campie v. Gilead Sci., Inc., 862 F.3d 890 (9th Cir. 2017)).
52. 2017 WL 2453032 (W.D. La. June 6, 2017).
53. *Id*.
54. *Id*. at *8.
55. *Id*. at *7.
56. *Id*. (citations omitted).
57. 857 F.3d 174 (4th Cir. 2017).
58. *Id*. at 176.
59. *Id*.
60. *Id*. at 178.
61. *Id*. at 178–79.
62. *Id*. at 179.
63. 220 F. Supp. 3d 676 (E.D. Va. 2016).
64. *Id*. at 682.
65. *Id*.
66. *Id*.
67. 2016 WL 415839 (N.D. Ga. Aug. 5, 2016).
68. *Id*. at *8.
69. *Id*.

